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Table of Contents

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Introduction

This Article addresses an issue of law relating to recording contracts entered into by California companies or involving California recording artists, the outcome of which could spell disaster for virtually all California record labels and a huge payday for their California recording artists creating "works made for hire." The issue is whether a contract involving a California artist, by which that artist creates sound recordings as works made for hire for a record company, violates California public policy embedded in a variety of labor laws.

This question may be of extreme importance to the recording industry. It should come as no surprise that a large segment of the recording industry operates in California. All of the major international labels are either headquartered or have a major office in California, generally in the Los Angeles area.[1] Some twenty-five percent of all independent American labels are based in or have major offices in California as well.[2] California, as one of the major (if not *the* major) entertainment centers in the country, also attracts numerous artists who are eager to live and work near the finest studios, musicians and other artists, and the record labels themselves. Thus, it is evident that any California law affecting the music industry has broad reaching ramifications throughout that industry.[3] This Article will address those potential ramifications.

I
History

Even a cursory review of recording and publishing contracts by both major and independent record labels and music publishers reveals that recording artists very frequently provide their recording and/or songwriting services pursuant to the "work made for hire" doctrine in the United States Copyright Act.[4] There is something of a historical reason for this. In the early years of the recording industry, there was, as a practical matter, a division between songwriters and

1. RECORDING INDUSTRY SOURCEBOOK 3-10 (Michael Fuchs ed., 1994).

2. *Id.* at 13-36.

3. *See generally* CAL. LAB. CODE §§ 1700-1700.47 (West 1989 & Supp. 1995) (California Talent Agencies Act); CAL. LAB. CODE § 2855 (West 1989) (California seven year personal services statute). For cases interpreting the Talent Agencies Act, see Wachs v. Curry, 16 Cal. Rptr. 2d 496 (Ct. App. 1993); Sinnamon v. McKay, 191 Cal. Rptr. 295 (Ct. App. 1983). For cases interpreting the personal services statute, see MCA Records, Inc. v. Newton-John, 153 Cal. Rptr. 153 (Ct. App. 1979); Lemat Corp. v. Barry, 80 Cal. Rptr. 240 (Ct. App. 1969); Foxx v. Williams, 52 Cal. Rptr. 896 (Ct. App. 1966).

4. 17 U.S.C. § 101 (1988). *See also* THIS BUSINESS OF MUSIC 629, 633, 654 (Sidney Shemel & M. William Krasilovsky eds., 6th ed. 1990).

performers. Few recording artists wrote their own material, or at least not the lion's share of it. Likewise, only a few major songwriters were also major recording stars.[5]

In order to profit from the fruits of the songwriters' labors, which often were to be overshadowed by the contribution of the performers, publishing companies that provided the music felt they needed to own, to as large an extent possible, the music they intended to sell. Ownership of the music gave the publishing companies the right to license it and collect on it as easily and profitably as possible, both in terms of recordings and especially sheet music. In the case of less well known composers, the companies hired them as employees on a day to day basis to crank out tunes for the performers. In the case of well known composers, the companies took ownership interests in the compositions and, in addition to flat fee compensation, agreed to pay back to the artists a percentage, or royalty, of the money the company collected on the songs.[6] Thus, many of these "Tin Pan Alley" songwriters were actually employees of the publishing companies, and although they might retain little or no interest in the success or failure of the songs they produced, they had (for an artist) relatively steady work and steady pay.

Unlike for musical compositions, in those early days (pre-1972) there was no adequate copyright protection available for sound recordings.[7] Thus, the recording artist had only a contractual interest in his or her contribution to the process. The recording artist was paid for his or her services and perhaps even maintained a royalty interest in the success of the recording; however, it was the record company that held common law ownership interests in the sound recording it published. In the final analysis, then, both the record labels and publishers maintained complete control over the songs and recordings to the largest extent they could.

As rock and roll and pop music became dominant in the industry, the era of the singer/songwriter emerged. Recording artists gained greater power as they became more responsible for all phases of their

5. *See generally* JACK BURTON, THE BLUE BOOK OF TIN PAN ALLEY (1951); DAVID EWEN, ALL THE YEARS OF POPULAR AMERICAN MUSIC 407-08 (1977).

6. Prior to the 1976 Copyright Act, songs created pursuant to a special commission were generally presumed to be "works made for hire" and the property of the commissioning party. *See* MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03[B], at 5-41 through 5-45 (1994).

7. Sound recordings were not the subject of federal copyright law under the Copyright Act of 1909 until the Sound Recording Amendment of 1971. Pub. L. No. 92-140, 85 Stat. 391 (1971), as amended by Pub. L. No. 93-573, 88 Stat. 1973 (1974) (codified as amended at 17 U.S.C. §§ 102, 301 (1988)). *See* CRAIG JOYCE, COPYRIGHT 125 (1986).

product, from composition through production.[8] Record companies became more and more involved in the publishing aspects of the industry, and most formed their own publishing companies.[9] As in the past, the record companies took all available steps to assure themselves of as much control as possible over the intellectual property created by their artists; after all, it was the record companies' investment in the compositions and recordings that made the music available to the public and remunerative for the artist. In addition, effective in 1972 the Sound Recording Amendment to the Copyright Act introduced federal copyright protection for those sound recordings.[10] This made ownership of the actual recording all the more important.

II
Recording Agreements and Royalties

In order to maintain this type of control and also to keep the newly empowered singer/songwriter artist "hungry"—that is, to ensure that the artist would continue to provide plentiful and high quality product—record labels developed what I refer to as the "advance-recoupment-royalty" system, still in place today. Under this arrangement, the artist provided recording and possibly songwriting services to the record label, allowing the record label to retain the ownership in the ultimate artistic creations as works made for hire.[11] In exchange, the record company financed the artist's project and paid the artist a royalty of the record sales (if any) resulting from the compositions and recordings after recouping the advanced costs of the album from the artist's royalties.

In practice, the system works as follows:[12] The record company enters into an exclusive multi-album recording contract with the artist whereby it agrees to pay for one or more albums and has options to demand several more from the artist at the record company's sole discretion. The record company then "advances" a sum of money to the artist for the production of the first album and perhaps for some incidental costs of living. The artist records the album, using the "advance," and turns it over to the record company, which owns the

8. *See* EWEN, *supra* note 5, at 699-722.

9. MICHAEL FINK, INSIDE THE MUSIC BUSINESS 14-16 (1989).

10. 17 U.S.C. §§ 102(a)(7), 301(c) (1988) (amending Copyright Act of 1909 to protect recordings fixed after Feb. 15, 1972).

11. 17 U.S.C. § 101. *See also* THIS BUSINESS OF MUSIC, *supra* note 4, at 654.

12. *See generally* MARC ELLIOT, ROCKONOMICS: THE MONEY BEHIND THE MUSIC 183-221 (1988) and NELSON GEORGE, THE DEATH OF RHYTHM AND BLUES (1988), for discussions of how the recoupment system works.

album as if it created it.[13] Assuming that the record company releases the album and that there are sales of it,[14] the record company agrees to pay the artist a "royalty" of the retail selling price of the album, based on an extremely complicated calculation involving a myriad of variables.[15] Before the record company actually pays any of these royalties to the artist, however, it is contractually entitled to "recoup" its entire "advance" *solely from the artist's royalties*.[16] Thus, if an artist were advanced $100,000 to make an album and paid $1.00 royalty per album, the artist would receive no compensation until after 100,000 royalty-bearing records were sold.[17]

As is evident from the above, the artist in such a case ultimately pays for the costs of producing a relatively successful album, but the record company owns the album in its entirety and the artist receives little or no real compensation. Worse yet, the record company has the option to demand further albums and to "cross-collateralize" outstanding advances from any one album against royalties otherwise payable from any others. Thus, an artist could consecutively sell 100,000 albums five or six times and never receive any real compensation in the way of artist's royalties (remember all or most of the $100,000 advances are used to produce the album). Put another way, an artist could produce one 20,000 unit selling album, one 30,000 unit selling album, one 50,000 unit selling album and two 200,000 unit selling albums and still not receive any royalties.

All the while, however, the record company is being paid for the albums and takes its profit off the top with the advance being just another expense.[18] To be sure, record companies frequently wind up with albums that do not sell and do not make a profit, and the record company loses its investment.[19] The record labels justify the "advance-recoupment-royalty" system largely on the basis that it protects

13. *See* THIS BUSINESS OF MUSIC, *supra* note 4, at 3-13. *See also infra* text accompanying notes 20-24.

14. The record label generally has no requirement to release or even make a record under the recording contract.

15. *See* THIS BUSINESS OF MUSIC, *supra* note 4, at 654.

16. DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 132-50 (1991). *See also* THIS BUSINESS OF MUSIC, *supra* note 4, at 3-7.

17. Even more significantly, in a typical recording agreement, an artist might only be paid on approximately 65% of domestic sales and even less on international sales. Thus, in the example above, the artist would have to sell well over 150,000 albums in order to begin earning any royalties. *See* PASSMAN, *supra* note 16, at 138-40; Lionel S. Sobel, *Recording Artist Royalty Calculations: Why Gold Records Don't Always Yield Fortunes*, ENT. L. REP., Oct. 1990, at 3.

18. *See* Leonard M. Marks, *Buchwald Case Has Stern Message for Labels*, BILLBOARD, Apr. 1992, at 8.

19. THIS BUSINESS OF MUSIC, *supra* note 4, at 5.

them from flops. The validity of this argument really depends on which side of the fence you sit. Nonetheless, a quick glance at the size and profitability of the major and large independent record labels indicates that the system works for them, not for the typical artist.

In any event, the record company maintains ownership of the sound recording copyright and the master recordings from which phonorecords are made. The company, in its sole discretion, determines how much money (if any) will be spent on marketing and advertising, how long the record will remain on the market and at what price, and whether the record will even be released.[20] The company achieves this measure of control by taking full ownership of the album (and frequently the compositions on it) as works made for hire. By doing so, however, the record label may be exerting just a bit too much control for its own good.

III
The Work Made for Hire Doctrine

Under the Copyright Act, in most circumstances the person who actually creates a given work of authorship or art is the "author" of that work and the owner of the copyright in it.[21] If the work is created as a "work made for hire," however, the party who hires or employs the artist or author is deemed to be the author of the work. The employer also then owns all rights of copyright in the work as if it had performed the work itself.[22] A work made for hire generally constitutes one that is carried out in the normal course and scope of a typical employment relationship. Additionally, a work made for hire can arise in instances where one party specially commissions another party through a written contract to create a work of art or authorship as a work made for hire.[23]

The use of the work made for hire doctrine in recording and publishing contracts is well established. Record and publishing companies have used the doctrine as it relates to regular employment and in the realm of special commissions. In regular employment circumstances, a record company or publishing house can hire an artist to write or perform songs (or produce other artwork) for a commercial use in the

20. PASSMAN, *supra* note 16, at 90-91.

21. 17 U.S.C. § 201(a) (1988).

22. *Id.* § 201(b).

23. *Id.* § 101; Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1492 (D.C. Cir. 1988), *aff'd*, 490 U.S. 730 (1989). Note that the words "work made for hire" are magic words that must be used in the contract granting the rights where such rights are granted pursuant to a special commission relationship. 17 U.S.C § 101.

course and scope of that artist's everyday employment. Under those circumstances, the artist would not necessarily receive additional compensation if he or she authored a "hit" song or recording or produced another exceptional, valuable work of art, but the artist would have the day to day job, wage, and benefit security a freelance hit artist does not enjoy. In such a case, the artist would be like a computer programmer creating software for a major computer company; he or she would have no interest in the success or failure of the art or software other than providing success for the company and strengthening the likelihood of the employee's continued employment.

The consequences of the work made for hire doctrine are especially significant when one considers that as artists have begun to carry out more roles in the production of their own music, the record companies have realized an opportunity to get the best of both worlds. By contracting with the artists as traditional independent contractors and using the specially commissioned work made for hire doctrine, the labels have gained control of the artists' output as if it were their own authorship, without having to afford the artist the job, wage, and benefit security of regular employees. In fact, as shown above, the labels can get away with paying the artists virtually nothing for their output, even if that output is profitable to the company.

Under circumstances as they now exist, the following scenario is quite common: 1. Artist enters into contract with record company by which he or she produces songs and sound recordings for the company as works made for hire. 2. Artist is guaranteed no minimum wage, no workers' compensation benefits, no disability, health or unemployment insurance, and no assurance that his or her work will be manufactured and sold. 3. Company advances Artist money to make the first album. 4. Artist makes an album that Company sells, retaining Artist's "royalties" to recoup the advance. 5. Album sells well enough to make Company a profit or to make it believe there is a significant potential for future profit. Company therefore exercises its option for the next album and issues another advance to be spent on another album. (Repeat steps 4 and 5 any number of times). 6. Given that industry standard royalties are not particularly high and are paid on only a fraction of actual sales, and given Company's right to recoup and cross-collateralize otherwise payable royalties against all outstanding advances, Artist is never recouped and never owed any artist royalties on several albums, all or many of which were profitable to Company. 7. Company owns Artist's work forever as a work made for hire and may do with it what it pleases, making money in a variety

of ways that may or may not redound to the Artist as well, or taking it off the market entirely.

Leaving for another day the argument that such an arrangement should be considered unconscionable in any jurisdiction, there is one additional flaw in the agreement that is peculiar to the State of California—the arrangement flatly violates California's labor laws.

IV
California Labor Law

In 1982 the California Legislature saw fit to bring a halt to such arrangements whereby specially commissioned works were exempt from the "employment" context.[24] The legislature mandated that persons who create works made for hire are deemed *employees* of the commissioning party for purposes of providing workers' compensation benefits and unemployment and disability insurance.[25] Thus, in the case above where an "independent" artist provided works made for hire, the legislature has declared that the artist is not independent at all! This may come as a devastating surprise to many California record companies; doubtless there are numerous artists out there who have claims against the record companies for employment benefits and other labor related claims.

Depending on the type of relationship between the artist and label, the use of the California work made for hire employment doctrine can have various effects. On the lightest end of the spectrum, an artist or former artist may have some legitimate claims for unemployment or other such benefits.[26] On the other end of the scale, however, artists over whom the record label exercised significant control relating to their artistic output[27] may claim that they are common law employ-

24. *See* CAL. LAB. CODE § 3351.5 (West 1989).

25. *Id.*; CAL UNEMP. INS. CODE §§ 621(d), 686, 2602 (West 1986). For example, § 3351.5 of the California Labor Code provides as follows:

> "Employee" includes . . . (c) Any person while engaged by contract for the creation of a specially ordered or commissioned work of authorship in which the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire, as defined in Section 101 of Title 17 of the United States Code, and the ordering or commissioning party obtains ownership of all the rights comprised in the copyright in the work.

CAL. LAB. CODE § 3351.5 (West 1989). The other cited code sections use substantially the same language.

26. *See* CAL. LAB. CODE §§ 98, 1194, 3706, 3715, 5400 (West 1989 & Supp. 1994); CAL. UNEMP. INS. CODE §§ 1112, 1142, 1326, 2602 (West 1989); CAL. CODE REGS. tit. 8, §§ 9880-9882 (1989).

27. In all recording contracts, the record company will retain a right to accept or reject a sound recording and may have the right to require an artist to re-record tracks until they

ees[28] of the record company and are therefore entitled to minimum wage guarantees and various other labor benefits.[29] In addition, failure to provide these benefits and guarantees from the outset of the relationship may provide grounds for the artist-employee to rescind the contracts based on fraud in the inducement or failure of consideration.[30] In the case of a successful recording artist with additional options remaining on his or her recording contract, such circumstances could be disastrous for the record label. When multiplied by dozens of artists to whom the doctrine may apply, a record label could find itself in quite a pickle.

Of course many labels, especially those that are not headquartered in California, may attempt to avoid the application of these California labor laws to their contracts with California artists by the use of a contractual choice of law or forum selection provision denominating another state as the appropriate law and forum to apply. Whether such a clause is effective will depend on the reasonableness of the choice of forum and applicable law.[31] It will also depend on whether the provision is freely negotiated or is deemed adhesive, and whether its application violates California public policy.[32]

If the plaintiff is a California resident and is attacking the application of a foreign choice of law provision denoting the record company's home state as the governing law and proper forum, then the plaintiff will have to marshall all of the preceding arguments. The plaintiff should argue that the application of the protections of the relevant California Labor Code sections, enacted for the protection of California laborers and taxpayers, will be frustrated if a record label may simply choose the expediency of a foreign choice of law or forum selection clause to avoid application of the relevant California statutes. This is clearly the hardest case and one in which the public policy argument is paramount. It may not be an easy road for the artist.

In other cases, however, the answer should be more simple. For example, if both parties are from California, any foreign forum selec-

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are acceptable, which may entitle the record label to exert considerable control over the artist's output. *See* PASSMAN, *supra* note 16, at 97-98.

28. *See* S.G. Borello & Sons, Inc. v. Department of Indus. Relations, 769 P.2d 399, 404 (Cal. 1989) ("Control of work" test is the dominant factor in determining employment status under California law).

29. *See* CAL. CODE REGS. tit. 8, §§ 11000, 11070 (1989).

30. CAL. CIV. CODE § 1689(b) (West 1989).

31. Cal-State Business Prods. & Servs., Inc. v. Ricoh, 16 Cal. Rptr. 2d 417, 424 (Ct. App. 1993).

32. Hall v. Superior Court, 197 Cal. Rptr. 757, 761 (Ct. App. 1983); Ashland Chemical Co. v. Provence, 181 Cal. Rptr. 340, 340-41 (Ct. App. 1983); Frame v. Merrill Lynch, 97 Cal. Rptr. 811, 814 (Ct. App. 1971).

tion clause almost certainly should not be given application.[33] In the case of a California record company but a non-California artist, the applicability of the California Labor Code sections is questionable, and a choice of law provision denoting the artist's home state would almost certainly be upheld.[34] These cases would appear to stand for the proposition that a non-California record label hiring a California artist and denominating a third state's law as controlling would have to be carefully scrutinized for reasons behind that appointment and might have great difficulties with enforcement of the provision. In any event, until the law is settled on this question and its variations, this issue should provide grist for a variety of headaches for record labels from all over the world with artists who believe the statutes might apply to them.

V
The Importance of "Employee"

Record labels and artists alike should take very seriously the possibility that their relationship is a matter of employment rather than independent contracting. From the record company's perspective, the State of California may well assess the record company for unpaid back taxes, withholdings, and other required payments for state benefits and disability programs.[35] These can be potentially enormous. The record company also needs to fear potential claims and lawsuits by the artists affected by the clause.

The artist has at least three weapons in his or her arsenal arising from the application of employment law in the recording relationship. First, an artist aggrieved by a record company's failure to provide the requisite benefits may make claims for those benefits where appropriate. For example, an artist suffering job related injuries (i.e., carpal tunnel syndrome, larynx nodules, etc.) may file for workers' compensation benefits.[36] If these injuries are severe enough, the artist may qualify for disability coverage.[37] Likewise, an artist who is fired (i.e., an option is not picked up) may well be entitled to claim unemployment insurance benefits,[38] something many artists would certainly find very useful. More importantly, if a label has failed to pay into the

33. Furda v. Superior Court, 207 Cal. Rptr. 646, 650-51 (Ct. App. 1984).

34. *Id.*; Smith, Valentino & Smith, Inc. v. Superior Court, 551 P.2d 1206, 1209 (Cal. 1976).

35. CAL. LAB. CODE §§ 3200-3214 (West 1989 & Supp. 1995); CAL. UNEMP. INS. CODE §§ 100-114, 2601-2612 (West 1989 & Supp. 1995).

36. CAL. LAB. CODE §§ 3208, 3351.5(c), 3600.

37. CAL. UNEMP. INS. CODE §§ 140.5, 686, 2601, 2602, 2626.

38. *Id.* §§ 140, 141, 686, 1252, 1253.

workers' compensation system, an injured artist can file suit for damages, be entitled to a jury trial, and receive the full panoply of remedies for any injuries, including pain and suffering and punitive damages.[39]

Second, the statutory determination that an artist is the record company's employee for certain purposes can only add fodder to a claim by the artist that he or she was also the record company's common law employee for all other purposes, including minimum wage benefits.[40] Such a finding is not so far fetched under California law and precedent. Two of the major factors of employment status are the company's right to control the putative employee's output and the employee's ability to practice his or her craft elsewhere.[41] Both of these factors can be construed against a record label without too much of a stretch.

Record labels have some right to control the nature and quality of an artist's work depending on the label's attitude and the negotiating power of the artist. If a label has a pro-artist mentality or the artist has some power, the right to control may only extend to allow the record company the right to approve the *technical* quality of the material recorded, for example, whether it is appropriate for phonorecording reproduction.[42] Such a power is probably not very strong support for an argument that the artist is the record label's common law employee. On the other hand, some companies have (and use) a common law right to control the artist's output of *commercially satisfactory* work.[43] In these cases, the company has the right (and may have exercised that right) to exercise discretion over the artistic content of the compositions and the recordings of those compositions. Thus, the company could require the artist to rewrite and re-record to suit the label's sense of what will sell. In these circumstances, it is far more likely that a court could find that the artist is not truly "independent" and that the conditions of employment exist.[44]

Furthermore, almost all significant recording and publishing contracts are "exclusive," that is, most companies control the sole right to

39. CAL. LAB. CODE §§ 3706, 3715; CAL. UNEMP. INS. CODE §§ 1112, 1142; Aetna Casualty & Surety Co. v. Aceves, 284 Cal. Rptr. 477, 486 n.10.

40. CAL. CODE REGS. tit. 8, § 11070 (1994).

41. S.G. Borello & Sons, Inc. v. Department of Indus. Relations, 769 P.2d 399, 403-04 (Cal. 1989); Santa Cruz Transp., Inc. v. Unemployment Ins. Appeals Bd., 1 Cal. Rptr. 2d 64, 67-68 (Ct. App. 1991).

42. PASSMAN, *supra* note 16, at 97-98.

43. *Id.*

44. *S.G. Borello*, 769 P.2d at 403-04; State Comp. Ins. Fund v. Workers' Comp. Appeals Bd., 706 P.2d 1146, 1150-52 (Cal. 1985).

the artist's artistic output during the term of the agreement.[45] Under California precedent, this factor weighs in favor of a finding that the artist is the record company's employee. Where there is no true independence because the laborer cannot ply his or her trade other than for the employer, the laborer should be considered an employee.[46] Generally, a songwriter or recording artist cannot write or record for anyone else during the term of the relationship and is thus dependent on the record company for his or her livelihood during the contract's term and so long as the artist is pursuing his or her chosen profession. When combined with the statutory definition of employee and a certain amount of control, "exclusivity" may well mean that the artist has a legitimate claim to be considered the record label's employee for all purposes.

If the artist is the record label's employee under the common law, then the artist has a variety of rights in addition to those benefits discussed above.[47] Most significantly, the artist has a right to claim minimum wage guarantees during the term of employment.[48] The wage order that should apply to a recording artist employed by a record label is found in the California Code of Regulations section governing the mercantile industry.[49] Under this regulation, a record company would have to pay (on a bi-weekly basis) an artist a salary amounting to some $10,800.00 annually.[50] Almost no record label pays more frequently than bi-annually, let alone bi-weekly, and as set forth above, many artists actually receive little or no compensation.[51] In addition, these amounts must be paid in a timely fashion and must be guaranteed. They cannot be based on the vagaries of sales figures and royalties in order to avoid their application.[52] Failure to abide by these standards opens the record label to claims for actual and statutory damages under the Fair Labor Standards Act[53] and other applicable labor laws.

45. PASSMAN, *supra* note 16, at 119-23.

46. Santa Cruz Transp., Inc. v. Unemployment Ins. Appeals Bd., 1 Cal. Rptr. 2d 64, 68-69 (Ct. App. 1991); Tieberg v. Unemployment Ins. Appeals Bd., 471 P.2d 975, 977 (Cal. 1970).

47. *See supra* text accompanying notes 36-40.

48. CAL. CODE REGS. tit. 8, § 11000 (1994).

49. *Id.* § 11070 (1994). This section is the applicable wage order because it applies to the mercantile industry. The record industry fits in no other category specifically and should be included in the "mercantile industry" because it sells phonorecordings at wholesale. *Id.* § 11070(2)(C). Unlike a number of the other wage orders, § 11070 does not exempt recording artists. *Id.* § 11070 (1)(A).

50. *Id.* § 11070.

51. *See supra* text accompanying notes 12-20.

52. CAL. CODE REGS. tit. 8, § 11070 (1994).

53. 29 U.S.C. §§ 206, 207 (1988).

Once again, application of these statutes to several important artist contracts (or hundreds of heretofore unimportant ones) could be disastrous for a record label. It could also mark a serious payday for artists aggrieved by the record companies' failure to provide adequate compensation and benefits to artists whose work they exploited.

Further, and perhaps more significantly for those artists who have enjoyed a measure of success or who have had long careers, the record company's failure to provide the appropriate employment benefits and (where appropriate) wage payments, may constitute grounds for rescission of the contracts on the basis that they violate public policy and are void ab initio, are the product of fraud in the inducement, or are void for lack of consideration.[54] If successful artists are able to rescind their contracts, they will have no further obligations to a record company and may be able to negotiate a new and more lucrative record deal elsewhere. The artists may also be able to collect consequential damages arising from the rescission of the contracts due to the record label's fault.[55]

Even more significantly, if a songwriter or recording artist successfully rescinds a recording or publishing contract, he or she may be able to claim the return of consideration tendered by the artist, to wit, the actual compositions and sound recordings of which the company claimed ownership! In the case of a hit song or a hit record, this can mean that the artist could prevent the record company from selling the record or song and could contract elsewhere, for much, much more money, to have the recording or song re-released. Again, this spells a potentially huge payday for a recording artist[56] and a concomitant disaster for the record label.

VI
What Does All This Mean?

For the record companies, the answer depends on the companies' willingness to litigate in the face of an overwhelmingly clear statutory problem. If they choose not to fight the application, then they can renegotiate existing contracts containing work made for hire clauses[57] and stop using them in the future. The potential benefits (if there are

54. CAL. CIV. CODE § 1689 (West 1985).

55. *Id.*

56. Even artists who did not enjoy great success will benefit, as they will enjoy the return of their artistic work, where they can take their own actions with respect to its marketing, etc.

57. Contracts with artist-owned production corporations are beyond the scope of this article.

any)[58] are clearly outweighed by the possible consequences of having one's entire roster of California artists, past and present, suddenly bring a class action against the label for rescission of the contracts, various violations of public policy, and damages under the Fair Labor Standards Act, workers' compensation laws and other applicable labor laws.

For the artist, this is an important matter to review in past contracts. It can also provide leverage for negotiations of new contract provisions and more lucrative and fair arrangements. If the artist's career is in its twilight, damages payments might be appropriate. The State of California has determined that artists are entitled to the same level of protection as other California laborers. Songwriters and recording artists should not hesitate to demand this fair and equal treatment heretofore largely denied them.

58. The only real difference between a full assignment of copyright and a work made for hire is that under an assignment, the author has a potential right (to be exercised in 35 years) to gain the return of the artist's work if it did not enjoy the success it might have until late in the artist's career. *See* PASSMAN, *supra* note 16, at 248-49. Further, a specially commissioned work made for hire is not even an effective agreement in the case of a sound recording because sound recordings are not included in the list of works that can be specially commissioned as works made for hire. *See* 17 U.S.C. § 101 (1988); Community for Creative Non-Violence v. Reid, 846 F.2d 1485, 1492 (D.C. Cir. 1988), *aff'd*, 490 U.S. 730 (1989). Thus, use of the doctrine seems to be of no value to the record company.