The Seven-Year Itch: California Labor Code Section 2855

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I
Introduction

The ability of competent persons to freely enter into enforceable contractual relations is part of the foundation for the workings of a commercial society. However, public policy considerations have resulted in legislative restrictions on freedom of contract in certain areas of the law. The legislative purpose of protecting employees has made employment contracts an area subject to a wide range of federal and state laws.

Section 2855 of the California Labor Code expresses a public policy consideration which overrides freedom of contract. By applying a seven-year limitation to the enforceability of a personal service contract, the legislature has determined that the importance to the general welfare of an employee's ability to bind himself to a lengthy contract is outweighed by the ability of an employee to extricate himself from a lengthy contract.

The theory behind limiting the duration of an employment contract is that circumstances will change over the course of the agreement and may vary greatly from those existing at the commencement of services. These circumstances may involve personal, economic, and social considerations, especially a rise in the employee's worth to the employer as a result of increased experience, talent, and skill. Section 2855 reflects the

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1. The U.S. Census Bureau has found that the “seven-year itch” in marriages is more than myth; the median duration of a United States marriage is seven years. ‘Seven-Year Itch’ Called a Reality, San Francisco Chron., July 2, 1984, at 2, col. 5.
2. Member, Third Year Class; B.A., University of California at Berkeley, 1979.
3. One definition of public policy is: “[t]he principles under which the freedom of contract or private dealings is restricted by law for the good of the community.” BLACK'S LAW DICTIONARY 1041 (5th ed. 1979).
4. CALAMARI & PERILLO, supra note 2, § 1-3, at 5.
5. CAL. LAB. CODE § 2855 (West 1974).
6. See id.
7. See infra text accompanying note 76.

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legislative determination that after seven years an employee should be able to reassess his employment situation, change employers or occupations, and be in a position to negotiate freely with a present or new employer for compensation commensurate with his fair market value.

Due to the financial structure and contractual practices of the entertainment industries, artists' employment contracts are frequently renegotiated or amended. The resulting contractual arrangements often entail an extension of the employment relationship. Since these dealings often occur during the term of a present employment agreement, this practice raises the question of whether the renegotiated, amended, or modified agreement constitutes a "new" contract which would start the running of a new seven-year limitation, or whether the new agreement merely extends the original contract. The enforceability of the contract under section 2855 will depend on the date from which the seven-year period is measured.

The issue of how to characterize mid-term contractual modifications—as either extensions of existing contracts or new agreements—may be resolved by determining whether the employee is absolutely guaranteed an open-market break at least once every seven years after the beginning of the employment relationship. (An open-market break, as used here, signifies the interval following the termination of a contractual commitment when an employee is free to negotiate for his services on the open market.) If the employee is guaranteed an open-market break, a renegotiated or amended agreement which extends the employment period beyond seven years would be rendered unenforceable, regardless of whether or not it was freely entered into by the employee.

While section 2855 may have a powerful effect on an artist and his employer, there is little case law interpreting the statute. This is because questions involving the statute arise primarily in entertainers' contracts, and very few contract

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8. See infra text accompanying notes 53-57.
disputes in the entertainment industry are litigated. Litigation is often inimical to the interests of both parties. The short-lived nature of entertainment careers makes it imperative for the artist to maximize available public exposure; even a brief hiatus from the limelight may diminish or destroy the momentum of a career. An artist in the courtroom is neither advancing his own career nor making money for his employer. The resulting lack of precedent necessitates a close examination not only of reported and unreported cases, but also of policy considerations in order to resolve questions involving section 2855.

This note briefly discusses the history of the statute and then examines the economic realities and accepted practices of the entertainment industry which generate issues involving section 2855. The primary focus of the note is the effect of section 2855 on mid-term contractual agreements. This issue will be discussed in the context of singer Melissa Manchester's efforts to free herself from a series of contracts with Arista Records, with emphasis on the seminal case interpreting section 2855, *De Haviland v. Warner Brothers.* The note then evaluates the alternative methods of interpreting section 2855 and recommends a new statutory provision designed to provide a useful framework for interpreting section 2855.

II

California Labor Code Section 2855

California Labor Code section 2855 provides:

A contract to render personal services . . . may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar


value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not to exceed seven years from the commencement of service under it.14

The California statute was originally based on the Field Code of New York15 and was enacted in California in 1872 as section 1980 of the California Civil Code.16 The period of service enforceable against the employee was limited to two years.17 In 1919, the term was extended to five years,18 and to seven years in 1931.19 The statute was transferred into the Labor Code in 1937 as section 2855 pursuant to the Industrial Labor Relations Act.20

The effect of the statute is to render a contract unenforceable against the employee after seven years. However, the employee may enforce a contract against the employer without regard to the seven-year limitation.21 While the statute appears fairly explicit with regard to the maximum duration of a contract, legal issues arise in determining exactly what constitutes a single contract when an agreement has been extended, amended, or supplemented in mid-term.

15. Fields Draft, N.Y. CIV. CODE § 1013 (Weed, Parsons 1865). The Field Code was never actually enacted into law in New York, and that state does not presently have a statute similar to § 2855. See infra notes 104-05 and accompanying text.
17. Id.
18. CAL. CIV. CODE § 1980 (Deering 1923). A Louisiana statute limits the duration of an employment contract to five years. LA. CIV. CODE ANN. art. 167 (West 1952).
19. CAL. CIV. CODE § 1980 (Deering 1933). While the period of seven years may have totemic significance in other contexts (see infra note 1 regarding the title of this note), the basis for the seven-year period in § 2855 appears to have been a legislative compromise between retaining the five-year period, as proposed in Senate Bill No. 937 on March 31, 1931, and adopting a ten-year period, as proposed in the amended version of Senate Bill No. 937 on April 16, 1931. See Respondent's Brief at 7, De Haviland v. Warner Bros., 67 Cal. App. 2d 225, 153 P.2d 983 (1944). The appellants in De Haviland viewed seven years as an “arbitrary figure arrived at without any definite relation to history, morals or economics.” Appellant's Brief at 20, De Haviland. Section 2855 does have a corollary, however, in early English law. The Statute of Apprentices, 5 Eliz. 1, ch.4, provided for a seven-year apprenticeship at no wages, with the assurance that at the end of the seventh year, the apprentice could freely ply his trade.
21. Stone v. Bancroft, 139 Cal. 78, 70 P. 1017 (1903). Stone was decided under § 1980 of the Civil Code, the precursor to § 2855, which established a two-year limitation. The decision stated that the “language is clear and explicit that [the contract] cannot be enforced against the employee beyond the two years, and it was manifestly for his protection that the statute was enacted. It leaves him at liberty to proceed under the contract, if he so elects.” Id. at 81-82 (emphasis in original).
III
Personal Service Employment Contracts

A. Personal Service Employment Contracts in the Entertainment Industry

Section 2855 applies to personal service employment contracts,22 a category which includes nearly all master/servant continuous employment agreements.23 Included in this classification are the employment agreements of artists. While artists are not ordinarily classified as servants,24 they will be so defined as long as the promised performance is of a personal and non-delegable character.25

Recording agreements usually state that the artist is employed to render his personal services.26 Duties are nondelegable if pertaining to a contract based on artistic skill or unique abilities;27 most personal service contracts in the entertainment industry contain a provision specifically stating that the artist’s services are of a special, unique, unusual, extraordinary, and intellectual—and thus nondelegable—character.28 The employer includes such provisions in the contract in order to satisfy the condition precedent to obtaining injunctive relief: that the services be unique and extraordinary.29 The inclusion

22. CAL. LAB. CODE § 2855 (West 1974).
23. See 5A A. CORBIN, CORBIN ON CONTRACTS § 1204, at 398 (1964). The issue of whether a contractual relationship is one of employment, and therefore within the ambit of the Labor Code, or an independent contractor/principal relationship outside the purview of the Labor Code, has been litigated. See Fox v. Williams, 244 Cal. App. 2d 223, 52 Cal. Rptr. 896 (1966); Ketcham v. Hall Syndicate, Inc. 37 Misc. 2d 693, 236 N.Y.S.2d 206 (1962), aff'd, 19 A.D.2d 611, 242 N.Y.S.2d 182 (1963). The issue was also raised in Manchester but was not addressed by the court. Defendant's Memorandum of Points & Authorities in Opposition to Motion for Summary Judgment at 12-15, Manchester, No. CV 81-2134.
24. 5A A. CORBIN, supra note 23, at 398.
25. Id. at 399-400.
26. S. SHEMEL & M. KRAISLOVSKY, THIS BUSINESS OF MUSIC 1 (rev. ed. 1977). Related to delegation of personal services is the issue of the assignability of the right to future recording services; assignment might not be upheld due to the personal nature of the services. However, most recording contracts convey (to the record company) express authority to assign. Id. at 12. See also CALAMARI & PERILLO, supra note 2, § 18-8, at 640 (assignment that would materially change the duty of the other party would not be recognized).
27. See CALAMARI & PERILLO, supra note 2, § 18-25, at 663.
29. Section 526 of the California Civil Procedure Code disallows the granting of an injunction to prevent the breach of a contract, the performance of which would not be
of the "unique and extraordinary" clause thus provides evidence (which is given varying weight by different courts) rendering the artist susceptible to injunction.\textsuperscript{30} However, such a stipulation also supports characterization of the artist's promised performance as personal and nondelegable, thereby classifying the artist's employment agreement as a personal service employment contract within the purview of section 2855 protections.\textsuperscript{31}

\textbf{B. The Long-Term Contract}

By allowing the enforcement of a contract for seven years, section 2855 effectively limits only long-term employment agreements.\textsuperscript{32} Such contracts may provide a degree of stability to the employee; however, the length of the term may also prove to be a detriment to an employee whose worth and bargaining power rise dramatically during the term.\textsuperscript{33} The volatile nature of the entertainment industry often catapults an unknown to stardom; but the new star is often encumbered by a contract bargained for with a low level of negotiating strength. Conversely, the ephemeral nature of success in an industry based on the vicissitudes of public taste makes it imperative to maximize the earning power of a potentially short-lived but high level of success. Nevertheless, the economic realities and accepted practices of the entertainment industry result in contracts where the artist is often tied to the employer com-

\textsuperscript{30} See Berman & Rosenthal, supra note 28, at 53-54. Berman and Rosenthal note that counsel rarely challenges the characterization of the services as so unique and extraordinary that injunctive relief is necessary, thus overlooking a potentially effective argument at a temporary restraining order conference or a hearing for a preliminary injunction. The grant of a preliminary injunction or restraining order is often the final legal act in entertainment contract disputes.

\textsuperscript{31} See supra note 23.

\textsuperscript{32} Seven years would be considered a long term for an employment contract. A short-term agreement (e.g., a one-year contract) may be affected if it is tacked onto a long-term contract or is one of a series of short-term contracts. See infra text accompanying notes 93 and 164.

\textsuperscript{33} Suzanne Sommers and John Schneider and Tom Wopat (the leads of the "Dukes of Hazzard") are examples of "unknown faces" who suddenly became stars on successful television shows and then demanded salary renegotiations. San Francisco Sunday Examiner & Chron., Mar. 13, 1983, Datebook, at 44, col. 1.

\textsuperscript{34} See infra notes 40-52 and accompanying text.
pany for a lengthy period. Two characteristics of these contractual arrangements are multiple option periods and suspension/extension clauses.

1. **Multiple Option Periods**

Recording agreements are generally term contracts consisting of a short initial term with short options. The standard recording artist contract is for an initial term of one year, with the company granted the right to exercise four successive one-year options to extend the initial term. Similarly, television producers require actors to contract for a one-year term with six consecutive one-year options. Motion picture contracts, by contrast, are more often performed under a free-lance (picture-by-picture) arrangement, rather than on a term basis.

Recording and television contracts are written in options, rather than for a flat term, in order to allow the employer an advantageous degree of flexibility in determining the duration of the employment relationship. The employer may exercise the yearly option if the employee's services are, or show a prospect of becoming, profitable; at the same time the employer is under no more than a year-to-year obligation should the employee's present or future prospects for success grow dim. Aside from the benefits achievable by the party with the superior bargaining strength, the record and television production companies have a specific economic inducement that leads them to insist on this arrangement: the amount of time necessary to realize a return on investment through record sales and television syndication.

(a) **Recording Artist Contracts**

A record company's financial status depends on its long-term

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35. See infra text accompanying notes 36-52 and 62-69.
38. During the halcyon years of the studio era (the 1920's and 1930's), actors were usually employed on a term basis (one-year initial term with six one-year options). With the demise of the studio system in the late 1930's and 1940's, the free-lance, or one-picture concept, became the prevalent form of employment agreement in the motion picture industry. See 2 Practising L. Inst., Counseling Clients in the Entertainment Industry 375 (1979).
39. See Sobel, supra note 37, at 15.
40. See infra text accompanying notes 42-43 and 45-52.
contracts with successful artists.41 Most recording artists do not achieve commercial success until they have recorded three or four albums,42 at which point the company may have nearly $1 million invested in the artist.43 Accordingly, a short-term contract would not provide the number of albums44 to be sold before the company would recoup its investment and turn a

41. See Ehrlich, Rock Music Mogul Sees his New Airline Take Off, San Francisco Sunday Examiner & Chron., June 24, 1984, at D1, col. 4 (quoting Maurice Oberstein, CBS Records Chairman (Britain)).


43. Cooper, supra note 36, at 45. A record company's investment in an artist consists of cash advances paid and expenses incurred in the production and promotion of the results of the artist's recording efforts. Cash advances must be repaid by the artist out of his record sales royalties and are analogous to an interest-free loan repayable only from earnings. Id. at 47.

The recording production budget for an album by a new artist will range from $75,000 to $150,000. See Landro, Merger of Warner Unit, Polygram Angers Troubled Record Industry, Wall St. J., Apr. 12, 1984, at 35, col. 4; Green & Sutherland, New Acts: Labels Play It Tight, BILLBOARD, Oct. 8, 1983, at 7, 70; Cooper, supra note 36, at 43, 45; Wallace, Warner Bros. May Issue Fewer Albums, ROLLING STONE, Mar. 8, 1979, at 10. Promotion costs, including broadcast and print media advertising, and in-store and disc jockey promotion, may run from $100,000 to $150,000 per album. Cooper, supra note 36, at 45. Other post-studio production expenses are manufacturing costs, freight charges, and administrative overhead. Production and promotion of a single new album will require a significant investment; for example, in 1978 these costs generally ranged from $350,000 up to $500,000, and by 1981 would sometimes escalate to over $1,000,000. 1 T. SELZ & M. SIMENSKY, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES 2-7 (1983); Wallace, supra, at 10.

The recording production costs under the standard contract are recoupable advances to be paid back by the artist out of record sale royalties or other sums due to the artist; contracts commonly include a "cross-collateralization" clause which provides that these other sums may come from "this or another contract." See infra note 95. Post-production expenses may also be deducted from the artist's royalties under the contract, although they are sometimes improperly included in the deductions for recording costs. See DENISOFF, supra note 11, at 68-69; SHEMEL & KRASILOVSKY, supra note 26, at 1-2, 333; Cooper, supra note 36, at 48. While most or all of the expenditures are chargeable to the artist, enough albums must be sold to generate the royalties to recoup advances and cover the company's expenditures which are not recoupable from the artist's royalties.

Estimates of the break-even point on record album sales range from 104,500 copies in 1979, to 200,000 copies in 1980 and 1981, to 250,000 copies by mid-1982. SELZ & SIMENSKY, supra, at 2-33. However, approximately 70-90% of albums released fail to reach the sales level necessary to cover costs. Id. at 2-32; CHAPPLE & GAROFALO, supra note 42, at 174; Landro, supra, at 35; Gortikov, Fairness in Pay-For-Play, BILLBOARD, July 28, 1979, at 10. While record industry accounting practices entail creative definitions of "profit" and "breaking even," apparently the majority of record album releases are not financially profitable for the record company. See G. Stokes, STAR-MAKING MACHINERY: THE ODYSSEY OF AN ALBUM, 22-26 (1975); DENISOFF, supra note 11, at 263; CHAPPLE & GAROFALO, supra note 42, at 174; SELZ & SIMENSKY, supra, at 2-33.

44. The typical recording contract contains a minimum and maximum guaranteed release of two albums per either a 12- or 18-month period. Cooper, supra note 36, at 46-47. See infra text accompanying notes 62-70 regarding suspension/extension clauses.
profit. Conversely, a flat long-term contract might require "throwing good money after bad" into the career of an artist who does not appear destined for commercial sales success. As a result, companies insist upon the initial-term-plus-yearly-options contractual format which allows latitude for appropriate business decisions as the employee's career does or does not progress.

(b) Television Performer Contracts

As with recording contracts, the multiple option periods found in television performer contracts are a result of the party with the superior bargaining strength demanding the most flexible contractual arrangements. Like record companies, television producers also have a compelling economic reason for insisting on multiple option periods: syndication.

Television producers license the first-run rights on a television series to one of the major networks for five to seven years at a negotiated per episode fee. The producers do not receive enough money from the license fees to break even on production costs and must depend upon syndication sales to individual television stations in order to recoup their investment and make a profit. Profitable syndication requires three to five television seasons worth of episodes; until that point, the series is deficit-financed with no guarantee of breaking even. The usual television series rarely runs enough seasons for syndication. Therefore, if a series is successful, the producer must be able to contractually obligate the actors for the number of seasons necessary for syndication. The resulting standard employment agreement between the television producer and actor is for one year with six consecutive one-year options exercisable by the producer. If the television series is unsuc-

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45. See infra text accompanying notes 55-57.
46. See Thompson, The Prime Time Crime, 1 Century City B.A. Ent. LJ. 1, 2 (1982).
47. See Sobel, supra note 37, at 15; Thompson, supra note 46, at 2.
48. Sobel, supra note 37, at 15.
49. See Thompson, supra note 46, at 5 (producer bears risk until approximately the third season); Sobel, supra note 37, at 15 (four or five seasons worth of episodes necessary for any significant syndication revenues).
50. Sobel, supra note 37, at 15.
51. Id. Professor Sobel makes an interesting point that the "producers have turned the law [§ 2855] on its head by converting the seven-year 'shield' into a sword, or at
cessful or the actor's character is written out of the series, the producer may terminate the employment agreement by not exercising the option. On the other hand, should the show turn out to be a success, the producer may keep the star or cast under contract long enough to insure profitable syndication revenues.52

(c) Renegotiation and Amendments

As a result of the option contract, long-term employment relationships may be created when the employer's risks would otherwise be too great to allow a commitment of such duration. When the employer does exercise his options, either because the artist is already a star or because the employer believes the artist will soon become one, the result is a long-term agreement encompassing a contractual period during which the attendant conditions have changed, often dramatically, since the signing. While the employer may have a property much more valuable than the price he is contractually obligated to pay, this potential windfall is tempered by the common entertainment industry practice of mid-term renegotiations.53 While the "sanctity of contracts" is affected by such renegotiations, they are often necessary to keep the artist happy by raising his level of compensation to more accurately reflect his worth. Such renegotiations also serve to appease the artist who has threatened to walk away from his contract.54

Renegotiations are inevitable under the option contract system in the television and recording industries. A television actor signs a seven-year contract at a determined yearly salary without a guarantee that he will even be tested for a part for

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Contract renegotiations do occur in other areas of business where the contracts are long-term and susceptible to changing conditions. One example is commercial real estate leases. See Sobel, supra note 37, at 15.

54. See Thompson, supra note 46, at 1.
which he is already under contract. As a result of his superior bargaining position, the television producer will not have to negotiate with an actor who knows that he is wanted for the part (i.e., an actor who can negotiate at arm’s length). In the recording industry, a new artist may be able to negotiate for a royalty of eleven percent or twelve percent of the retail price of each album sold; an established recording artist may have the bargaining power to get up to eighteen percent. An artist who makes the leap from a new to an established artist, while still under a contract entailing a low percentage royalty or low salary, will understandably want to share in the proceeds resulting from his increased stature.

The employer may be willing to acquiesce to an increased royalty scale or other changes in contractual provisions, but will most likely demand an extension of the employment agreement in the form of an additional option year (or years) as a quid pro quo. This type of extension might also result from factors other than renegotiation demands. For example, the employer may desire to secure services that he foresees as profitable beyond the term of the original agreement and amend the agreement or draw up a new contract. In another scenario, an issue outside the scope of the contract may arise whereby the company provides a compensatory benefit to the artist and, in exchange, the contract is amended by a grant to the company of another option on the artist’s services.

Such extensions of the contract—whether by renegotiation, amendment, or modification—implicate section 2855 if they extend the employment relationship beyond a total of seven years from the signing of the original contract. The issue is

55. Id.
56. See Cooper, supra note 36, at 51; Green & Sutherland, supra note 43, at 70. Recording superstar Michael Jackson reportedly has the highest royalty rate in the record business—approximately 42% of the wholesale price of each record sold. Goldberg & Connelly, Trouble in Paradise?, ROLLING STONE, Mar. 15, 1984, at 23, 25.
57. Renegotiations brought about by a recording artist’s commercial success may possibly be avoided by a provision which ties increased royalties to increased sales. See Cooper, supra note 36, at 54. For a television contract success clause, see Thompson, supra note 46, at 5 (based on Nielsen ratings and advertising revenues). However, other contractual provisions that reflect the previous balance of bargaining power (e.g., advances, creative control, copyright reversion) may impel the artist to demand renegotiation.
59. See Bushkin & Meyer, supra note 53, at 386.
60. See infra text accompanying notes 95 and 171.
whether the renegotiated, amended, or modified contract is actually a "new" contract, thus starting the seven-year limit running afresh, or whether it is merely an extension of the old contract and thus subject to the seven-year limitation running from the date of the initial employment agreement.

Crucial in this analysis is the fact that the new agreement is negotiated while the employee is bound by the original agreement. The employee once again is at a negotiating disadvantage; he must negotiate with an employer to whom he is already obligated, and thus might not be able to achieve the compensation he could have gotten on the open market. The enforceability of the resulting agreement—where the employee is obligated to an employment relationship running more than seven years without the benefit of an "open-market" break—will depend on the interpretation given to section 2855.

2. Suspension/Extension Clauses

Personal service contracts in the entertainment industry often contain suspension/extension clauses which allow the employer to suspend the employment contract and extend the term of the agreement by the duration of the aggregate periods of any such suspensions. The clause normally encompasses

61. See Bushkin & Meyer, supra note 53, at 385, 393-98.
62. See Berman & Rosenthal, supra note 28, at 57. A representative clause reads: We [the Company] shall have the right, at our election, to suspend the running of the term of this contract and our obligations hereunder upon written notice to you [the Artist] if for any reason whatsoever your voice or your ability to perform as an instrumentalist shall become impaired or if you shall refuse, neglect, or be unable to comply with any of your obligations hereunder, or if as a result of an act of God, accident, fire, labor controversy, riot, civil commotion, act of public enemy, law enactment, rule, order, or act of any government or governmental instrumentality, failure of technical facilities, failure or delay of transportation facilities, illness or incapacity, or other cause of a similar or dissimilar nature not reasonably within our control or which we could not by reasonable diligence have avoided, we are hampered in the recording, manufacture, distribution or sale of phonograph records or our normal business operations become commercially impractical. Such suspension shall be for the duration of any such event or contingency, and unless we notify you to the contrary in writing, the term hereof (whether the initial term or any renewal term hereof) during which such event or contingency shall have commenced shall be automatically extended by such number of days as equal the total number of days of any such suspension. During any such suspension you shall not render your services as a recording artist to any other person, firm or corporation.

the contingencies of breach by the employee, illness or incapacity of the employee, and acts of God or force majeure.

Suspension/extension clauses are another manifestation of the employer's superior bargaining power; the right to suspend and extend the contract is purely contractual and not based on common law or statutory rights. This right primarily inures to the benefit of the employer by insuring receipt of the contracted-for period of service at the employee's current level of compensation.

The mechanical extension of the contract for the period of suspensions results in the contract being extended past the originally contracted-for term if the "term" is measured in calendar time rather than service time. If the extension runs past seven years from the beginning of the employment agreement, the enforceability of these contractual extensions must be determined according to section 2855. This issue, with procedural variations, is presented in Manchester v. Arista. Discussion of the Manchester case, however, first requires an examination of the seminal case interpreting section 2855: De Haviland v. Warner Brothers.

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64. See, e.g., Universal Pictures v. Cummings, 150 F.2d 986 (9th Cir. 1945) (involving the refusal of an actor to play a role). In recording contracts, the breach is commonly in the form of not fulfilling the contractual requirement of a certain number of albums per year. The contract will be extended by a period equal to the artist's delay in delivering the required number of albums, i.e., the contract year is not completed until the albums are produced. See Cooper, supra note 36, at 46; see infra text accompanying note 93.
67. Youngman, supra note 63, at 11.
68. Note, supra note 10, at 494-95.
69. Youngman, supra note 63, at 11-12. In the case of an artist's incapacity, the presence of a suspension/extension clause may be to the benefit of a nonestablished employee by giving the employer an alternative to cancellation of the contract. Id.
70. The method of measuring the term is an important aspect of the interpretation of § 2855 in the De Haviland case. See infra note 75 and accompanying text.
71. De Havilland's name was misspelled in the title of the reported case. See 1 WHO'S WHO IN AMERICA 838 (41st ed. 1980-1981). In this note, the case name will be cited as reported, while other references to De Havilland's name will be spelled correctly.
IV

De Haviland v. Warner Brothers: California Public Policy

In 1936, Warner Brothers Pictures entered into a contract with Olivia De Havilland for a term of fifty-two weeks with the option to extend the term for six successive fifty-two week periods. Warner Brothers exercised all six options and De Havilland performed from 1936 to 1943, a period of seven calendar years. The contract contained a standard suspension/extension clause giving Warner Brothers the right to suspend De Havilland for failure, refusal or neglect to perform her services to the full extent of her ability.73

During the seven years, Warner Brothers suspended De Havilland for a total of twenty-five weeks as a result of her refusal to play several roles74 (with one suspension due to illness), and extended the term of the agreement for a like period. In 1943, De Havilland sought a judgment declaring that the contract was unenforceable against her after seven years under section 2855, despite the fact that the extensions were made under an otherwise valid contractual provision.

De Havilland was granted her requested relief. The court held that the duration of the contractual term enforceable against the employee was seven calendar years, rather than seven years of actual service.75 However, Warner Brothers contended that De Havilland had effectively waived the protection of section 2855 by her breaches of the contract and was thus estopped from disputing the validity of the contract extensions.

The court responded to Warner Brother's argument by setting forth the purpose of section 2855:

It is safe to say that the great majority of men and women who

73. See supra text accompanying notes 60-68.
74. De Havilland began to refuse roles which she felt were not “suitable to her stature as an artist” after she appeared in “Gone With the Wind.” Appellant’s Opening Brief at 4-5, De Haviland.
75. De Haviland, 67 Cal. App. 2d at 230-34, 153 P.2d at 987. Warner Brothers presented an extensive semantic argument that the wording of the statute allowed the enforcement of a contract for exceptional services for seven years of actual service. Appellant’s Opening Brief at 9-16, 19-25, De Haviland. The argument was based on the purpose underlying the phrasing changes wrought in the 1931 amendment of § 1980 of the Civil Code (the predecessor to § 2855). However, the court reasoned that the legislature would have included the phrase “actual service” (or “term of service” or “years of service”) if it had so intended. De Haviland, 67 Cal. App. 2d at 231-33, 153 P.2d at 986.
work are engaged in rendering personal services under employment contracts. Without their labors the activities of the entire county would stagnate. Their welfare is the direct concern of every community. *Seven years of time is fixed as the maximum time for which they may contract for their services without the right to change employers or occupations. Thereafter they may make a change if they deem it necessary or advisable.* There are innumerable reasons why a change of employment may be to their advantage. Considerations relating to age or health, to the rearing and schooling of children, new economic conditions and social surroundings may call for a change. *As one grows more experienced and skillful there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation.*

The court then declared that the statute promoted the welfare of the general public and applied the well-established rule embodied in section 3513 of the California Civil Code that “rights created in the public interest may not be contravened by private agreement.” Thus, even though the extensions were a matter of valid contractual agreement and resulted solely from De Havilland’s own actions, the advantages of section 2855 could not be waived.

The court specifically noted that allowing the employee to waive his rights under section 2855 would nullify any practical effect of the statute:

> [T]he construction of the code sections contended for by defendant would render the law unworkable and would lead to an absurd result. If an employee may waive the statutory right in question by his conduct, he may waive it by agreement, but if the power to waive it exists at all, the statute accomplishes nothing. *An agreement to work for more than seven years would be an effective waiver of the right to quit at the end of seven.* The right given by the statute can run in favor of those only who have contracted to work for more than seven years and as these would have waived the right by contracting it away, the statute could not operate at all. It could scarcely have been the intention of the legislature to protect employees from the consequences of their improvident contracts and still

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77. *Id.* at 236, 153 P.2d at 988.
78. *Cal. Civ. Code* § 3513 (West 1970) (“Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.”).
leave them free to throw away the benefits conferred upon them. The limitation of the life of personal service contracts and the employee's rights thereunder could not be waived.

The factual situation underlying the De Haviland case underscores the court's reading of the statute in absolute terms, thereby guaranteeing the rights of the employee. The contract had been reviewed and approved by the Los Angeles Superior Court (because of De Havilland's status as a minor at the time of signing) as "just, fair and conscionable . . . ." The contract set De Havilland's salary at $500 per week, with periodic increases raising that sum to $2500 per week in the seventh year of the contract (1943). The contract as written would have been completed in less than seven years. Warner Brothers did not have the right to arbitrarily extend the term of the contract; the extensions could only be invoked by De Havilland, which she in fact did. De Havilland had the alternative of honoring the contract by completing it, but chose not to for personal reasons. As Warner Brothers stated to the court of appeal, "[De Havilland] now claims, having had all of the privileges and benefits of the contract, that equity should discharge her from her contract obligation."

The equities of the case appeared to weigh overwhelmingly in favor of Warner Brothers; yet the court of appeal ruled for De Havilland. Warner Brothers repeated these arguments in a petition to the California Supreme Court, but was denied a hearing. De Haviland, then, stands as an expression of the

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80. Id. at 236-37, 153 P.2d at 988-89 (emphasis added).
81. See infra text accompanying notes 152-61.
82. For a full "behind-the-scenes" treatment of De Haviland, see Bushkin & Meyer, supra note 53, at 389.
83. A minor employed to render artistic or creative services may not disaffirm an otherwise valid contract on the ground that it was entered into during minority if the contract has been reviewed and approved by a county superior court. CAL. CIV. CODE § 36 (West 1982).
85. Appellant's Opening Brief at 3, De Haviland.
86. Appellant's Closing Brief at 38, De Haviland.
87. See id. at 24-25, Bushkin & Meyer, supra note 53, at 389.
88. See Appellant's Closing Brief at 16, De Haviland.
89. Id.
91. Warner Brothers' Petition for Hearing, Ev. No. 14643, De Haviland (Cal. Sup. Ct. filed Jan. 16, 1945). The effect of a denial of hearing by the California Supreme Court has been regarded by some judges and attorneys as establishing weightier precedent for the particular court of appeal decision than when no hearing has been sought. See generally 6 B. WITKIN, CALIFORNIA PROCEDURE 4581 (1970 & Supp. 1983).
formidable weight of public policy backing the seven-year rule. Nearly forty years later, the federal district court in Manchester was also called upon to interpret section 2855.

V

Manchester v. Arista Records, Inc. 92

A. Factual Background

In 1973, Melissa Manchester, a popular recording artist, signed a contract with Arista Records, Inc. The contract called for an initial term of eighteen months with four one-year options exercisable by Arista. Manchester was required to deliver two record albums during the initial eighteen month period and two albums during each additional contract year. 93 The contract contained a standard suspension/extension clause giving Arista the right to suspend the contract in the event of a default or breach by Manchester in the performance of her contractual obligations, i.e., if she were late in producing the required albums, the contract would not be completed until the albums were produced. Manchester was late on several...
occasions and Arista exercised its suspension rights so that eight years after the beginning of the employment relationship the parties were only in the fifth and final year of the contract.

In 1976, Manchester and Arista signed an agreement whereby Arista would pay Manchester's former producer the amount of a judgment he had obtained against her, in exchange for a one-year option, exercisable at the completion of the 1973 contract. In 1980, Arista notified Manchester that it would exercise the one-year option under the 1976 agreement.

In 1981, Manchester filed an action for declaratory judgment, seeking to have her contract with Arista declared unenforceable under section 2855. Manchester alleged that her contract was entered into in 1973 and amended in 1976, and contended that both agreements were unenforceable seven years after the first agreement was entered into.

Arista claimed that Manchester owed Arista one album under the 1973 contract and two albums under the 1976 contract. Arista moved to dismiss the action on the basis of a forum selection clause in the 1973 contract. The court granted Arista's motion as to the 1973 contract, but refused to do so for the 1976 contract. In holding that the 1976 contract was

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94. The former producer brought a lawsuit against Manchester in state court in New York and obtained a judgment in his favor of $145,000. Defendant's Points and Authorities in Support of Motion to Dismiss the Complaint at 5, Manchester.

95. Under the agreement, the payment was an advance to be charged against Manchester's royalty account and recouped from royalties due under the 1973 agreement and the 1976 agreement. Recording contracts commonly include a "cross-collateralization" clause which provides that recoupable advances (owed by the artist to the company) may be debited from "this or another contract." This type of provision allows the company to "cross-collateralize" the production costs or other monies advanced to the artist. This accounting practice applies royalties received under one agreement to the artist's royalty account debt under another contract.

The effects of cross-collateralization are particularly onerous for an artist whose publishing contract is with an affiliate of the record company. The artist as composer is a different business persona from the artist as recording artist. Under a songwriting-publishing agreement, the artist normally receives royalties beginning with the sale of the first record because there are essentially no recoupable expenses or advances involved. However, a cross-collateralization provision will allow the company to apply the publishing (or mechanical copyright) royalties against the recording production costs and advances. The artist will not actually receive any royalties until the recording costs and advances are recouped out of the artist's earnings from record sales and publishing royalties.

A recording artist must have a strong bargaining position in order to exclude a cross-collateralization provision from the contract. See Taubman, supra note 93, at 58-59; Cooper, supra note 36, at 57.

96. The suit was filed under diversity jurisdiction in the United States District Court, Central District of California.
dependent of the 1973 contract, the court analyzed the dependency question under section 2855.

B. Manchester's Argument

Manchester argued that the 1976 contract was not enforceable against her because she had entered into that agreement while still obligated to Arista under the 1973 contract. Because there was no break in the continuum of the employment relationship during which Manchester could freely contract with an employer other than Arista, she asserted that under section 2855 this continuous contract could not be enforced against her seven years after the beginning of the 1973 agreement. Since the 1973 agreement had already been extended more than seven years, and the 1976 option was exercisable only upon completion of the 1973 contract, Manchester contended that the 1976 agreement was therefore unenforceable against her.

The success of Manchester's argument depended on the court's acceptance of the De Haviland court's interpretation of section 2855, which stressed the employee's absolute right to freely bargain for the highest obtainable compensation after being under contract for seven years. The argument for such an interpretation is as follows: an agreement extending a contract, negotiated while the earlier contract is in force and taking effect upon expiration of the earlier contract, does not constitute a new contract starting the seven-year period running again. The reason for this is that the employee has not had the open-market break guaranteed after seven years when she would be free to contract her services to another employer. The new agreement, rather than a new and independent contract, should be characterized as a mid-term extension of the original contract. Such an extension would constitute a waiver of the protections of section 2855 and must therefore be invalid. This is essentially the argument implied, if not explicitly stated, by Manchester.

C. The Court's Treatment of the Contracts

Before discussing the court's response to Manchester's char-

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97. Plaintiff's Points and Authorities in Reply to Defendant's Opposition to Motion for Judgment at 23-24, Manchester.  
98. See supra text accompanying note 81; see also infra text accompanying notes 152-61.  
acterization of the 1976 contract as a mid-term extension, the court's treatment of the 1973 contract merits analysis.


While the ruling regarding Manchester's 1973 contract was not based on section 2855, it nevertheless involved interesting section 2855 issues concerning the procedural question of choice of law and forum.

The 1973 contract contained choice of law and choice of forum clauses specifying that New York law would govern and that jurisdiction would be granted to the Supreme Court of the State of New York. Choice of forum clauses are enforced by the federal, California, and New York courts if they are freely entered into, negotiated at arm's length, and unaffected by fraud and if there is an absence of excessive influence by one party. Manchester argued that the choice of forum clause was unenforceable, not because of these factors, but rather because it would violate the public policy of California. The thrust of her argument was that a New York court would not hesitate to apply its own law as specified in the contract; New York has no statutory equivalent to California's section 2855 limiting the enforceable duration of a contract, thereby leaving Manchester bound to a contract that had already run for eight years. Under California law, this contract would have violated the strong public policy expressed in section 2855. Additionally, California courts generally enforce

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103. See supra notes 100 and 102; see infra text accompanying notes 152-61.
105. See Ketcham v. Hall Syndicate, Inc., 37 Misc. 2d 693, 236 N.Y.S.2d 206 (1962), aff'd, 19 A.D.2d 611, 242 N.Y.S.2d 182 (1963) (enforcing a ten-year contract under New York law). The Ketcham court, while finding that Ketcham (creator of "Dennis the Menace") was actually an independent contractor and therefore unable to invoke the protection of California Labor Code § 2855, see supra note 23, based its decision on a determination that the contract did not require perpetual performance.
106. See supra text accompanying notes 76-80.
choice of law clauses in contracts;\textsuperscript{107} however, they will not enforce a choice of law clause requiring the application of a foreign jurisdiction's law that would offend California's public policy.\textsuperscript{108}

The district court judge in \textit{Manchester} found that section 2855 expressed a strong public policy of California,\textsuperscript{109} as construed in \textit{De Haviland},\textsuperscript{110} a California court would apply California law and not enforce a clause requiring application of a New York law which would "directly contravene the strong public policy of California embodied in § 2855."\textsuperscript{111} As a result of this determination, the issue arising from Arista's motion to dismiss the action was "whether a choice of forum clause, although enforceable on its face as being reasonable and agreed to in an arm's length transaction, should nevertheless be refused enforcement because the chosen forum would apply a rule of law contrary to a strong public policy of the forum in which the action was brought."\textsuperscript{112} Stating that this question appeared to be a matter of first impression, the court granted Arista's motion to dismiss, holding the forum selection clause enforceable under several theories.\textsuperscript{113}

On a pragmatic level, the court noted that if Manchester's argument were a correct interpretation of the law, a court would have to determine the result of the litigation in the transferee court whenever a choice of forum clause was present in a disputed contract and would then have to determine whether that result would contravene a strong public policy of the transferor court's state.\textsuperscript{114} This type of analysis would be "complicated and uncertain in cases involving complex legal questions or voluminous amounts of disputed issues of fact . . . [and would involve] detailed speculation on the merits at the outset of the action."\textsuperscript{115}

\begin{itemize}
\item \textsuperscript{108} Hollingworth Solderless Terminal Co. v. Turley, 622 F.2d 1342 (9th Cir. 1980); Weisz v. Weisz, 19 Cal. App. 3d 676, 97 Cal. Rptr. 18 (1971).
\item \textsuperscript{109} \textit{De Haviland}, No. CV 81-2134 at 11. \textit{See also supra} text accompanying notes 76-80.
\item \textsuperscript{110} \textit{Manchester}, No. CV 81-2134 at 11. \textit{See also supra} text accompanying notes 76-80.
\item \textsuperscript{111} \textit{Manchester}, No. CV 81-2134 at 11. \textit{See also supra} text accompanying notes 76-80.
\item \textsuperscript{112} \textit{Manchester}, No. CV 81-2134 at 11.
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.} at 11-12.
\item \textsuperscript{115} \textit{Id.} at 12.
\end{itemize}
On a theoretical level, the court distinguished a refusal to enforce a choice of law clause from enforcement of a choice of forum clause: the latter "merely allows the courts of the chosen forum to enforce their laws; it does not force the transferor court to act on the merits at all."\(^{116}\)

A third reason for enforcing the choice of forum clause was to preserve the certainty of the contract as intended by the parties, and thus avoid a race to the courthouse of a jurisdiction where a party could claim that the result of enforcing the choice of forum clause would be contrary to that jurisdiction's public policy.\(^{117}\)

Arista's motion to dismiss the complaint for noncompliance with the choice of forum clause in the 1973 contract was ultimately granted.\(^{118}\)

The outcome-determinative nature of the choice of law and choice of forum issues illustrates the important differences between California and New York law regarding the duration of personal service employment agreements. Most recording contracts are signed in either New York or California.\(^{119}\) The parties (artists and companies) are often residents of, or have their principal place of business in, either New York or California.\(^{120}\) Accordingly, either California or New York law will probably be controlling where the parties do not specify the law of either state.\(^{121}\)

Whether an artist's contract is governed by New York or Cal-

\(^{116}\) Id.

\(^{117}\) Id.

\(^{118}\) Id.

\(^{119}\) SHEMEL & KRASILOVSKY, supra note 26, at 5.

\(^{120}\) For example, Melissa Manchester signed the 1973 contract in New York while a resident of New York. She began recording albums in California in 1974, moved to California in 1975, and brought the 1981 action as a resident of California. Arista has its principal place of business in New York; the 1976 Arista/Manchester contract was signed in New York. Manchester, No. CV 81-2134 at 3-4.

\(^{121}\) THE RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 188 (1971) states:

1. The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in § 6.

2. In the absence of an effective choice of law by the parties (see § 187) the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

(a) the place of contracting,

(b) the place of negotiation of the contract,

(c) the place of performance,

(d) the location of the subject matter of the contract, and
California law is important; an enforceable contract under New York law may be rendered unenforceable in California by section 2855. Considerations of certainty regarding the effect of the written agreement mandate the inclusion of both a choice of forum and choice of law provision. Examination of the 1976 Manchester/Arista contract demonstrates that a choice of law clause alone may not be applied in certain circumstances.

2. The 1976 Contract—Mid-term Extension?

The court considered the 1976 contract separately because, while it specified New York law, the contract did not include a choice of forum clause. In the court’s view, Manchester’s argument—that the 1976 contract was, under section 2855, simply an agreement continuing or extending the 1973 contract and thus unenforceable against her seven years after the signing of the first agreement—was doomed from the start. If the 1976 agreement was not an independent contract but rather an extension of the 1973 contract, the choice of forum clause in the 1973 contract would have applied, and the entire action should have been dismissed. On the other hand, the court ruled that if the 1976 contract was an independent contract, California law would apply since no choice of forum clause was present.

(e) the domicile, residence, nationality, place of incorporation and place of business of the parties.
These contacts are to be evaluated according to their relative importance with respect to the particular issue.

(3) If the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied, except as otherwise provided in §§ 189-199 and 203.

122. An additional choice of law/conflicts of law problem could foreseeably arise should a court apply the doctrine of renvoi. When a jural matter is referred to a foreign law for decision, a renvoi question is raised: “[I]s the reference to the corresponding rule of the conflict of laws of that foreign law, or is the reference to the purely internal rules of law of the foreign system; i.e., to the totality of the foreign law, minus its conflict-of-laws rules?” Schreiber, The Doctrine of the Renvoi in Anglo-American Law, 31 Harv. L. Rev. 523, 525 (1917). The answer will depend on the court’s approach to choice-of-law.

The renvoi issue may be avoided by the insertion of a clause specifying the choice of forum and the choice of law “regardless of its or any other law’s choice of law principles.” Interview with Neil Flanzwraich, Esq., Syntex Corp. in Palo Alto, Cal. (Nov. 15, 1982).

123. See supra notes 94-95 and accompanying text.
124. Manchester, No. CV 81-2134 at 13; see Manchester/Arista Contract, id. at 24, para. 29.
125. Id. at 13-14.
126. The ruling that California, rather than New York, law would apply was based on “California’s strong public policy.” Id. (referring to § 2855). However, enforcement
present; Manchester, however, would still not prevail, because the 1976 contract had only run for one year and thus did not yet violate the seven-year rule.127

While the court reasoned that Manchester would not prevail whether the contract was characterized as dependent or independent, it determined that the issue of what law applied to the contracts still merited discussion. If the 1976 contract had been found dependent on the 1973 contract, and California law had been held inapplicable, the action would have been dismissed without prejudice for failure to bring the claim in the proper forum, due to the choice of forum clause in the 1973 contract. The court, however, held that the contract was indepen-
ent of the 1973 contract; it analyzed the dependency question under California law and section 2855, and dismissed the claim on the merits for "failure to state a claim for violation of § 2855 for which the court may grant relief." 

3. The Balancing Approach: Arguments Pro and Con

(a) The Manchester Court's Balancing Approach

The Manchester court rejected the plaintiff's argument that the 1976 contract was an extension of the 1973 contract in violation of section 2855, finding the plaintiff's analysis overly broad. The court reasoned that such an approach "would effectively prevent an employee from entering into a new contract with his or her current employer until after the completion of all obligations between them." The court proposed a case-by-case balancing test, with an emphasis upon the point in time when the second agreement was entered into:

The better course is to consider the circumstances surrounding the formation of the new contract in each situation. If the new contract was entered into at or near the time of formation of the earlier contract, and if the two contracts appear to have been entered into to avoid the application of § 2855 to a single agreement, then they should be considered a single contract for purposes of § 2855. However, if the latter contract was entered into toward the end of the first contract, it should be treated as a separate agreement for purposes of § 2855. Each employment situation will necessarily be interpreted according to its unique facts. The interpretation of the two contracts should be made in light of the policy consideration underlying § 2855 to protect employees, rather than by principles of formal contract law.

The court considered a number of factors in applying this test. The 1976 contract was entered into following the partial completion of the 1973 contract and was an integrated agreement embodying several material differences from the 1973 contract: the 1976 contract did not contain a forum selection clause; the royalty provisions were materially altered; and since the contract was entered into to pay the debt owed by Manchester to her former producer, it was thereby supported

129. Id. at 15.
130. Id. at 13.
131. Id. at 14.
132. Id.
The court found that the only significant factor supporting the dependency of the contracts was that the 1976 agreement was an option contract exercisable only if all of the options under the 1973 contract were exercised by Arista.

This type of "balancing approach" has been acknowledged by some commentators as a viable method of interpreting mid-term extensions under section 2855.134 Again, the sparse case law does not provide a clear-cut answer to the question of whether a mid-term agreement may start another seven-year period. However, De Haviland provides support, not only for the inability of a valid suspension/extension clause to extend the seven years, but also for the incapacity of the employee to separately agree (as Manchester did) to a provision which extends the contract past seven years, even near the end of the contracted-for term.

(b) De Haviland Revisited

Nearly six years after commencing services under her contract, De Havilland had requested and received a four-week extension of her contract so that she could take a four-week leave of absence.135 At trial Warner Brothers raised this amendment to the agreement as a defense to De Havilland's claim that the contract was no longer enforceable against her and again argued the point to the court of appeal.

Nevertheless, even this express agreement was not allowed to extend the seven years. The court of appeal gave the statute the absolute reading noted by Warner Brothers to be the only interpretation under which De Havilland could be relieved from her contract: "Only a holding that L.C. 2855 is mandatory, absolute, and represents an expression of public policy and was established for a public reason, can in this case justify the granting of any relief herein to the artist."136 The court of appeal made only brief reference in its opinion to De Havilland's express agreement.137 While this issue was argued strenu-
ously by Warner Brothers, it was apparently viewed as insufficient to support an extension of the contract.

In its Petition for Hearing before the California Supreme Court, Warner Brothers argued that the common film industry practice of amendatory or supplemental agreements which extend the contractual term was destroyed by the De Haviland decision. Warner Brothers asserted that the decision not only restricted contracts like the one involved in De Haviland, but also prohibited any other independent services contracts between the parties entered into during the seven-year period, even if the contract would take effect after that time.139

Warner Brothers made the policy argument that a producer expends great sums of money in order to build up a star, but will often not be able to obtain the benefits of his “asset” until near the end of the original contract period. The producer protects his investment by entering into a new contract for the artist’s services (with new terms and considerations) before the current contract has expired.140 These new contracts, Warner Brothers argued, would apparently be held completely unenforceable under the court of appeal’s decision in De Haviland.141

The Manchester court’s concern that an absolute interpretation of section 2855 would “effectively prevent an employee from entering into a new contract with his or her current employer until after the completion of all obligations between them,”142 provides a degree of vindication for the argument asserted by Warner Brothers in its Petition for Hearing in the De Haviland case. While the Manchester court did not mention industry practice, artists’ agreements in the recording industry frequently consist of more than a single document, with amendments and modifications added when an option is exercised or the agreement extended.143 As Warner Brothers argued in the context of the film industry, an absolute interpretation of section 2855 may severely impinge on such agreements.

The view that an employee should be able to contract for an

138. The petition was filed January 16, 1945.
139. Warner Brothers’ Petition for Hearing at 20, De Haviland.
140. Id. at 21.
141. Id. at 22.
142. Manchester, No. 81-2134 at 14.
143. See SHEMEL & KRASILOVSKY, supra note 26, at 61.
additional period beyond the seven-year limit of the original contract, unhindered by section 2855, also finds support in the unreported 1946 Los Angeles Superior Court case of *Autry v. Republic Productions, Inc.*\(^\text{144}\) In 1938, singing star Gene Autry signed a contract with Republic for one year plus four successive one-year options. In 1942, the parties signed a second agreement for another one-year term to follow the expiration of the 1938 contract.\(^\text{145}\) From 1942 to 1945, Autry was unable to provide his services to Republic because he was serving in the armed forces.\(^\text{146}\)

Autry contended that the second contract was unenforceable seven years after services were initially rendered under the first contract. Relying on *De Haviland*, the court denied enforcement of the first contract beyond seven years;\(^\text{147}\) however, the second contract was found enforceable against Autry.\(^\text{148}\) The *Autry* court read section 2855 as limiting enforcement of a *given* contract against an employee to seven years:

> The law does not provide that a contract of employment may not be enforced against an employee beyond seven years after the establishment of the employment relationship between him and the employer. No public policy exists against the indefinite continuance of that relationship. No public policy exists against the renewal of employment agreements, period after period, until the total term of employment exceeds seven years.\(^\text{149}\)

The court went on to emphasize the importance of the parties' ability to make long-term plans, a necessary component of which is the ability of the employee to enter into an enforceable agreement without having to wait for the earlier agreement to terminate. The court felt that a contract should not be any less enforceable because it was entered into the day before expiration of the earlier seven-year agreement than if it were entered into the next day.\(^\text{150}\)

The *Autry* court has been criticized for not applying the pro-employee public policy interpretation of section 2855 mandated

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\(^{145}\) *Id.* at 5.
\(^{146}\) *Id.* at 8.
\(^{147}\) *Id.* at 8.
\(^{148}\) *Id.* at 3.
\(^{149}\) *Id.*
\(^{150}\) *Id.* at 4-5.
This criticism is grounded in the Autry court's pro-employer resolution of the issue of the enforceability of a contract entered into by an employee already restrained under an existing contract—a resolution seemingly at odds with the De Haviland explication of the public policy considerations which should guarantee an open-market break under section 2855.

VI

Manchester and the Absolutist Argument

The court in Manchester reasoned that an absolute view of the mid-term extension issue under section 2855—that any mid-term agreement is merely an extension of an existing agreement and not an independent contract—would impinge upon the employee's ability to enter into a new contract while an existing contract was in force. The Autry court phrased this same consideration in terms of the value of "permanency and security" in the employment relationship.

Under the absolutist view of section 2855, the same criticism may be applied to both decisions: one of the intentions of section 2855 is to impair the employee's ability to enter into a relationship so "permanent and secure" that it extends more than seven years into the future. The absolutist view allows the employee to consider the benefits of a long(er) term relationship, but free from contractual restraints every seven years. Although it claimed to have interpreted the two contracts "in light of the policy consideration underlying section 2855 to protect employees, rather than by principles of formal contract law," the court in Manchester perpetuated a line of reasoning that arguably allows an employee to waive the seven-year rule by entering into a new agreement, before the expiration of his original contract.

The absolutist view—that the employee is actually waiving section 2855 by means of a mid-term agreement—requires a reading of the statute in light of the underlying policy expressed in De Haviland. The statute bars an employee from

151. See Bushkin & Meyer, supra note 53, at 392.
152. See id. at 393-98. The Bushkin and Meyer article is the source of the "absolutist" interpretation of § 2855.
153. See Manchester, No. CV 81-2134 at 14.
154. See Autry, No. 503481 at 2.
guaranteeing an employer that he will work for him for more than seven years—the maximum term as directed by the legislature, after which the employee "may make a change [of employers or occupations] if they deem it necessary or advisable"—even if the employee at an earlier time wished and attempted to bind himself under a contract for more than seven years.

However, the statute does read, "[a] contract to render personal service . . . may not be enforced against the employee beyond seven years from the commencement of service under it." Under a literal reading of section 2855, it could be argued that the statute refers only to a contract, and a series of agreements would therefore fall outside of the strict reach of the statute. The absolutist argument, however, provides that if the policy behind the statute is considered, the series of agreements may be viewed as merely extensions of a contract, by which an employee should not be "free to throw away the benefits conferred upon [him]." The benefit is the guarantee of a "reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation."

An employee who negotiates a new agreement while under the restraint of an existing contract is not in a bargaining position where he can truly negotiate for the highest obtainable compensation. The employee does not have the spectrum of opportunities by which to maximize his worth that he would have if he were selling his services on the open market. Without such an open-market break, under the absolutist approach, the new agreement cannot be viewed as a truly "new" contract executed under the conditions guaranteed every seven years, but rather should be viewed as an extension of the earlier contract. If the later agreement is given the status of a new con-

158. Id. at 235, 153 P.2d at 988.
159. Id. at 235, 153 P.2d at 988.
160. In Foxx v. Williams, 244 Cal. App. 2d 223, 52 Cal. Rptr. 896 (1966), the California Court of Appeal implicitly approved the validity of an employment relationship running more than seven years where there had been open-market breaks. Comedian Redd Foxx entered into a one-year contract with Dootone Records on January 6, 1956; Dootone chose not to renew an option for an additional two years. On January 28, 1957, the parties entered into a similar agreement (but at a higher royalty rate), which expired after one year because Dootone failed to exercise its option. A third contract was entered into on April 4, 1958, for a term of five years with a two-year option to extend...
tract starting a new seven-year period, the seven-year guarantee has effectively been waived by the employee, a practice which violates the rule that "rights created in the public interest may not be contravened by private agreement."

While the statute requires more than a literal reading in order to reach a finding that a series of "contracts" is legally one extended contract, this gap in the logic of the absolutist view appears to be adequately supported by the policy bridge of section 2855.

In Manchester, the 1976 Manchester/Arista one-year option agreement was entered into and exercised before the expiration of the 1973 contract. Under an absolutist interpretation of section 2855, there was no open-market break, and the 1976 agreement would be viewed as dependent upon, or a mid-term extension of, the 1973 contract.

VII
Approaches to the Interpretation of Section 2855

As evidenced by the above discussion, the case law directly addressing the issue of mid-term agreements under section 2855 is sparse and the commentaries few. As a result, resolution of this issue depends to a great degree on the policy considerations that underlie the statute and the effects of the enforcement of the relevant policies.

According to Bushkin and Meyer, there are at least three possible approaches to interpreting the mid-term extension issue under section 2855. The first approach is a pure consider-

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the contract. The trial court had ruled that Foxx's failure and refusal to record albums under the contract merited a nearly two and one-half year extension of the term pursuant to a suspension/extension provision of the third contract. Id. at 237.

The court of appeal held that the third contract was subject to the seven-year limitation, id. at 243, a determination which necessarily upheld the enforceability of the third contract for seven years, even though the employment relationship had begun nine years earlier. The court specifically observed that the earlier contracts had expired before the following agreement was entered into. Id. at 228. While not explicitly stating that Foxx had been afforded open-market breaks between the contracts, the court did view each contract as independent and did not measure the seven years from the beginning of the employment relationship. The third contract was valid up to seven years after it was entered into. Id. at 243.

161. De Haviland, 67 Cal. App. 2d at 236, 153 P.2d at 988. See also CAL. CIV. CODE § 3513 (Deering 1972) ("[a]nyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement.").
162. See Bushkin & Meyer, supra note 53, at 394-96.
ation test, where any bargain supported by new consideration would initiate a new seven-year period.\(^{163}\) This approach is inconsistent with *De Haviland* and could result in an obvious circumvention of the statute.

An intermediate balancing approach, similar to that taken by the *Manchester* court, requires a case-by-case review of the specific facts of each case. A court must assess a variety of factors, including: (1) whether the new agreement is a legitimate new contract entailing additional consideration and material alterations of the contract provisions; (2) whether the intent of the new agreement appears to have been to avoid the strictures of the seven-year rule, which may be indicated by whether the new contract was entered into at or near the time of formation of the earlier contract; and (3) the equality of bargaining positions between the employer and employee, indicated by the degree of restraint upon the employee by the existing contract.

Commentators have noted the possibility that a court may allow a new bargain to exceed the seven-year period under a balancing approach:

We think that the court would carefully scrutinize such an arrangement and would consider among other factors, whether the amendment or new contract was *bona fide*, whether there was fairly equal bargaining position between employer and employee, whether the employee freely elected to extend the term. Notwithstanding the presence of all these factors, if the parties simply extended the term and did not materially change other provisions of the agreement, the seven year rule may still be applied. However, if it were truly a new arrangement involving additional consideration and other material changes, and the other requisites just mentioned were present, the court might well rule that the seven year period could be exceeded.\(^{164}\)

The *Manchester* decision evidences judicial acceptance of this method of interpreting section 2855, which is essentially a test based on equitable considerations in addition to the requisite legal elements. However, the balancing approach has been criticized as inviting “needless review of an individual’s freedom, the market value of his services, and the nature of the

\(^{163}\) *Id.* at 396.

restraints—all on a case-by-case basis." This necessary degree of judicial inquiry does result in some uncertainty to both the employer and employee in that it may make the eventual effect of the written document unpredictable. However, the balancing approach does allow judicial latitude in determining the results according to the weight of the equities, as indicated by the objective and subjective factors found in, and attendant to, the parties' agreement(s).

The third approach applies the absolutist interpretation to section 2855. It has been defined by Bushkin and Meyer as "[a]ny subsequent bargain executed under existing contractual restraints to the employee's freedom, and which therefore does not give the employee his market worth, is not a 'new contract' under the statute; a 'new contract' thus arises only if the employee were truly free at the time of contracting." The employee is thus "absolutely" guaranteed an open-market break by section 2855.

The absolutist approach is supported by the decision in De Haviland and is implicitly approved by the California Court of Appeal decision in Foxx v. Williams. These cases support the argument that the employee is guaranteed an open-market break every seven years, unaffected by a mid-term agreement. The absolutist rule also provides certainty in determining the effect of section 2855 on subsequent employment agreements; any such agreement will not start a new seven-year period and thus may be unenforceable.

However, that same certainty may potentially lead to inequitable results, defeat the purpose of the statute, and deprive the

165. See Bushkin & Meyer, supra note 53, at 396.
166. See supra text accompanying notes 152-61.
167. See Bushkin & Meyer, supra note 53, at 396.
168. See supra note 160.
169. This issue also arose in a dispute between talk show host Johnny Carson and NBC in 1979—seven years after the signing of Carson's 1972 contract. Carson contended that his contract was unenforceable under § 2855. NBC argued that it had entered into three separate agreements with Carson subsequent to the signing of the 1972 contract. The last agreement gave Carson more money for reduced hours as the host of The Tonight Show. NBC asserted that Carson was contractually bound until April 1981. The dispute was submitted to arbitration. See Family Feud: Carson and NBC Go To Court, Time, Sept. 24, 1979, at 86.

The dispute was settled by the parties before the arbitration award was handed down; however, according to one of Carson's attorneys, retired Judge Parks Stillwell was leaning toward granting summary judgment in favor of Carson. Telephone interview with Rauer Meyer, Esq., Bushkin, Kopelson, Gaims, Gaines & Wolf, in Beverly Hills (Jan. 31, 1983).
parties of necessary contractual freedom. If Manchester's absolutist argument—that the 1976 contract was an unenforceable extension of a contract beyond seven years—had been successful, Arista would have been required to pay off Manchester's $145,000 debt without receiving one year of services in exchange. As mentioned earlier, the $145,000 was considered an advance against Manchester's royalty payments, so that even if Manchester did not record any more albums for Arista, the company would recoup its advances against any royalties accruing from sales of previously recorded records. However, the result could still conceivably be that Arista would not recoup all of the $145,000 and thus have effectively given away its money—an apparently inequitable result.

The *quid pro quo* for the renegotiation of royalty provisions and fringe benefits is often an extension of the contractual term. Indeed, more “service time” is often virtually all that the artist has to offer the employer. If the renegotiated agree-

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170. The success of Manchester's claim depended upon characterizing the 1973 and 1976 contracts as one combined employment agreement for purposes of § 2855. In order for the 1976 contract to exceed the seven-year limit, it was necessary to “tack” the five years that had run on the 1976 contract onto the additional three years from the 1973 contract.

As noted in the text accompanying notes 100-13, the *Manchester* court found that even if the 1976 agreement were an extension of the 1973 contract, Manchester could not prevail because the choice of forum clause in the 1973 contract (specifying New York law) would then apply to the 1976 contract. The entire combined agreement would not in that case be subject to California law or § 2855.

In her moving papers, Manchester argued that the parties intentionally omitted the choice of forum clause from the 1976 “amendment,” and therefore the choice of forum clause in the 1973 contract should not control the 1976 amendment even though the contracts were combined. Plaintiff's Reply at 26-27, *Manchester*.

The issue thus presented was: may a California court prevent enforcement of the 1976 agreement that is under California law, but which only violates the seven-year limit if viewed as an extension of the 1973 agreement that is not subject to the laws of California? While the issue as framed by Manchester was not addressed by the court, it raises the question of whether the public policy embodied in § 2855 is strong enough to protect a California employee in such a “tacking” situation.

A different type of “tacking” was involved in the recent case filed by football player Fred Dean against the San Francisco 49ers. Dean is claiming that his contracts with separate employers (the 49ers and the San Diego Chargers) are all one contract, the total of which exceeds seven years. Therefore, Dean argues, this latest contract with the 49ers is invalid under § 2855. The case had not gone to trial at the time of this note's publication. San Francisco Chron., July 19, 1984, at 77, col. 5.

171. The agreement to pay off Manchester's judgment debt was entered into by Arista at Manchester's request. Declaration of Elliot Goldman in Support of Defendant Arista Record Inc.'s Motion to Dismiss at 6, *Manchester*.

172. *See supra* note 95.

173. *See supra* note 58 and accompanying text.
ment extends the term of the employment relationship past seven years from the commencement of services under the original contract, the employer may not be able to enforce the agreement. With such knowledge, the employer may understandably be unwilling to bargain away money for an unenforceable promise. As a result, the absolutist approach may effectively limit the artist's "reasonable opportunity to move upward and employ his abilities to the best advantage and for the highest obtainable compensation."

The problem faced by an artist who can only offer "service time" as consideration for a needed contractual benefit is illustrated in Manchester. It was in the interests of both Manchester and Arista to shift the employee's debt from her former record producer to her present record company. Under the absolutist approach to such a situation, an employer may be unwilling to "bail out" an employee, knowing that the contract option received in exchange for its payment may not be enforceable.

Countering the employer's contention that it bargained for an unenforceable agreement, one may argue that the employer has the option of terminating the earlier agreement, allowing the artist a bona fide open-market break, and then re-signing the artist at the deserved level of compensation and benefits. With such an open-market break, the employer would be assured of his ability to enforce the new contract for a full seven years. In view of the especially sensitive nature of employment relations involving artistry, it may benefit the employer to pay an artist the increase in compensation resulting from commercial success in order to maintain a satisfying working relationship.

An employer, however, may balk at the prospect of turning

174. De Haviland, 67 Cal. App. 2d at 235, 153 P.2d at 988. See also Note, supra note 10, at 496 n.36; Bushkin & Meyer, supra note 53, at 394.
175. See Note, supra note 10, at 496 n.36; Bushkin and Meyer, supra note 53, at 396. Contracting parties have used the "moment of freedom" technique. The rock group Steely Dan signed new contracts with its record company almost seven years after its initial contracts. The group signed the contracts and then set the briefcase containing them down in the record company's office. The record company then signed papers releasing the group from its earlier contracts. Moments later, the record company signed the new contracts. CBS Records used the same technique for recording star Neil Diamond. However, if courts were assessing this situation, they would probably look to the substance and reality of the situation rather than the form of technical compliance. Remarks by Donald Biederman, Legal Aspects of the Music Industry Seminar, at Hastings College of the Law (Nov. 12, 1983).
his valuable investment loose without the certainty that the artist will return to the fold. It has been suggested that this problem may be obviated by a grant of “first refusal” rights\textsuperscript{176} to the employer—giving the employer the option of being first in line to pick up the employee’s services—at the employee’s open-market worth.

However, in a situation such as in \textit{Manchester}, where the term of the second agreement was of short duration, it is unlikely that the employer, in order to provide an open-market break, would be willing to terminate a long-term primary contract before entering into the new agreement. As a result, an artist may be unable to enlist the help of the employer in solving an immediate problem requiring positive cash flow.

\section*{VIII}

\textbf{Proposal for an Interpretive Statutory Provision}

An analysis of the \textit{Manchester} case illustrates the difficulties involved in applying section 2855, and especially illustrates the problems that could arise if the statute is “absolutely” applied to mid-term extensions.\textsuperscript{177} An employer may be foreclosed from enforcing a valid promise supported by consideration and justifiably relied on. The employer’s cognizance of this possibility may prevent an artist, involved in a long-term employment relationship, from being able to renegotiate terms (including compensation, royalties, fringe benefits, and artistic control), or obtain a needed monetary advance in exchange for an additional period of service. The employer may not wish, or may be unable, to terminate the earlier agreement in order to

\footnotesize{\textsuperscript{176} See Bushkin & Meyer, \textit{supra} note 53, at 398.}

\footnotesize{\textsuperscript{177} The precedential value of \textit{Manchester} outside of the Central District of California is uncertain. While California courts are not bound to follow a federal court decision on matters of state law, \textit{Estate of D’India}, 63 Cal. App. 3d 942, 948, 134 Cal. Rptr. 165, 168 (1976), federal decisions may have a persuasive effect. \textit{Demeter v. Annenson}, 80 Cal. App. 2d 48, 53, 180 P.2d 998, 1001 (1947). See also 6 B. \textit{Witkin, California Procedure} § 674 (2d ed. 1971); 20 \textit{Am. Jur. 2d Courts} § 225 (1965). In view of the paucity of applicable case law, \textit{Manchester}, even though unpublished, may possibly be cited in future California court cases involving the interpretation of § 2855. The decision was noted in the Entertainment Law Reporter as one “long awaited by entertainment lawyers, concerning the effect of [the] seven year limitation on subsequent modifications of personal service contracts . . . .” \textit{Ent. L. Rep.}, \textit{supra} note 12, at 1. A prominent entertainment attorney, however, has stated that the § 2855 analysis in \textit{Manchester} might be a gratuitous statement and possibly not the “law.” Remarks by Jay Cooper, Legal Aspects of the Music Industry Seminar, \textit{supra} note 175.}
provide an open-market break between a primary long-term contract and a supplementary short-term contract.

Nevertheless, the absolutist approach appears to be the correct method of interpreting section 2855 in most situations. It provides the employee with the greatest degree of protection against being bound to a long-term contract that does not provide compensation commensurate with his ability. And it appears to reflect the pro-employee purpose of section 2855 as defined in *De Haviland*, that is, to give the employee the opportunity to freely negotiate for his fair market value every seven years.

However, the absolutist approach will not provide the correct result in all situations. Such a mechanical application of the statute, while providing certainty to the contracting parties, could lead to inequitable results. Even the promise of certainty may dissipate as a judge "creatively" interprets the contract or statute in order to avoid an unjust resolution of a contract dispute.

The rationale for the absolutist approach is that a subsequent bargain executed under existing contractual restraints does not give the employee his market worth. But what if the employee has received his market worth by almost anyone's standards? Arguably, the purpose of the statute has already been met. The reason for giving the employee an open-market break is to remove the employer's dominance rooted in the existing contract and to allow the employee to actually use the bargaining strength built up by his accumulation of seven years of skill and knowledge—in other words, to promote equalization of the parties' bargaining positions. However, an employee who has renegotiated a contract from a bargaining posture equal to, or greater than, the employer's does not need the statute, and should not be able to mechanically apply section 2855 and escape from a contract which was renegotiated and extended on very favorable terms. The same equities appear to apply in a case such as *Manchester*, where the contract, while involving the artist's services (and extension of the term) as part of the consideration, was entered into for a valid purpose separate from the original contract.

The resulting problem is that while the statute should be

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178. See *supra* text accompanying note 167.
179. See *supra* text accompanying note 94.
strictly applied in most circumstances, there is a threshold point where the imposition of section 2855 on an otherwise valid contractual arrangement brings inequitable results.

A possible solution may be to add an interpretive provision to section 2855. The absolutist approach and the intermediate balancing test could be combined in a rebuttable presumption, similar to that embodied in California Labor Code section 2750.5.\textsuperscript{180} Section 2750.5 creates a rebuttable presumption, affecting the burden of proof, that a worker performing certain services is an employee rather than an independent contractor. It assigns the evidentiary burden to the employer on the issue of whether the worker can invoke the protections of the Labor Code. The statute then presents a detailed list of factors (basically elements of a balancing test) which must be proved by the employer in order to overcome the presumption and establish that the worker is an independent contractor.\textsuperscript{181}

\textsuperscript{180} CAL. LAB. CODE § 2750.5 (Deering Supp. 1984).
\textsuperscript{181} Section 2750.5 states:

There is a rebuttable presumption affecting the burden of proof that a worker performing services for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Business and Professions Code, or who is performing such services for a person who is required to obtain such a license is an employee rather than an independent contractor. Proof of independent contractor status includes satisfactory proof of these factors:

(a) That the individual has the right to control and discretion as to the manner of performance of the contract for services in that the result of the work and not the means by which it is accomplished is the primary factor bargained for.

(b) That the individual is customarily engaged in an independently established business.

(c) That the individual's independent contractor status is bona fide and not a subterfuge to avoid employee status. A bona fide independent contractor status is further evidenced by the presence of cumulative factors such as substantial investment other than personal services in the business, holding out to be in business for oneself, bargaining for a contract to complete a specific project for compensation by project rather than by time, control over the time and place the work is performed, supplying the tools or instrumentalities used in the work other than tools and instrumentalities normally and customarily provided by employees, hiring employees, performing work that is not ordinarily in the course of the principal's work, performing work that requires a particular skill, holding a license pursuant to the Business and Professions Code, the intent by the parties that the work relationship is of an independent contractor status, or that the relationship is not severable or terminable at will by the principal but gives rise to an action for breach of contract.

In addition to the factors contained in subdivisions (a), (b), and (c), any person performing any function or activity for which a license is required pursuant to Chapter 9 (commencing with Section 7000) of Division 3 of the Busi-
Similarly, a rebuttable presumption could be employed to assign the burden of proof as to whether a renegotiated, amended, or modified contract, which extends the contractual term, is in fact a new contractual arrangement starting a new seven-year period under section 2855. The statute could read:

There is a rebuttable presumption affecting the burden of proof that an agreement renegotiated, extended, or modified while the employee is under an existing contract with that employer, and which involves an extension of the term of the employment relationship, is considered a mid-term extension of the existing contract for the purposes of Labor Code section 2855. Proof that the renegotiated, amended, or modified agreement is sufficient to begin a new seven-year period includes satisfactory proof of these factors:

1. whether the new agreement is a *bona fide* new contract, entailing (a) additional consideration, and (b) material alterations of the contract provisions;
2. whether the intent of the new agreement appears to have been to avoid the strictures of the seven-year rule, which may be indicated by whether the new contract was entered into at or near the time of formation of the earlier contract; and
3. the equality of bargaining positions between the employer and employee, indicated by (a) the substance of restraint upon the employee due to the existing contract and (b) the contractual benefits accorded the employee as measured by current industry standards.

Such a statute, in most cases, would ensure the employee the benefits of the absolutist interpretation of the mid-term extension issue, while also recognizing that there are situations where mechanical application of the statute would be unfair to the employer. However, it places the burden on the employer to prove that the new agreement is fair enough to the employee so that it should be considered a new contract starting another seven-year period.

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In the Construction Industry and Professionals Codes shall hold a valid contractors' license as a condition of having independent contractor status.

For purposes of workers' compensation law, this presumption is a supplement to the existing statutory definitions of employee and independent contractor, and is not intended to lessen the coverage of . . . employees under Division 4 and Division 5.

*Id.*
The employee will thus be afforded the protection of section 2855 unless the employer can present satisfactory evidence that the employee should not be allowed to break the renegotiated agreement by virtue of section 2855. Matters of proof may be problematic due to the subjective nature of parts of this proposed provision. Since judges may lack an expert understanding of the entertainment industry, expert opinion may be required to determine the relative bargaining positions of the parties and how fair the contract was to the employee. As with other expert opinions, this would entail a certain amount of subjectivity and would require a great deal of factual information and add to the expense of litigation. An even greater problem would be that the contracting parties may be less certain of the effect of mid-term extensions. However, even though an absolute rule would provide a greater degree of certainty, a court may be hesitant to strictly apply the seven-year rule if the result would be incorrect or unjust, and thus might likely bend such a rule. The rebuttable presumption suggested above would allow a judge to avoid applying section 2855 without having to justify his decision through tortured reasoning.

Such an interpretation of section 2855 also allows for a situation such as in Manchester where the artist exchanges a period of service for the payment of a debt. In this situation, the artist's ability to obtain such an advance on the open market is probably very slim and the resulting agreement should be viewed as a new contract under the proposed statutory provision and section 2855.

IX
Conclusion

The proposed statutory provision leaves intact section 2855's renunciation of contracts whose terms have run for more than seven years, as well as section 2855's prohibition of suspension/extension clauses that extend the maximum period. The proposal does, however, affect the analysis of mid-term extensions under section 2855 by establishing that the seven-year period is presumed to run from the date of the original contract

182. See Bushkin & Meyer, supra note 53, at 396 (criticism of a balancing approach to § 2855 mid-term extensions, which would apply equally to the balancing approach embodied in the proposed statutory provision).
183. See infra text accompanying notes 73-91.
regardless of renegotiations, *unless* legal requirements and considerations of fairness mandate otherwise.

The mid-term extension issue should always be viewed through the strong pro-employee perspective embodied in the Labor Code,\textsuperscript{184} inherent in section 2855, and articulated in the *De Haviland* decision. In most cases, the "absolutist" approach is correct, and the renegotiated agreement should not start a new seven-year period. However, the rationale for the absolutist approach is that the employee has not achieved his market worth in the renegotiation because of existing contractual restraints. The proposed provision gives courts a degree of flexibility in an otherwise absolute rule in cases where an artist's market worth has been achieved.

\textsuperscript{184} See Frackman, *supra* note 10, at 349.