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Smells Like Slavery: Unconscionability in Recording Industry Contracts

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Smells Like Slavery:
Unconscionability in Recording Industry Contracts

by
PHILLIP W. HALL JR.*

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I

Introduction

The music recording industry today is fundamentally broken. Artists are in open revolt against the labels, because the labels have used their overwhelming bargaining strength to force the artists into standard industry contracts that are clearly oppressive and unjust. As Senator Orrin Hatch aptly put it: “this is the only industry in which after you pay off the mortgage the bank still owns the house.”

The recording industry’s use of a standard industry-wide contract has forced artists into a position that some have said amounts to professional slavery. The artist Prince went so far as trading in his name for an unpronounceable symbol in 1993 to protest his relationship with his label at the time, Warner Brothers. During the rest of his contract with Warner Brothers, Prince (or The Artist Formerly Known as Prince) took to scribbling the word “slave” on his face during appearances.

The standard industry contract is set up in such a way that a label can make a profit off an album, while the artist is left indebted to the label on the very same album. In addition, the contract requires the artist to sign over all authorship rights in the work to the label. Currently, the major label working environment leaves an estimated 99.6 percent of artists indebted to their labels. Compounding the problem, an estimated 75 percent of releases from the major labels are not even in print, leaving artists with a debt they have no means

2. Stan Soocher, They Fought the Law: Rock Music Goes to Court 46 (Schirmer Books 1999); California State Senate Select Committee on the Entertainment Industry Hearing (Calgov Sept. 5, 2001) (tv broadcast) [hereinafter Senate Select Comm.].
4. Id.
of paying back.\textsuperscript{8} The fans and the labels are harmed by a system where multi-platinum selling bands, like Hole, have disbanded rather than ever record again under their contracts.\textsuperscript{9} In the case of Nirvana, there was new material recorded just before the death of the band’s leader, Kurt Cobain, in April of 1994, that almost never saw the light of day.\textsuperscript{10} Courtney Love, Cobain’s widow and trustee of his estate, refused to turn over the master recordings in her possession under the terms of the band’s original contract.\textsuperscript{11}

The courts have not had an opportunity to hear suits challenging the conscionability of these contracts, because the labels settle the suits or renegotiate the contracts when they are faced with an artist who has the muscle to sue.\textsuperscript{12} The artists, for their part, accept these renegotiated contracts even though they leave many of the oppressive and unconscionable terms in the contract.\textsuperscript{13} The artists accept these settlements and renegotiated contracts because the cost both financially and to their careers makes litigation unpalatable.\textsuperscript{14}

The courts, for their part, have developed a doctrine that could and should provide relief to the artists. The courts, however, have not had the opportunity to do so because of drawbacks in the judicial system.\textsuperscript{15} Therefore, for the good of the artist, the labels, and the fans, I propose that Congress step in and pass legislation to prevent these unfair and oppressive contract clauses.

This Note will examine just a few of the oppressive clauses in the standard music industry recording contract, and how a court could and should use its discretion, under the doctrine of unconscionability, to refuse enforcement of those clauses or the contract as a whole. After demonstrating that the contract clauses are unconscionable, I will show how drawbacks in the doctrine of unconscionability and the judicial system have prevented the issue from being heard by courts. It is because of this reality that I will propose that Congress step in with legislation regulating these clauses for the benefit of the artists, the labels, and the fans.

\textsuperscript{8} \textit{Id.}
\textsuperscript{9} \textit{Senate Select Comm., supra n. 2.}
\textsuperscript{10} \textit{See Id.; Gary Graff, Album release lets band’s fans find ‘Nirvana,’ Plain Dealer E1 (Oct. 29, 2002).}
\textsuperscript{11} Graff, \textit{supra} n. 10.
\textsuperscript{13} \textit{See Soocher, supra} n. 2, at 45.
\textsuperscript{14} \textit{See Id.}
\textsuperscript{15} \textit{See Id.}
II

Background

A. The Development of the Doctrine of Unconscionability

Courts developed the discretionary doctrine of unconscionability to provide relief in those contract situations where the contract is so unjust that it shocks the conscience of the court and the more specific doctrines of undue influence, duress, misrepresentation, or fraud are not applicable.\textsuperscript{16} In the nineteenth-century case of \textit{Hume v. U.S.}, the United States Supreme Court endorsed this discretionary doctrine and described an unconscionable agreement as one that “no man in his senses and not under delusion would make on the one hand and as no honest and fair man would accept on the other.”\textsuperscript{17}

Originally, the doctrine of unconscionability was used by a court of equity as a discretionary bar to equitable relief in a contract suit.\textsuperscript{18} Because it is the function of a court of equity to do justice between the parties, the court would use this doctrine to decline relief to a plaintiff that had acted inequitably in the court’s opinion.\textsuperscript{19}

For example, if a party to a contract sued for equitable relief (such as specific performance) under a contract that was harsh or unfairly bargained, the court would refuse to enforce it on the ground that to do so would offend its conscience.\textsuperscript{20}

This early development of the doctrine, however, was not available in most contract cases, because contract suits often involve claims for damages or other relief of law,\textsuperscript{21} and claims in courts of equity dealt only with claims asking for specific performance or injunctive relief prohibiting breach.\textsuperscript{22} Even after the courts of law and equity had merged, many courts failed to recognize the doctrine of unconscionability.\textsuperscript{23} The courts that did recognize the doctrine would often only do so in cases that were equitable in nature, and since most contract cases involve claims for damages or other relief of law, the

\textsuperscript{17} 132 U.S. 406, 415 (1889).
\textsuperscript{18} Blum, \textit{supra} n. 16, at § 13.11.2, 366.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at § 2.5, 23.
\textsuperscript{23} Id. at § 13.11.2, 366.
doctrine was often unavailable even in those jurisdictions that recognized it. 24

This all changed when the Uniform Commercial Code (U.C.C.) was enacted. 25 While explicitly regulating only the sale of goods, the U.C.C. has had a strong influence on the common law of contracts. 26 The U.C.C. adopted the doctrine of unconscionability in section 2.302, which reads as follows:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid an unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination. 27

While section 2-302 has not adopted a specific test, the official comment provides for the following:

The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. Subsection (2) makes it clear that it is proper for the court to hear evidence upon these questions. The principle is one of the prevention of oppression and unfair surprise and not [the] disturbance of allocation of risks because of superior bargaining power. 28

The trend of courts to use the U.C.C. as justification for the applying doctrine of unconscionability, even in cases not explicitly

24. Id.
25. Id.
26. Id.
28. Id. at § 2-302.1.
governed by the U.C.C., was bolstered by the adoption of section 208 in the Restatement (Second) of Contracts.\(^{29}\) The Restatement closely follows the U.C.C., and reads as follows:

> If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.\(^ {30}\)

While both the Restatement Second and the U.C.C. brought the doctrine of unconscionability out of the court of equity and into the court of law, they both frame the determination of conscionability as a matter of law.\(^{31}\) Therefore, conscionability is determined solely by the court.\(^{32}\) Of course, this is in keeping with the doctrine's origins, since in the court of equity there is no jury.\(^{33}\)

While neither the Restatement Second nor the U.C.C. codified a particular test, the comments accompanying both suggest a two-part test that has become widely accepted.\(^{34}\) Under this test,

> For relief to be granted on grounds of unconscionability, the transaction must exhibit both bargaining unfairness (referred to as procedural unconscionability) and result [in] unfair or oppressive terms (called substantive unconscionability) [in the contract].\(^ {35}\)

While the test requires the showing of two distinct elements, in practice courts have granted relief in some cases where only one of the elements is shown.\(^ {36}\) This, however, usually only happens when that one element is so overwhelmingly present that the court can assume the presence of the other element.\(^ {37}\) Often when a court grants relief upon the proof of just one element, that element is "substantive unconscionability in the form of [an] outrageously unfair contract."\(^ {38}\) Although in most cases courts will find "both improper

\(^{29}\) Blum, supra n. 16, at § 13.11.2, 366.
\(^{30}\) Restatement (Second) of Contracts § 208 (1979).
\(^{31}\) Blum, supra n. 16, at § 13.11.2, 366.
\(^{32}\) Id.
\(^{33}\) Id.
\(^{34}\) Id. at § 13.11.3, 367.
\(^{35}\) Id.
\(^{36}\) Id.
\(^{37}\) Id.
\(^{38}\) Id.
bargaining and oppressive terms are present, at least to some degree, they are often less strict in requiring strong proof of a second element if the first element is overwhelmingly shown.

B. **Substantive Unconscionability Defined**

The substantive unconscionability analysis focuses on the terms of the contract at the time the contract was written. In determining substantive unconscionability, a court uses its discretion to determine whether in its opinion, the contract or the terms are harsh, unfair, oppressive, or unduly favorable to one of the parties.

C. **Procedural Unconscionability Defined**

The procedural unconscionability analysis focuses on the bargaining process that created the contract. In particular, this element focuses on the bargaining behavior of the party alleged to have acted unconscionably. The official comment to U.C.C. section 2-302 does not really provide much guidance on what is or is not procedural unconscionability, and some courts have even concluded that according to the comment a finding of substantive unconscionability is all that is required under the U.C.C. The comment merely states, “the principle is one of the prevention of oppression and unfair surprise and not the disturbance of allocation of risks because of superior bargaining power.”

While there is no codification of what satisfies procedural unconscionability in the Restatement either, the comment to section 208 largely echoes that of the U.C.C. The Restatement’s comment does, however, expand on the U.C.C.’s comment by adding that gross inequity of bargaining power may satisfy the requirements of unconscionability if combined with substantively unfair terms. The comment also indicates that gross inequity in bargaining power needs to be combined with some indication that oppressive bargaining has

39. *Id.*
40. *Id.*
41. *Id.* at § 13.11.5, 369.
42. *Id.*; U.C.C. § 2-302.1
44. *Id.*
46. U.C.C. at § 2-302.1.
47. *Id.*; *Restatement (Second) of Contracts* § 208.
48. *Id.*
occurred, such as some degree of deception or compulsion.\textsuperscript{49}

While both comments emphasize that mere disparity in bargaining power alone is not enough to constitute unconscionability, the purpose of the doctrine is to place both parties on equal footing by eliminating the incentive for the party with greater bargaining strength to use that strength unfairly.\textsuperscript{50} “Thus the key is not whether one party was more powerful or knowledgeable than the other but whether it abused its power to impose its will on the other party.”\textsuperscript{51}

The doctrine of procedural unconscionability has been extended by courts beyond just the actual contract bargaining process and into the marketplace.\textsuperscript{52} Courts are likely to find a contract unconscionable if one party has so much control over the marketplace as to prevent any real choice by the other party, and this control over the marketplace has resulted in oppressive or unfair terms.\textsuperscript{53} This area of contract law is directly intertwined with adhesion contracts.\textsuperscript{54}

An adhesion contract is one where no bargaining has taken place, and the superior party has simply presented a “take it or leave it” contract or clause to the weaker party.\textsuperscript{55} While courts understand the significance of these types of contracts in modern commerce, courts will find them unconscionable when the terms of the contract create an oppressive or unfair outcome.\textsuperscript{56}

\textbf{D. The Differences in the Level of Review Between Consumer and Non-Consumer Cases}

“Although some lawyers think of unconscionability as a form of consumer protection, . . . courts have applied the doctrine much more broadly, to a variety of commercial transactions.”\textsuperscript{57} This misconception comes from a general unwillingness of courts to find procedural unconscionability when both parties are commercial entities.\textsuperscript{58} In these cases, courts review the contract under a more deferential standard, requiring a much stronger showing of

\begin{itemize}
\item \textsuperscript{49} Id.
\item \textsuperscript{50} Blum, \textit{supra} n. 16, at § 13.11.4, 368.
\item \textsuperscript{51} Id.
\item \textsuperscript{52} Id.
\item \textsuperscript{53} Id.
\item \textsuperscript{54} Id.
\item \textsuperscript{55} Id.
\item \textsuperscript{56} Id.
\item \textsuperscript{57} Amy Hilsman Kastely, Deborah Waire Post, & Sharon Kang Hom, \textit{Contracting Law} 650 (Carolina Academic Press 1996).
\end{itemize}
procedural unconscionability by the party challenging the contract.\textsuperscript{59} As the Klopp court notes, “[t]he rules developed in the consumer case are necessarily tied to the identity of the contracting parties.”\textsuperscript{60} Consumer cases, according to the Klopp court, “involve considerations absent from cases involving contracts between commercial entities where the parties generally have sophisticated business judgment and familiarity with contract terms gleaned through repeated transactions.”\textsuperscript{61} The deference given to contracts made by two commercial entities, however, does not entirely prevent successful claims of unconscionability in the commercial setting.\textsuperscript{62} As the Klopp court also notes, “a number of courts have recognized that although it is possible, rarely will a commercial contract or term be found to be unconscionable.”\textsuperscript{63} While courts are more reluctant to find commercial contracts unconscionable, the definition of unconscionability in commercial cases remains the same as the definition in non-commercial cases.\textsuperscript{64} “Unconscionability may be expressed as the lack of meaningful choice coupled with a contract term which is so one-sided as to be oppressive.”\textsuperscript{65}

E. The Doctrine in Practice and the Effect of the Doctrine’s Discretionary Nature

The vast discretion given to courts by the doctrine of unconscionability is clearly illustrated in the Yellow Pages cases. In these cases, where the facts are nearly identical, some courts have determined that the clauses at issue were unconscionable while others have decided that the clauses were not.\textsuperscript{66} The opposing logic laid down in these cases demonstrates the extreme difficulty that a plaintiff, especially a business plaintiff, faces when they challenge the freedom to contract.

An example of a case where the court found an adhesion clause unconscionable is \textit{Allen v. Michigan Bell Telephone Company}.\textsuperscript{67} In \textit{Allen}, the plaintiff, an insurance agent, had contracted with Michigan

\begin{center}
\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 810.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\end{enumerate}
\end{footnotesize}
\end{center}
Bell Telephone to publish several advertisements in the 1963 Yellow Pages listings. After Michigan Bell failed to publish the listings, Allen sued for damages. Michigan Bell responded by asserting the following clause of their contract as an affirmative defense:

Telephone company (a) will not be bound by any verbal agreements or (b) will not be liable to advertiser for damages resulting from failure to include all or any of said items of advertising in the directories or from errors in the advertising printed in the directories, in excess of the agreed prices for such advertising for the issue in which the error or omission occurs.

After noting that courts in other jurisdictions had upheld exculpatory clauses identical or similar to the one involved in this case, the court concluded “that the factor of unequal bargaining power between the parties had never been fairly considered in connection with the standard limitation of liability clause in a Yellow Pages advertisement contract.” In fact, as the court noted, only one previous case had made any mention of the question of relative bargaining positions, and even in that case the court failed to “disclose what considerations or facts moved him to reject it out-of-hand.” After determining that the case turned on whether the contract was unconscionable, the court focused its attention on the bargaining power between the parties and the availability of other alternatives to the Yellow Pages. As the court stated:

Implicit in the principle of freedom of contract is the concept that at the time of contracting each party has a realistic alternative to acceptance of the terms offered. Where goods and services can only be obtained from one source (or several sources on noncompetitive terms) the choices of one who desires to purchase are limited to acceptance of the terms offered or doing without. Depending on the nature of the goods or services and the purchaser’s needs, doing without may or may not be a realistic alternative. Where it is not, one who successfully exacts agreement

68. Id. at 634.
69. Id.
70. Id.
71. Id. at 635 n. 1.
72. Id.
73. Id. at 636.
to an unreasonable term cannot insist on the courts enforcing it on the ground that it is “freely” entered into, when it is not. He cannot in the name of freedom of contract be heard to insist on enforcement of an unreasonable contract term against one who on any fair appraisal was not free to accept or reject that term.\footnote{Id. at 637.}

The \textit{Allen} court determined that the parties to the suit were not in positions of equal bargaining power.\footnote{Id. at 638-40.} After all, “the defendant’s Yellow Pages is the only directory of classified telephone listings freely distributed to all the telephone subscribers in the Flint area,” and “[i]t is not disputed that the contract signed by the parties was a form prepared by the defendant and used by the defendant in all subscriptions for advertising in the [Y]ellow [P]ages.”\footnote{Id. at 639-40.} The plaintiff was also unable to bargain for different terms in the contract, since the contract as presented and signed was strictly a “take it or leave it” proposition.\footnote{Id. at 640.} Finally, the court determined that there was no reasonable alternative, because there were “no competing director[ies] or means of communicating with the same audience of potential customers except possibly at prohibitive (and by comparison totally disproportionate) cost, doing without in this case was not a realistic alternative.”\footnote{Id.}

After determining that the lack of a reasonable alternative amounted to procedural unconscionability under these facts, the court turned its attention to the determination of substantive unconscionability.\footnote{Id.} In determining that substantive unconscionability existed, the court stated: “Clearly the challenged term is substantively unreasonable. It relieves the defendant from all liability — its only obligation is to return the agreed contract price for the service it did not perform.”\footnote{Id.}

While adopted by some courts, others have rejected the logic in \textit{Allen}.\footnote{Robinson Insurance, 366 F. Supp. at 310.} The \textit{Robinson} court departs from the logic laid forth in \textit{Allen} by claiming that Yellow Pages are in fact not monopolistic.\footnote{Id. at 310-11.} 

\begin{itemize}
\item \footnote{Id. at 637.}
\item \footnote{Id. at 638-40.}
\item \footnote{Id. at 639-40.}
\item \footnote{Id. at 640.}
\item \footnote{Id.}
\item \footnote{Id.}
\item \footnote{Robinson Insurance, 366 F. Supp. at 310.}
\item \footnote{Id. at 310-11.}
\end{itemize}
court in *Robinson* rested on the view that Yellow Pages are an advertisement instead of an indispensable telephone directory for businesses, and as such, there are other advertising alternatives.\(^{83}\)

After determining that the contract was not procedurally unconscionable, the court turned its attention to the substantive element of the clause.\(^ {84}\) The *Robinson* court ruled that the clause was not substantively unreasonable because the “clause represents nothing more than an application of a basic concept of contract law which recognizes the propriety of parties contracting to limit their liability.”\(^ {85}\) While ruling that in the present case the clause was not unconscionable, the court left open the question of whether the clause would be unconscionable had the defendant been seeking immunity from gross negligence or willful misconduct.\(^ {86}\)

Clearly these cases demonstrate the difficulty a plaintiff, especially a commercial plaintiff, will face in persuading a court that a contract is procedurally unconscionable. Substantive unconscionability is much easier to prove, but without the procedural element also being present most courts will refuse to find unconscionability, unless in the court’s opinion the contract or clause is outrageously unfair or oppressive.\(^ {87}\)

**III**

**Analysis**

A. The Level of Review to be Applied in Recording Industry Cases

While bands, and their members, may be reluctant to accept the fact that they are a business, courts will almost certainly find they are and view the contracts in that light.\(^ {88}\) Generally, most bands split profits among themselves rather than receive a salary from one or more owners of the band.\(^ {89}\) This format for sharing profits and liabilities will automatically place the band in the legal position of being a partnership.\(^ {90}\) Bands that are just starting out, or just trying to keep it simple, will also knowingly choose this route to organize their
business because they don’t have to do anything to exist as a partnership and a partnership treats all band members equally.\textsuperscript{91}

The realization that a band is in fact a business and not just a group of musicians having fun will not necessarily prevent the band from challenging their recording contract as unconscionable.\textsuperscript{92} As the \textit{Klopp} court points out, the greater deference applied to contracts between commercial entities does not necessarily prevent claims of unconscionability.\textsuperscript{93} Furthermore, that greater deference might not be warranted in all recording contracts. The \textit{Klopp} court justifies this greater deference on the premise that commercial entities are generally more sophisticated than consumers, and have a “familiarity with contract terms gleaned through repeated transactions.”\textsuperscript{94} This logic would seem to suggest, however, that most recording contracts between artists and independent labels falls outside of the commercial context, and therefore the greater deference standard should not be applied in those circumstances.

There is a strong argument that contracts between independent labels and artists are more analogous to contracts between consumers and commercial entities than to contracts between two commercial entities. This is because independent label contracts are often negotiated and signed without the presence of attorneys or the financial ability to acquire legal advice on the part of the artist.\textsuperscript{95} While shorter, and with less “legalese” than a major label contract, the independent label contract mirrors a major label contract and it is filled with strict “take it or leave it” boilerplate language, like most consumer contracts.\textsuperscript{96}

The contract between a major label and an artist, however, will most likely be examined under the greater deference standard. This is because the major contract is signed with legal representation.\textsuperscript{97} While it is true that these contracts are essentially a “take it or leave it” deal with little room for negotiation,\textsuperscript{98} the fact that the artist has the legal advice to make an informed decision will most likely qualify the contract for the greater deference standard of review.

\begin{itemize}
  \item \textsuperscript{91} \textit{Id}.
  \item \textsuperscript{92} See \textit{Klopp}, 510 F. Supp. at 810.
  \item \textsuperscript{93} \textit{Id}.
  \item \textsuperscript{94} \textit{Id}.
  \item \textsuperscript{95} Stim, supra n. 5, at ch.14, 10; \textit{Senate Select Comm., supra} n. 2.
  \item \textsuperscript{96} \textit{Id}.
  \item \textsuperscript{97} \textit{Id}.
  \item \textsuperscript{98} \textit{Id}.
\end{itemize}
B. Procedural Unconscionability in Major Label Contracts Through the Lack of a Reasonable Alternative

While it is true that major label contracts are negotiated with both sides having legal counsel, this fact alone does not preclude a finding of procedural unconscionability. As Allen demonstrates, even in commercial contracts, the lack of a “realistic alternative” plus a substantively unfair term may lead to a finding of unconscionability. In today's music industry, a band has no option but to sign with a major label if the band wants to achieve any commercial success, because independent labels are largely local in nature and specialize in niche markets that prevent large commercial success. An independent label is also hamstrung in today’s music industry by a lack of the financial wherewithal to adequately promote the albums and compete in the new pay-for-play system that major labels have implemented with radio stations and MTV. These business realities have allowed the five major labels to achieve control over almost all commercially produced music.

One of the most pronounced differences between major labels and the independent labels is the ability to distribute the music. The independent labels are forced to distribute their catalogues through independent distributors, while the major labels own and operate their own distribution systems. This forces independent labels to rely on independent record stores and some chainstores to sell their records, while the major labels have access to all major chains and retail outlets. This effectively closes off large portions of rural America to independent labels because consumers in those areas are forced (due to a lack of independent record stores) to rely upon the local major chainstore, like Wal-Mart, for their music purchases.

An even greater disparity between the majors and independents exists in the new pay-for-play system that determines what will be played on the radio. While not illegal like the 1950’s and 1960’s

101. Senate Select Comm., supra n. 2.
102. Id.
103. Id.
104. Stim, supra n. 5, at ch.14, 2-3.
105. Id.
106. Id.
107. On file with author.
108. See Jason Bracelin, Foul Play for Airplay: Now More Than Ever, Payola Makes
“payola” scandals, the outcome is the same.\(^{109}\) If an artist or label wants to get its record played, it is going to have to pay.\(^{110}\) Donovan Finn, head of radio promotion at the independent label Matador Records, has stated: “to even see if you have a record that has a chance of becoming a hit, you have to spend tens of thousands of dollars in promotion money.”\(^{111}\) This puts the independents at an insurmountable disadvantage because they lack the financial wherewithal to compete in this system.\(^{112}\)

In today’s legal pay-for-play situation, radio listeners are supposed to be informed that the label has paid the station to air the particular song.\(^{113}\) However, the way the payment is disclosed to listeners is highly deceptive.\(^{114}\) This hurts the independents because the public is given a false sense that the new music they hear on the radio is the new hip music that fellow listeners request, instead of the paid-for advertisement that it is.\(^{115}\)

In January 1998, the major label Flip-Interscope Records paid KUFO in Portland, Oregon about $5,000 to play a song by the then emerging band Limp Bizkit.\(^{116}\) As a result of the deal, KUFO played the song “Counterfeit” fifty times over five weeks.\(^{117}\) To inform listeners that the time had been paid for, “just before each playing, the station announced, ‘brought to you by Flip-Interscope.’”\(^{118}\) This is deceptive because a listener has no real way of determining what the “brought to you by” announcement means.\(^{119}\) After all, videos shown on MTV clearly indicate the label’s name at the beginning and end of each video.\(^{120}\) So how is a listener supposed to know that the “brought to you by” means the radio station played it because the

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109. Id.
110. Id.
111. Greg Knot, Arranged by Jeff McClucky; As an Independent Record Promoter, He Makes Friends so He Can Make Hits, Chicago Trib. Magazine C10 (Nov. 28, 1999).
112. Id.
114. See Id.
115. See Id.
116. Id.
117. Id.
118. Id.
119. Id.
120. MTV Music Videos (MTV Jan. 11, 2001) (cable tv broadcast); In the bottom right corner of each video is the band name, the song title, the album, the label, and the video’s director. This format is also followed by virtually all of the music video television networks.
station was paid to? In 1998, Chancellor Media, which operates more than 400 stations, had twenty-five million dollars worth of pay-for-play contracts.\textsuperscript{121} Also in 1998, Chancellor established a $237,000 marketing partnership with the major label A&M Records.\textsuperscript{122} The partnership included adds for a ‘Bryan Adams single and according to a Los Angeles Times report, [it] resulted in ‘significantly increased airplay’ for that record.’\textsuperscript{123}

While some stations and labels play this straight and admit to a pay-for-play situation, others have found ways to circumvent the federal payola regulations.\textsuperscript{124} The Federal Communications Commission (FCC) has not investigated any rumors of payola recently, but Mr. Kelley at the FCC is quoted as saying:

Record labels and radio stations have found legal ways to circumvent federal regulations and collaborate to put songs on the air without telling listeners. For example, a record label will pay for a radio-station contest in which the winners are flown to meet a top band if the station will play one of the label’s new, lesser known bands.\textsuperscript{125}

Another popular way to circumvent the system is to disguise the payola as advertising dollars.\textsuperscript{126} One music executive, speaking on the condition of anonymity, is quoted as saying, “[a] radio station will hint, ‘Hey, take out ads on the record and we’ll see if we can get your band added.’ It happens all the time. So you run fifteen to eighteen spots and suddenly you’re added.”\textsuperscript{127}

One of the most expensive ways to circumvent the system is through forced radio station promotion concerts.\textsuperscript{128} Since the label often helps to subsidize the tour, this has a direct impact on whether the artist should sign with an independent or a major label.\textsuperscript{129} As Jeff Kwatinetz, whose company manages Limp Bizkit, points out:

Bands often find themselves forced to play

\begin{footnotes}
\footnotetext[121]{David Hinckley, \textit{Pay-for-Play Gets Plug With Proper Disclosure, It’s Kosher, Says Trade Mag}, Daily News (New York) Television (July 7, 1999).}
\footnotetext[122]{\textit{Id.}}
\footnotetext[123]{\textit{Id.}}
\footnotetext[124]{Strauss, \textit{supra} n. 113.}
\footnotetext[125]{\textit{Id.}}
\footnotetext[126]{\textit{Id.}}
\footnotetext[127]{\textit{Id.}}
\footnotetext[128]{\textit{Id.}}
\footnotetext[129]{See M. William Krasilovsky & Sidney Shemel, \textit{This Business of Music} 16 (7th ed., Billboard Books 1995); Since a major has vastly greater financial resources to help subsidize the tour, an artist would prefer to sign with a major in regards to this aspect.}
\end{footnotes}
concerts sponsored by radio stations for little or no money to either get added to a station’s playlist or to keep from getting dropped from it. I’ll be looking at a Limp Bizkit tour and the itinerary will say Boston, Hartford, New York, and I’ll get a call that says we have to play this radio-station show on the West Coast. So we have to cancel Boston, fly the band out and at the end of the day it ends up costing $20,000 to $25,000.\textsuperscript{130}

Another way that major labels have an advantage is they have the financial wherewithal to hire independent promoters like Jeff McClusky.\textsuperscript{131} Independent promoters like McClusky lobby and schmooze program directors to get a band’s music added to the stations playlist.\textsuperscript{132} Given the limited amount of airtime radio stations have, the services of promoters like McClusky are a sought after commodity, and the labels pay them dearly.\textsuperscript{133} “A Virgin Records source says the label paid McClusky $36,000 in one week alone to land ‘adds’ at stations across the country for a new single by one of its highest profile acts, Janet Jackson.”\textsuperscript{134} Deals like this “are a daily part of business in an industry where major labels routinely spend hundreds of thousands of dollars on radio promotion for each record.”\textsuperscript{135} According to industry sources, “the five major labels spend tens of millions of dollars annually on independent promoters alone.”\textsuperscript{136}

Another drastic difference between a major label and an independent label is the ability of the major to afford the production costs associated with music videos.\textsuperscript{137} Music videos today are a significant, if not the preeminent, promotional aid.\textsuperscript{138} In 1993, MTV reached 57 million households while its sister channel VH-1 reached more than 47 million.\textsuperscript{139} According to Jem Aswad, product manager for Caroline Records in New York, “[m]any independent labels,

\begin{footnotes}
\footnote{130} Strauss, supra n. 113.  
\footnote{131} Greg Knot, supra n. 111.  
\footnote{132} Id.  
\footnote{133} Id.  
\footnote{134} Id.  
\footnote{135} Id.  
\footnote{136} Id.  
\footnote{138} Krasilovsky & Shemel, supra n. 129, at 74  
\footnote{139} Id.  
\end{footnotes}
ourselves included, do not have the clout, the connections and vast sums of money that a Sony or a Warner Brothers has to throw into promotion.” This drastic financial disparity leaves an independent label artist out of the loop when it comes to one of the most important streams for disseminating their music to the masses.

Kevin Weatherly, program director of KROQ radio in Los Angeles, admits, “Getting a record played on Buzz Bin will probably sell more records than any radio station.”

The importance of MTV airplay can be seen in sales of the self-titled tribute album by the band Temple of the Dog. The Seattle-based group, which included members of both Pearl Jam and Soundgarden, recorded the album as a tribute to their late friend, up-and-coming Seattle rocker Andy Wood. Released in April of 1991, the record had sold only 105,000 copies in fourteen months, even though it was the product of two of the most popular and influential Seattle/grunge bands. Within three weeks of the band’s single video, “Hunger Strike,” being added to MTV’s Buzz Bin, the album sold an additional 315,000 copies.

C. Substantive Unconscionability in the Standard Industry Contract

While it is clear from the above discussion that procedural unconscionability could be found based on the lack of a realistic alternative, it must be kept in mind that courts, as seen in the Yellow Pages cases, are reluctant to find procedural unconscionability in cases between two commercial entities. Therefore, the real issue in any case challenging the conscionability of the standard major label recording contract is whether the recording label used its superior bargaining power to force the artist into a contract, or a clause, that is outrageously oppressive. As the following discussion will demonstrate, several of the standard terms in the major label recording contract meet this outrageously oppressive standard.

1. Substantively Unconscionable Contract Clause 1: Royalties for Foreign

140. Woletz, supra n. 137.
141. Id.
142. A “Buzz Bin” video is typically shown three times a day for an average of eight weeks.
143. Id.
144. Id.
146. Woletz, supra n. 137.
147. Id.
The use of the label’s superior bargaining power to force outrageously unfair terms upon the artist is quite possibly no more evident than in the clause dealing with royalties for foreign sales. According to the industry standard contract, the label will not pay the artist royalties on albums sold outside the United States (U.S.), if the label receives payment for those sales in non-U.S. currency. Under this clause, the label will pay royalties for those foreign sales (in the foreign currency) only if the artist requests that the label do so in writing, and the artist provides the label with a foreign bank account to deposit the royalties in at the artist’s expense. The label will of course calculate the currency difference so the payments will reflect the royalties that would have been paid if those sales had been made in U.S. currency.

One might think that this clause is drafted as a tax protection, but that would be erroneous. American taxpayers are exempt from foreign income tax on royalties earned abroad due to reciprocal treaties with many countries. In those countries that do not have reciprocal treaties with the United States, “some or all of the adverse effects of that double taxation might be ameliorated by appropriate use of the foreign tax credit.”

This clause puts a significant burden on the artist. After all, does a young artist really have the time or the knowledge required to set up bank accounts in every single country that his major label sells his album in? Of course, it might be argued that the artist should hire counsel to do that task. The problem with this argument is that when you add the additional cost of hiring counsel to the banking fees, the costs begin to get prohibitive. And in any event, the label of course tracks the sales and receives payment for those sales. So why should the label benefit financially by not paying the royalties due its artists on those sales? The additional cost to the label in paying these foreign royalties would be minimal.

A clause limiting the label’s responsibility to paying foreign royalties only when those payments exceed the difference in costs between U.S royalties and the foreign royalties would be much fairer, and probably conscionable. The labels, however, have failed to
include such a fair and conscionable royalties clause in the contracts. 
The only logical conclusion that can be drawn here is that the labels 
have used their superior bargaining power in an attempt to avoid 
paying the royalties rightfully owed to the artist by putting onerous 
and unconscionable requirements on the artist.

2. Substantively Unconscionable Contract Clause 2: Prohibition of Punitive 
Damages, Costs, or Termination of Contract 

The labels have even gone so far as to place language in the 
contract which could possibly prevent a court from awarding punitive 
damages or costs, or terminating the contract, in a successful suit over royalty payments. 154 The contract often reads as follows:

Your recovery of any such royalties will be the 
sole remedy available to you or the artist by reason of 
any claim related to Company’s royalty accountings. 
Without limiting the generality of the preceding 
sentence, neither you nor the Artist will have any right 
to seek termination of this agreement or avoid the 
performance of your obligations under it by reason of 
any such claim. 155

It appears from the language that the labels are not simply 
limiting their liability for negligence; instead, it appears that the labels 
are attempting to limit their liability for gross negligence as well, 
something even the Robinson court would agree is unconscionable. 156

3. Substantively Unconscionable Contract Clause 3: Auditing of Royalties

One of the most glaringly unfair and oppressive clauses in the 
standard recording industry contract has to do with auditing of the 
royalties paid out to the artist. The standard industry contract only 
allows the artist to object to a royalty statement within one year of the 
date the label should have rendered the statement. 157 The contract also makes no provisions for instances where the label has been late 
in submitting the royalties statement to the artist. 158 Therefore, if the 
label is three hundred days late in submitting the royalties statement, 
the artist only has sixty-five days to prepare for and audit the label. 159 
Furthermore, according to the standard contract, after the one-year

154. Id.
155. Id.
157. Television and Radio Artists, supra n. 6, at Clause 12.
158. Id.
159. Id.
period has expired, the royalties paid to the artist are binding even if they are inaccurate.\textsuperscript{160}

Many labels further compound the unconscionability of this clause, by requiring contractual terms that discourage audits altogether.\textsuperscript{161} Using their superior bargaining power, labels present a “take it or leave it” clause in the contract that requires the artist to stipulate that no audit may be done on a contingency basis.\textsuperscript{162} This clause puts a small time artist with little financial wherewithal in a position where she is unable to audit the royalty payments because she cannot afford the upfront fee required.\textsuperscript{163}

Compounding on the unconscionability even further, the contracts also restrict the accounting firms that artists can choose.\textsuperscript{164} According to the contract, the audit cannot be done by any firm or accountant that is currently auditing the label for another artist.\textsuperscript{165} Even if the examination period is complete, the auditor cannot audit the label for any other artist until all applicable audit issues have been resolved in the first case.\textsuperscript{166} This allows the label to prevent an auditor who is aware of how the label cooks its books from representing other artists, by simply failing to resolve the issues brought up by that auditor for another artist. Compounding the oppressiveness of this clause is the fact that audit issues can take several years to be fully resolved and during that entire time, according to the contract, that auditor is unable to represent any other artists from that label.\textsuperscript{167}

Since the late 1970’s, the recording industry has contractually prohibited the auditing of crucial manufacturing and distribution documents.\textsuperscript{168} As a result of this, an auditor’s task of determining exactly how many CDs are sold, bartered for airplay, or discounted through record clubs has become much tougher, if not impossible.\textsuperscript{169}

Furthermore, another section of the contract requires that audits take place no more than once a year and last less than thirty days, or

\begin{itemize}
\item 160. \textit{Id.}
\item 161. \textit{Id.}
\item 162. \textit{Id.}
\item 163. \textit{Id.}
\item 164. \textit{Id.}
\item 165. \textit{Id.}
\item 166. \textit{Id.}
\item 168. \textit{Id.}
\item 169. \textit{Id.}
\end{itemize}
the label can terminate the audit on seven days’ notice. The label also requires that the audit take place at its offices, and at a time and date that the label chooses.

The outrageousness of the audit clauses are even further compounded when you consider how some labels have acted when it comes to paying the royalties they owe their artists. “Auditors at the dozen firms that specialize in this field say some record labels routinely fleece artists of millions in unpaid royalties.” According to Sherman Oaks accountant Fred Wolinsky, “The companies play this ‘catch-us-if-you-can’ game with artist royalties.” While Wolinsky doesn’t say the labels intentionally scheme to take advantage of artists, according to him, “the systems are designed to impede,” and only “artists with muscle really have the ability to get their money.” The labels achieve this by using antiquated auditing procedures and understaffing their royalty departments.

The accounting practices that created this situation are currently undergoing both judicial and political scrutiny. In 2001, both Hole and the Dixie Chicks filed lawsuits accusing their labels (Vivendi Universal and Sony respectively) of engaging in “systematic thievery” to “swindle” them and other acts out of millions of dollars in royalty payments. The chairman of the California State Senate Select Committee on the Entertainment Industry, Senator Kevin Murray, plans on introducing a bill this year to penalize record labels that purposely underpay royalties, by making it a crime punishable by a $100,000 fine.

4. Substantively Unconscionable Contract Clause 4: Copyright Ownership

One of the most oppressive and outrageous clauses in the contract has to do with copyright ownership of the recorded material. A standard boilerplate clause that applies to virtually every single recording contract requires the artist to sign over their ownership of the copyrighted material as a work-for-hire. The labels use their

170. Television and Radio Artists, supra n. 6, at Clause 12.
171. Id.
173. Id.
174. Id.
175. Id.
176. Id.
177. Id.
178. Id.
179. Television and Radio Artists, supra n. 6, at Clause 1; Amicus Curiae Br. of
superior bargaining power here to even defy the express
determination of Congress in the 1976 Copyright Act that sound
recordings are not works-for-hire.\footnote{Recording Artist Coalition, Recording Industry Association of America v. Napster, Inc., No. C-MDL-00-1369 MHP (N.D. Cal. Nov. 14, 2001).}

The importance of the work-for-hire provision can only be
understood when you examine its connection with the termination
provision of the 1976 Copyright Act. The Copyright Act allows artists
to recapture their copyrights thirty-five years after contractual
assignment, by termination of the assignment.\footnote{Infra nn. 187-90; Amicus Curiae Br. of Recording Artist Coalition, Recording Industry Association of America v. Napster, Inc., No. C-MDL-00-1369 MHP.} Congress intended
the right of termination to be a safeguard for new artists who assign
their copyrights at a time when they have limited bargaining power
and they cannot know the future value of their copyrights.\footnote{17 U.S.C. § 203(a) (1994); Melville B. Nimmer & David Nimmer, \textit{Nimmer on Copyrights} vol. 3, § 11.01[B], 11-6 (Lexis 1999).} Congress was so adamant in this protection, that it expressly forbid
the contracting away of the termination provision in the Act.\footnote{Nimmer & Nimmer, \textit{supra} n. 181, at § 11.01[A], 11-3; Amicus Curiae Br. of Recording Artist Coalition, \textit{Recording Industry Association of America v. Napster, Inc.}, No. C-MDL-00-1369 MHP.}

This right of termination, however, does not apply to works that
are works-for-hire,\footnote{18 U.S.C. at § 203(a)(5); Nimmer & Nimmer, \textit{supra} at 181, at § 11.02[A][2], 11-11.} because if a work is made as a work-for-hire the
party that commissioned the work becomes the sole owner and
author of the copyright.\footnote{\textit{Id.}} This distinction in the right of termination, however, does not allow the record labels to legally bypass the right
of termination by contractually claiming the works are works-for-hire. As \textit{Nimmer on Copyrights} proclaims, the termination clause may not
be contracted away by simply claiming that a work is a work-for-hire
when that work fails to fall into one or more of the enumerated work-
for-hire categories.\footnote{18 U.S.C. at § 203(a); Nimmer & Nimmer, \textit{supra} at 181, at § 11.02[A][2], 11-11.} Avoiding the termination right in such a
manner “would be contrary to the statutory provision that
termination of the grant may be effected notwithstanding any
agreement to the contrary.”\footnote{\textit{Id.}}

Under the Copyright Act, for a work to be considered a work-
for-hire it must fall within one or more of nine specifically
enumerated classifications.\(^\text{188}\) Those classifications are:

(1) a work prepared by an employee within the scope of his or her employment; or

(2) a work specifically ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as answer material for test, or as an atlas, if the parties expressly agree in written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a supplementary work is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon or assisting in the use of the works such as forewords, afterwards, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an ‘instructional text’ is a literary, pictorial, or graphic work prepared for publication with the purpose of use in systematic instructional activities.\(^\text{189}\)

In coming to this definition Congress consulted with various interested parties before it reached the above language:

The status of works prepared on special order or commission was a major issue in the development of the definition of ‘works made for hire’ in section 101, which has undergone extensive revision during the legislative process. The basic problem is how to draw a statutory line between those works written on special order or commission that should be considered as ‘works made for hire,’ and those that should not. The definition now provided by the bill represents a compromise, which in effect spells out those specific categories of commissioned works that can be considered ‘works made for hire’ under certain circumstances.\(^\text{190}\)

\(^{190}\) H.R. Rpt. 94-1476, 94th Cong., 2d session (1976).
As the above legislative history clearly illustrates, the classifications are meant to be all-inclusive, and sound recordings are therefore exempted from classification as works-for-hire.

While the judicial record on the question of whether sound recordings qualify as works-for-hire is very limited, the three courts that have considered the question all concluded that they do not. The Staggers court ruled that “[b]ecause a sound recording does not fit within any of the nine categories of ‘specially ordered or commissioned’ works, whether it [is] made for hire depends” on the employment relationship between the label and the artist under the common law of agency. Under this ruling, sound recordings will never be considered works-for-hire, because the employment relationship between the artist and the label is more akin to an independent contractor relationship than a standard employee/employer relationship required by the common law of agency.

Compounding the unconscionability of this particular clause is the fact that the artist receives no fee or payment for making an album and therefore does not qualify as an employee of the label. The artist receives an advance to cover the costs of the recording process, but under the recoupment clause of the contract, the artist pays back the advance in full through their royalties. The recoupment clause of the contract even goes so far as to require the artist pay for the promotion and packaging of the albums. It’s because of this recoupment clause that the majority of recording artists will never achieve financial success or independence. The recoupment clause and the work-for-hire clause have left artists in a position where they have paid for everything but own nothing.

191. Staggers v. Real Authentic Sound, 77 F. Supp. 2d 57 (D.D.C. 1999); Ballas v. Gennara Tedesco, 41 F. Supp. 2d 531 (D.N.J. 1999); Lulirama Ltd v. Axcess Broadcast Services, Inc., 128 F.3d 872 (5th Cir. 1997). The judicial record is limited because the vast number of cases will not become ripe for adjudication until the year 2013, when the artists can begin to try and recapture their works under the termination right.

192. Staggers, 77 F. Supp. 2d at 64.


194. Amicus Curiae Br. of Recording Artist Coalition, Recording Industry Association of America v. Napster, Inc., No. C-MDL-00-1369 MHP.

195. Id.

196. Id.

197. Recording Artists Coalition, Contractual Issues, supra n. 1.

198. Id.
In achieving the inclusion of this clause in the contract, the label has also divested the artist of any say in how the music is used in the future.\textsuperscript{199} Therefore, if the label wishes, and at its sole discretion, it can authorize the music to be used for soundtracks, advertising, or sampling by other artists.\textsuperscript{200} An outrageous example of this is seen in the sampling, unauthorized by the artist, of the groundbreaking Nirvana song “Smells Like Teen Spirit” by a German band on a single featuring a neo-nazi skinhead holding a shotgun on the cover.\textsuperscript{201} The author of the song, Kurt Cobain, had been tormented as a child by hate filled people, and his music was an outgrowth of his angst from that experience.\textsuperscript{202} In fact the song “Smells Like Teen Spirit” is an ironic statement against macho hate filled actions.\textsuperscript{203} Given Kurt Cobain’s life experience and the actual meaning of the song in question, it is clear that he would not have authorized his music to be sampled by a band that placed a neo-nazi skinhead on its cover. The label, however, allowed the music to be sampled, and in the words of Cobain’s widow, this action has “debased and devalued one of the most influential rock recordings in music history.”\textsuperscript{204}

Realizing they would have difficulty justifying a claim that sound recordings were works-for-hire, the Recording Industry Association of America (the labels’ trade group and lobbying arm) pushed for an amendment to the Copyright Act, which would include sound recordings in the categories of works eligible for classification as a work-for-hire.\textsuperscript{205} Billboard magazine reported that the Recording Industry Association of America (RIAA) tried unsuccessfully for years to get the language changed, by trying to attach the amendment to various copyright bills.\textsuperscript{206} In 1999, the RIAA finally succeeded in getting the Copyright Act amended to include sound recordings in the

\textsuperscript{199} Television and Radio Artists, supra n. 6, at Clause 1.
\textsuperscript{200} Id.
\textsuperscript{201} See MTV, Courtney Love Sues For Control Of Nirvana’s Master Recordings <http://www.mtv.com/news/articles/1449505/20011002/story.jhtml> (Oct. 2, 2001); While the article claims the sample was unauthorized, the label under the contract does not need Love’s authorization. Universal is the label for both bands so the authorization is implicit. It should also be noted that the man on the cover had a swastika tattoo, thus indicating he is a neo-nazi skinhead.
\textsuperscript{202} Cobain: From the Editors of Rolling Stone 35-50 (Rolling Stone 1997).
\textsuperscript{203} See Id.; Supra n. 199.
\textsuperscript{204} Supra n. 199.
\textsuperscript{205} See Amicus Curiae Br. of Recording Artist Coalition, Recording Industry Association of America v. Napster, Inc., No. C-MDL-00-1369 MHP.
\textsuperscript{206} Bill Holland, Acts’ Reps Decry C’right Clause, Billboard, 75 (Jan. 15, 2000).
“works made for hire” provision.207

Aside from the substantive impact of the amendment on artists, the amendment was controversial because of the way it was passed. A very credible argument could be made that the RIAA acted like thieves in the night when they got the amendment passed. “Register of Copyrights Marybeth Peters says she was concerned ‘that [the amendment] was suggested in the middle of the night... obviously this was done without any input from performers.’”208 As an appendix to an appropriations bill of over one thousand pages, the new work-for-hire amendment passed without hearings or debate on the last day Congress was in session.209 “The amendment is one sentence found within the appendix in a title regarding satellite transmissions of copyrighted television content.”210 Billboard reported that the amendment “was not requested by any member of Congress. Instead, it was apparently inserted into a final conference report of the Satellite bill by a congressional staffer at the request of the RIAA.”211 Adding to the appearance of impropriety, Billboard reports that the staffer, Martin Glazier, was hired by the RIAA as its new Washington lobbyist just months after the bill’s passage.212

Hilary Rosen, president and CEO of the RIAA, claims that the amendment was merely a technical amendment and that it was not a preemptive strike against litigation on the works-for-hire issue.213 She further asserts that “record companies have long registered [sound] recordings with the Copyright Office as works-for-hire, ‘this is why in everybody’s view this was a technical issue’.”214 Rosen’s idea of “everybody,” however, must not include the artists, their attorneys, Intellectual Property professors and authors, top officials at the Copyright Office, or the courts for that matter, because all believe differently.215 When asked if the amendment was technical in nature, Register of Copyrights Marybeth Peters responded, “the answer is no. It is a substantive amendment.”216 M. William Krasilovsky, a veteran music business attorney and the co-author of the music

207. Id.
208. Id.
210. Id. at 1024.
211. Holland, supra n. 206.
212. Bill Holland, Newsline, Billboard 87, 87 (Feb. 19, 2000).
213. Holland, supra n. 206.
214. Id.
216. Holland, supra n. 206.
industry text, *This Business Of Music*, says the assertion that the amendment was a clarification is fraudulent.217

After the amendment became public knowledge, recording artists immediately mobilized in a successful fight to get it repealed.218 Even after the repeal of the amendment, the labels still don’t seem inclined to change their ways and they use their overwhelming bargaining power to force artists into signing contracts that classify their recordings as works made for hire.219 The labels, even when faced with the very real possibility they were about to lose the amendment, failed to show a willingness to negotiate an acceptable work-for-hire amendment with the artists.220 The labels took this approach even after Congress expressed a clear desire that the labels and recording artists negotiate an acceptable work-for-hire amendment.221 The obvious conclusion from this episode is that the recording industry has made a tactical decision to use its superior strength to fight the issue out in court.222 This tactical decision prevents many artists from ever recouping their work, because they will lack the financial wherewithal to challenge the labels’ practices in court. As a result, labels will be able to continue exploiting the intellectual property of many artists well beyond the time frame prescribed by Congress.

5. Substantively Unconscionable Contract Clause 5: Term of Contract

Another industry standard clause that is unconscionable is the term of the contracts. This particular clause is currently under review by the California legislature.223 Under the standard contract, the term is not calculated in years but rather in the number of albums.224 The number of albums differs from artist to artist, but the label will usually require five to seven albums during the term of the contract.225 The number of albums, however, could be far fewer if the label

217. Id.
219. Id.
221. Id.
222. Id.
224. Id.
225. Id.
decides not to exercise its options on the remaining albums. This decision is at the sole discretion of the label, and the label is under no duty to pay the artist anything for terminating the remainder of the contract. While the use of the options clause by the label to get out of the contract may not be unconscionable, the label’s use of this clause to extend the contracts into decades instead of years is most certainly unconscionable.

Under California law, no personal service contract may extend beyond seven years. This law has become known as the de Havilland law, because many see it as the codification of the ruling handed down by California courts in Olivia de Havilland’s suit against the Warner Bros. Studios. The 1940’s de Havilland suit “helped break the back of the studio star system.” Under the studio star system, a studio paid relatively low wages to the talent it had developed and signed to exclusive long-term personal service contracts.

In 1987, the labels pushed for, and were granted, the addition of a subsection to the seven-year statute. There are claims, however, that the subsection was added without proper debate and that the labels duped the California legislature into passing the subsection. In either case, the labels have used the subsection to force artists into staying with a label under the same contract well in excess of the seven-year period. An outrageous example of this can be seen in the contract of country singer LeAnn Rimes. The contract, which prohibits her from residing in all but two states, was signed when Rimes was only 13. The contract includes label options on twenty-one albums, which means Rimes will be at least 35 before the completion of the contract.

Under the additional subsection of the seven-year statute, labels are allowed to sue an artist for failing to deliver the number of albums

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226. Id.
227. Id.
228. Id.
229. Id.
230. Soocher, supra n. 2, at 45.
231. Id.
232. Id.
233. Senate Select Comm., supra n. 2.
234. Id.
235. Id.
236. Id.
237. Id.
called for in the contract. This subsection extends the contract beyond the seven-year period, because the labels refuse to accept more than one album every eighteen to twenty-four months. While this may not have been the industry reality in the 1970's, when Elton John released seven multi-platinum albums in seven years, today labels claim they need this time to promote the albums and to allow artists to tour in support of the album. The question, then, is: “Do the labels really need this claimed promotional time period, or are they simply using this as an excuse to bypass the term limit of the seven-year statute?” In either case, this subsection, and the manner in which the labels bypass the seven-year rule has yet to be adjudicated “because, to prevent a decision in favor of an artist, record companies invariably settle these suits.”

Don Henley, after being under contract for more than seven years, tried to provide his label with the master recordings to finish out his contract. The label refused to accept the albums, because they were not delivered over what the label felt was an appropriate time period. As a result, Henley made it known that he would no longer record for Geffen Records, and the label filed a damages suit under the subsection of the seven-year statute. Henley then filed a counter suit against the label, claiming that the contract was now void because the seven years had passed and that the majors had conspired to force him into staying with his previous contract. The label countered by claiming that the seven years was not up, because Henley and the label had renegotiated the contract, and at that point the seven years began to run again. Henley’s former bandmate in the Eagles, Glenn Frey, also used the seven-year statute in an attempt to get out of his deal with MCA. His attempt was also met with a

238. Id.
239. See Id. There are a few exceptions to this rule, like Garth Brooks, who released an album a year for a time. Other artists, like Prince and Don Henley, have had albums rejected because they were not delivered over what the label felt was an appropriate time period.
241. Senate Select Comm., supra n. 2.
242. Soocher, supra n. 2, at 55.
243. Senate Select Comm., supra n. 2.
244. Id.
245. Senate Select Comm., supra n. 2; Soocher, supra n. 2, at 55.
246. Id.
247. Soocher, supra n. 2, at 55.
248. Id. at 56.
lawsuit by the label.249 Both cases were settled before they proceeded to trial,250 and therefore the question of how the seven-year statute is to be interpreted was not resolved.

While Courtney Love was involved in a lawsuit that seemed destined for trial over this very provision with her label,251 an eleventh-hour settlement granted her the release from the contract she sought,252 and the issue of how to calculate the seven years is still unclear. There is clearly a need for judicial interpretation of this statute; however, that interpretation may never come, due to new maneuvers in the California Legislature. California State Senator Kevin Murray has written a bill that would repeal the subsection of the seven-year statute.253 The new bill would also expressly prevent the parties from contracting out of the statute.254


Another outrageous and oppressive part of the contract has to do with a clause that an artist would want, but the label is almost always unwilling to agree to.255 A “Key-Man” clause allows the artist to leave the label if certain key personnel, like the label head, leave the label.256 This is an important clause for bands because all major label contracts, and increasingly independent label contracts, are filled with the same “take it or leave it” oppressive boilerplate language.257 Therefore, artists often determine which label to sign with based upon their personal relationships with the people that sign them to the label.258 Without this clause, artists are stuck with the label after the people that were instrumental in the band’s decision to sign have either been fired or moved on.259

249. Id.
250. Id. at 55-56.
251. Senate Select Comm., supra n. 2; Senate Judiciary Comm., supra n. 223.
252. Phil Hardy, Practices of US record companies come under scrutiny as the industry seeks governmental relief; Music&Copyright (Oct. 16, 2002).
253. Senate Judiciary Comm., supra n. 223.
254. Id.
255. Television and Radio Artists, supra n. 6, at Clause 3.
256. Id.
257. Stim, supra n. 5, at ch.14, 10.
258. Senate Select Comm., supra n. 2; Television and Radio Artists, supra n. 6, at Clause 3.
259. Id.
7. Substantively Unconscionable Conduct 2: Conduct in the Event the Label Undergoes a Merger, Acquisition, or Dissolution.

A similar and even more difficult provision for artists to get in the contract has to do with what happens if the label is merged, sold, or dissolved. Since an artist will try to sign with a label that specializes in the genre of music they perform, this can be a very important clause to secure. This very clause was one of the key issues in two lawsuits filed by Courtney Love. While neither Nirvana nor Love’s band Hole was able to get this provision added to the contracts they signed with Geffen Records, Love is arguing that the contracts became void as a matter of law after Universal’s purchase of Geffen. The suits were both settled just before trial, with settlements that clearly favored Ms. Love. In the case of Hole, the band chose to turn down a contract with Universal, and signed with Geffen because the band felt Geffen was a better fit for their music. Geffen, at the time, had many of the hit “grunge” genre bands under contract, including Nirvana. As a result of this, Hole decided that Geffen would be the best fit for their music. After signing their contract however, Hole was in for quite an unpleasant shock when Geffen was bought out by the label the band had jilted just months before. Compounding the unwarranted label change was Universal’s assignment of the contract to its Interscope subsidiary. At that point, Interscope had no commitment to rock music and no experience in that genre of music. This left Nirvana and Hole in a situation where the label’s promotion machine was learning on the job. Clearly, this fundamentally changed the contract that was originally signed between Geffen and Hole. While Love was able to use her financial wherewithal to extract herself from the contracts, artists without the financial muscle to sue will be, and have been, stuck with their contracts in similar situations.

260. Id.
261. Senate Select Comm., supra n. 2.
262. MTV, supra n. 199.
263. Id.; Love as the lead member of Hole filed the Hole suit in her own name. She has filed the Nirvana suit in the name of her late husband’s estate.
264. Hardy, supra n. 250.
265. Senate Select Comm., supra n. 2; Senate Judiciary Comm., supra n. 223.
266. Id.
267. Id.
268. Id.
269. MTV, supra n. 199.
270. Id.
271. See Id.
D. The Inability of Courts to Deal with the Recording Industry Contract

As the above discussion has indicated, a court could and should find the standard industry contract unconscionable. After all, procedural unconscionability exists because there is no meaningful negotiation process combined with the lack of a realistic alternative. The substantive prong is met by the inclusion of several standard contract clauses which are oppressive and unduly favorable to the labels. However, there are serious disadvantages in allowing the judiciary to address the problems seen in the standard recording industry contract with the doctrine of unconscionability. Those disadvantages include the artist’s typical inability to finance a suit, the harm caused by the extended period of inactivity during the suit, and the uncertainty created by the discretionary nature of the doctrine. It’s these disadvantages that have allowed the recording industry to develop into the oppressive industry it is. As Orrin Hatch put it, “this is the only industry in which after you pay off the mortgage the bank still owns the house.”

1. Problem 1: Lack of Financial Resources to Litigate Issue

The first hurdle artists have to overcome in challenging their contract in court is the very same hurdle that forced them to sign with the major label to begin with: a lack of financial wherewithal. The major labels are huge multinational conglomerates today, and they have the financial resources to withstand even the most lengthy contract disputes. The average artist, on the other hand, will not have the financial ability to withstand the endless appeals and legal fees. The few artists who do have the resources to put up a fight are often rewarded with new, and much fairer, contracts when they merely threaten suit. The labels have claimed they award these artists with the new contracts in order to maintain a good relationship with their high profile artists, but this seems somewhat dubious, because even when the contracts are renegotiated many of the substantively unconscionable clauses remain in the new contract.

One might claim that if artists with the ability to sue do not take advantage of the doctrine of unconscionability, then the contracts must not be that unfair. This logic, however, fails to acknowledge two

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272. Recording Artists Coalition, Contractual Issues, supra n. 1.  
273. See Senate Select Comm., supra n. 2; Senate Judiciary Comm., supra n. 223; Soocher, supra n. 2, at 43-63.  
274. See Id.  
275. See Id.
very important realities. First, as discussed earlier, all the major labels use a substantially unfair contract and even those artists with the financial resources to survive the costs of a lawsuit renegotiate rather than sue. And secondly, the harm a long drawn-out hiatus can have on an artist’s career forces the artist into accepting a renegotiated contract, which still leaves many of the most oppressive terms intact.

2. Problem 2: Length of Time Required for Judicial Intervention

The judicial process is notoriously long, and is made even longer by the appeals process. The potential magnitude of an unconscionability ruling on the music industry as a whole makes endless appeals a foregone conclusion. In all, it could take in the neighborhood of three to seven years for any suit to be fully adjudicated. While this might not seem like an eternity, when you consider the average length of a recording artist career, this can be even longer than an eternity.

The detrimental effect this extended period of inactivity can have on an artist’s career can be seen in the following example. In 1992, George Michael filed suit in England against his label, Sony Music. The suit involved the English legal principle of restraint of trade. Other labels, afraid of the possible ramifications if the court found for Michael, watched the proceedings intently. The trial started in 1994, and lasted for seventy-five days. The Court took another sixty-one days to issue a ruling in favor of Sony. The court reasoned that Michael had affirmed the contract when he asked for an advancement on his 1992 album, even after he had been advised of his potential ability to break the contract on restraint of trade grounds.

This, however, was not the end of the saga. After the ruling Michael filed for and was granted an appeal hearing, albeit not on the
expedited basis he had requested.  Sony, facing the reality that their victory might be lost on appeal, decided to settle. In July 1995, a settlement was finalized that allowed Michael to leave Sony Music and sign with Dreamworks-Virgin. According to the settlement, Sony was allowed to release Michael’s greatest hits album, and the new contract between Dreamworks-Virgin and Michael was free of many of the oppressive terms that are standard in recording industry contracts.

While appearing to be a victory, the outcome for Michael can also be considered a defeat. When Michael filed suit, he was at or near the pinnacle of his career. By the time the six-year ordeal was over, however, Michael had largely been forgotten by his fans. His first new album after the ordeal achieved only lukewarm sales, even though it followed two hugely successful multi-platinum albums. It became very clear from the sales that Michael’s six-year hiatus had certainly affected his career momentum.

The outcome of this ordeal had a serious psychological effect on the industry as a whole. Labels learned that they had “better be careful about how [they] throw [their] weight around.” While artists learned that it might be possible to void their contracts through lawsuits, they also learned how costly the suits could be, both financially and to their careers.

3. Problem 3: Judicial Inconsistency Inherent to the Doctrine of Unconscionability

Another important disadvantage in allowing the judiciary to handle the problem created by these contracts has to do with the doctrine itself. The doctrine of unconscionability is, by its very nature, discretionary. It is this discretion that makes the doctrine inappropriate for handling an industry-wide problem. As seen in the Yellow Pages cases, the very same clause can be found by one

286. Id.
287. Id. at 62.
288. Id.
289. Id.
290. Id.
291. Id.
292. Id. at 63.
293. Id.
294. Id.
295. Id.
296. See supra n. 19.
Compounding this problem is the overwhelming pressure on the judiciary in reaching a ruling on these issues. Because the most oppressive and, therefore, unconscionable terms in the contract are ones that are standard in almost all recording industry contracts (independents and majors alike), a finding of unconscionability by a court will throw the whole industry into chaos. Labels and artists alike will have to reexamine their contracts; and since a court may only strike the clause or the contract as a whole, neither the artists nor the labels will have any firm understanding of what a court would consider conscionable. A court, well aware that a finding of unconscionability will put a multi-billion dollar industry into chaos, might not be willing to find unconscionability, and instead defer to the legislature to handle the problem.

IV
Proposal

Since the judiciary is unable to deal with the outrageously unfair aspects of the standard recording industry contract, I propose that Congress step in for the good of the artists, the labels, and the fans. There are several options open to Congress, ranging from outright regulation of the entire contract, to the lesser, and probably more appropriate, regulation of specific clauses. In either event, the outright revolt that is occurring in the industry today requires that Congress step in and step in fast.

When it examines the legislative options open to it, the first thing that Congress needs to realize is that the labels have an overwhelmingly superior bargaining position. Congress needs to address this problem by expressly preventing the parties from contracting out of any legislation that Congress passes on these issues. This would not be an unusual step in cases like this, and Congress need look no further than the termination clause in the Copyright Act to justify the decision. The termination clause expressly prevents parties from contracting out of the clause in order to protect copyright authors, who most likely would be at a disadvantage in the bargaining process. Critics of this approach will claim that it destroys the parties’ freedom of contract. The freedom to contract, however, is not absolute, and the legislature will simply be making a

297. See supra n. 66.
298. See supra n. 183.
legislative determination on what is unconscionable.

A. Areas in the Contract that need Specific Federal Legislative Revision

1. Specific Revision I: Address Works-for-Hire Provision

One of the most glaringly unfair aspects of the contract that Congress needs to address is the works-for-hire provision. While the Copyright Act appears to be very clear on this issue, and Intellectual Property professors agree that the sound recordings are not works-for-hire, the standard industry contract requires that the artist sign over their authorship rights as works-for-hire. Congress, in order to illuminate this aspect of the contract, needs to develop a listing of works that are specifically not eligible for treatment as works-for-hire, in addition to the current system, which lists works that could qualify as works-for-hire. In repealing the 1999 amendment, Congress did nothing more than reestablish the previous status quo: a status quo in which the labels are able to use their superior bargaining power to force the artists into signing over their authorship rights. This change will have no effect on the labels for thirty-five years from the delivery date of the album, but it will allow artists to recover the product of their labor (a product which under the recoupment clause they have paid for) even if they do not have the resources to sue. As was originally intended by the right of termination, this would allow the artist to recapture their rights in the works they authored, and it would allow them to pass on works to their children and grandchildren. The labels will argue that they need the authorship rights to the works in order to make a profit and recover the money they spent in promoting the albums. This argument, however, fails to recognize the reality that only a very few albums will have any value thirty-five years after their release. It is illogical to believe that a label, which has been unable to make a profit on an album in thirty-five years, will ever be able to make a profit off that album after the expiration of that time period. And furthermore, in those cases where the album still has commercial value thirty-five years into the future, the label will have the inside track on renegotiating the rights to the music.

299. Amicus Curiae Br. of Recording Artist Coalition, Recording Industry Association of America v. Napster, Inc., No. C-MDL-00-1369 MHP.
300. See supra n. 250.
2. Specific Revision 2: Royalty Payments

Another important aspect of the contract that should be addressed with legislation is royalty payments. The ability of a label to avoid paying royalties on albums sold in non-U.S. currency makes no sense. Clearly, the labels can calculate currency exchange rates. The solution to this issue is simply that Congress needs to require royalty payments on all sales, regardless of where those sales take place. Furthermore, Congress needs to require that the label make those payments to one bank account in whatever currency and country the artist chooses. Currently, the labels will only pay royalties on albums sold outside the U.S. if the band provides a foreign bank account. There should be no problem with the label calculating the rate and depositing the payments in one bank rather than several, especially in today’s world of instant money transfers. While the issue of who should bear the burden of currency exchange rate risk will arise, this issue can be fairly dealt with in the new regulation by requiring calculation of the royalty payments once a month, using specific exchange agencies.

3. Specific Revision 3: Limit the Term of the Contract

Congress also needs to federally legislate a term limit to these contracts. The California seven-year statute, while a step in the right direction, has been circumvented by the added subsection. California State Senator Murray has addressed the problem by writing a bill that would repeal the subsection. The problem with this solution is that new bill will only affect those deals made in California. Therefore, artists who sign their deals in other states, like Tennessee (many country music acts sign their deals in Nashville), are unable to take advantage of the statute.

Another problem with the California statute is that the seven-year maximum length is too long. With an artist delivering albums at the normal industry rate of one every eighteen to twenty-four months, the contract will last for four albums. Since the average artist’s career probably will not last for four albums, this prevents the artist from ever having the chance to try and test their value in the open label market. A more appropriate time limit would be closer to five years. This would allow for the delivery of at least three albums to the label.

Another option Congress should consider is doing away with

301. Senate Judiciary Comm., supra n. 223.
302. Id.
term limits in years, and instead defining the limit in terms of actual albums delivered. This would allow the label to be secure in the delivery of the albums contracted for, even in those situations where the artist has other career pursuits that might prevent the delivery of albums in the standard industry time frame. After all, it appears that big name recording artists are frequently pursuing acting careers, which has often slowed their delivery of albums.\footnote{Id.}

Both major and independent labels argued against the seven year statute because they claim they need the longer term contracts in order to recoup the money they have spent in developing the artist and promoting previous albums.\footnote{Id.} This argument is flawed, because it fails to recognize the reality that the earlier material of an artist who achieves large commercial success will also become sought after. An example of this is Nirvana’s first album \textit{bleach}. The album was released on the independent label SubPop.\footnote{Id.} After Nirvana achieved large commercial success with their second album \textit{Nevermind} (a major label release), \textit{bleach} became one of SubPop’s best sellers, and it still is.\footnote{Id.} The success of Nirvana also brought the label worldwide fame and increased the sales and exposure of the label’s entire catalogue of artists.\footnote{Id.} Clearly, SubPop and the entire Seattle music scene commercially benefited from Nirvana’s big label contract, which enabled the band to make the groundbreaking “Smells Like Teen Spirit” video.\footnote{Id.}

4. \textit{Specific Revision 4: Auditing Provisions}

One of the most important aspects of the standard contract that Congress needs to address is the audit provisions. As the system now stands, the artist is unable to hire auditors that are currently auditing the label for another artist.\footnote{Id.} While it might be true that conflicts of interest could develop between the auditor and his two separate clients, the decision to avoid these possible conflicts should be left up to the artist, not the label. After all, it is the artist, not the label that stands to lose if a conflict arises. The labels might counter that they are trying to preempt a suit where they are accused of colluding with the auditor to benefit one client while damaging another. The

\begin{thebibliography}{9}
\bibitem{303} Id.
\bibitem{304} Id.
\bibitem{305} Hugo Kugiya, \textit{Beyond Grunge at Subpop}, The Seattle Times (Aug. 11, 1997)
\bibitem{306} Id.
\bibitem{307} \textit{Hype} (Cinepix 1996) (Documentary).
\bibitem{308} Id.
\bibitem{309} \textit{See supra} n. 164.
\end{thebibliography}
underlying principle of the suit, however, would be that the label has failed to pay the appropriate amount of royalties. If the label had indeed paid the royalties owed the artist, then there would be no grounds for a suit because there could be no collusion. If Congress were to statutorily ban this provision, the label would still have the superior position in disputes over royalties. The artist’s position, however, would be substantially improved, because the artist would then have the option of hiring auditors that were intimately familiar with that labels accounting practices.

Another audit provision that Congress needs to address is the label’s limitations on the documents that can be examined and the time and place for those examinations. There is no logical reason to exclude the auditor from examining copies of the materials in his own office. The standard recording contract, however, requires that the observations take place in the label’s offices, and the labels have even gone so far as to limit the artist’s ability to examine important manufacturing documents that are needed for the audit. Congress needs to require the labels to open their books fully, so that audits can be properly done and the artist can be assured she has received the royalties she deserves.

The labels might claim that they need these provisions to protect themselves from artists who would use the ability to audit as an oppressive tool to get out of their contracts. This logic is faulty, though, because it fails to recognize the remedies that courts could provide. If an artist is using the audit as an oppressive bargaining tool, the label could simply seek an injunction and sanctions from the courts to stop the oppressive behavior.

\section*{Conclusion}

The recording industry has used its superior bargaining position to force artists into signing contracts that amount to professional slavery. The courts have been unable to address this issue because the labels will settle when faced with an artist who has the muscle to sue the label successfully. The artists will accept a settlement that leaves many, if not all, of the oppressive terms in the contracts, because of the damage a drawn-out lawsuit will do to their careers and pocketbooks. Allowing courts to handle the issue is also problematic because the doctrine of unconscionability is discretionary

\begin{itemize}
\item 310. \textit{See supra} nn. 168-171.
\item 311. \textit{Senate Select Comm., supra} n. 2.
\end{itemize}
and a discretionary doctrine is inappropriate in dealing with an industry-wide issue such as this one. Therefore, Congress needs to step in and legislate solutions to some of the more oppressive clauses in the contract for the benefit of the artist, the labels, and the fans.

My proposals would benefit the artists, the labels, and the fans, because they would ban many of the outrageously oppressive terms in the contracts that have created the open revolt now occurring in the recording industry. This hostility has damaged fans, artists, and labels because the disputes between the labels and the artists have led to several multi-platinum artists refusing to record music for their labels.

An example of this is the *Nevermind* ten-year anniversary box set, which was set to be released in the fall of 2001. The box set was going to include unreleased music that had been recorded just before the death of Kurt Cobain. The box set was never released, though, because of the lawsuit over Nirvana’s contract. While a settlement was eventually reached and some of the unreleased music appeared on the album titled *Nirvana*, the anniversary box set is no more. This one case clearly demonstrates how the hostilities have damaged all. The box set, in all likelihood, would have been a multi-platinum release, yet the hostility has prevented the label, the artist, and the fans from sharing in the success of this band’s music. This case is by no means an isolated instance, either. As this paper has discussed, several multi-platinum artists have refused to record any new material for their labels under their original contracts. Therefore, the dispute is harming the label because some of the biggest artists, who bring in the largest revenues, have refused to release new music. The artist is of course harmed, because they have put their careers on hold over a contract dispute that may take years to resolve. Furthermore, as the Michael case shows, this layoff period can do serious harm to the artist’s career.

This is all occurring at a time when the labels are complaining to Congress that the sale of blank CDs has created open piracy. The labels blame this piracy for cutting album sales by upwards of twenty percent. While it is disputed whether or not internet file swapping is actually causing an increase or a decrease in music sales, one thing is clear: you cannot sell albums if they are not being recorded. The recording industry’s open hostilities have created a situation where the some of the most well known artists are refusing to record under their oppressive contracts and the labels have refused to give up the oppressive “take it or leave it” terms. This hostility is damaging everyone, and it is time for Congress to step in and referee the dispute.