

5-1-1999

Sound Recordings: Copyright and Contractual Differences between the United States and Japan

John D. DeFrance

Recommended Citation

John D. DeFrance, *Sound Recordings: Copyright and Contractual Differences between the United States and Japan*, 21 Loy. L.A. Int'l & Comp. L. Rev. 331 (1999).

Available at: <http://digitalcommons.lmu.edu/ilr/vol21/iss2/8>

This Notes and Comments is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles International and Comparative Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

COMMENT

SOUND RECORDINGS: COPYRIGHT AND CONTRACTUAL DIFFERENCES BETWEEN THE UNITED STATES AND JAPAN

I. INTRODUCTION

A number of recording artists have experienced wild success in the United States, only to find that their style of music became obsolete within a short period of time.¹ When this occurs, record labels routinely refuse to exercise contract options on the artists and drop them from the label's roster. In response, many artists look at international markets as sources of income. They have started to exploit foreign markets such as Europe and Japan, where music genres that are considered dated in the United States remain a viable business.²

Conducting business in foreign markets means different expectations in terms of copyrights and contractual rights for the artists' sound recordings. This Comment analyzes the differences between Japan and the United States in this regard, and predicts that many of the points that are so carefully negotiated in U.S. recording contracts will increasingly become the source of arbitration and/or litigation in Japan.

Part II of this Comment gives the background on some of the different copyright treaties to which the United States and Japan are signatories. Part III will discuss how the United States has incorporated its philosophy on sound recordings into the current 1976 Copyright Act. Part IV explores the Japanese copyright philosophy and different legislative measures that have burdened recording artists and their record labels. Part V examines the

1. For example, the punk, grunge and heavy metal genres have recently been usurped by genres like hip-hop, R & B, and alternative, especially those with female singers (i.e., Sarah McLaughlin, Alanis Morissette, and Garbage).

2. See Carla Hay, *Local Artists and Foreign Licensing*, MUSIC CONNECTION, Sept. 26, 1994, at 24. "If you're not exactly the status quo or if you have a sound that's not popular in the U.S., you can probably find another country that will welcome your style of music." *Id.*

barriers to litigation in Japan and some of the troubling aspects of Japanese recording agreements that have resulted in arbitration and litigation. This Comment also suggests U.S. and Japanese legislative reform. Furthermore, different methods that parties to a Japanese recording contract can use to avoid contractual disputes will be delineated. Use of such preventative measures will maintain the relatively stable status quo and placate the Japanese society's aversion³ to settling differences in court.

II. COPYRIGHT TREATIES

A. *The Berne Convention and the Geneva Phonograms Convention*

Only recently had the United States become a signature member to the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention").⁴ Japan, however, ratified the Convention almost 100 years ago, in 1899.⁵ The purpose of the Convention was to "constitute a Union for the protection of the rights of authors in their literary and artistic works,"⁶ which includes musical works.⁷ The goal of the Convention was to promote predictability and provide a minimal guarantee of artistic rights, especially for foreign authors in each of the member nations.⁸

3. As Part V shows, however, this "aversion" to litigation could be more a product of the Japanese legal system itself than just cultural preferences alone.

4. See M. WILLIAM KRASILOVSKY & SIDNEY SHELLEY, *THIS BUSINESS OF MUSIC* 340 (1995). The United States joined the Berne Convention in 1988, effective March 1, 1989, almost 100 years after its inception. See H.R. REP. NO. 100-609, at 32-40 (1988).

5. See Mark S. Lee, *Japan's Approach to Copyright Protection For Computer Software*, 16 LOY. L.A. INT'L & COMP. L.J. 675, 678 (1994).

6. United Nations Educational, Scientific and Cultural Organization (UNESCO) and World Intellectual Property Organization (WIPO), *Comp. 3 Copyright Laws and Treaties of the World, Berne Copyright Union: Art. 1 (Paris Text, 1971)*, reprinted in ROBERT A. GORMAN & JANE C. GINSBURG, *COPYRIGHT FOR THE NINETIES* 385 (4th ed. Supp. 1993) [hereinafter *Berne Convention*].

7. See *id.* art. 2(1).

8. See MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* § 12.2, at 372 (2d ed. 1995). This paper does not discuss the Universal Copyright Convention (UCC) because both the United States and Japan are now members of the Berne Convention, which has effectively superseded the UCC. The UCC remains an important treaty between the United States and those countries that signed the UCC, but not the Berne Convention. The Soviet Union is one example of such a country. See *id.* §§ 12.2-12.3.

The goal of predictability was undermined, however, because the treaty left many decisions to the individual countries regarding the scope of copyrights, especially copyrights that pertain to musical works. The Convention states, “[e]ach country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work.”⁹ Interestingly, the Berne Convention did not cover sound recordings of the musical work because “many countries other than the United States [did] not believe that the making of a sound recording comprehended sufficient originality of authorship . . . to qualify for copyright protection.”¹⁰

Instead, a separate treaty, the Geneva Phonograms Convention,¹¹ allows its members to reciprocally protect sound recordings from production or importation of unauthorized recordings distributed to the public.¹² To achieve this result, the United States and Japan, both members of the convention,¹³ have enacted different limitations on sound recordings consistent with their domestic laws and social philosophies towards copyrights.¹⁴

There are numerous reasons why it took so long for the United States to enter the Berne Union. The primary reason was that before the implementation of the Convention, many of

9. Berne Convention, *supra* note 6, art. 13(1). At this point, it would be helpful to distinguish between a musical work and a sound recording. A “musical work” is the instrumental and vocal melodies contained in a musical composition as well as the accompanying words. A “sound recording” is the work that results from the fixation of these underlying sounds in one particular instance, (i.e., a completed recording session) and are usually embodied in mediums such as compact discs and CD-ROMs, tapes, or vinyl (or collectively, “phonorecords” as discussed *infra*.) See The Copyright Act of 1976, 17 U.S.C.A. § 101 (West 1998). If you were to look on a phonorecord, the musical work’s copyright (and also the graphical artwork such as album design and printed lyrics) is designated by the © symbol; the sound recording’s copyright is designated by the a symbol. See *id.* §§ 401–02; see also LEAFFER, *supra* note 8, § 8.9.

10. ROBERT A. GORMAN & JANE C. GINSBURG, COPYRIGHT FOR THE NINETIES, 880 (4th ed. 1993).

11. Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, Oct. 29, 1971, 25 U.S.T. 309, 866 U.N.T.S. 178 [hereinafter Geneva Phonograms Convention].

12. See KRASILOVSKY & SHEMEL, *supra* note 4, at 344.

13. The United States and Japan joined this convention which became effective March 10, 1974 and October 14, 1978 for each country, respectively. See KRASILOVSKY & SHEMEL, *supra* note 4, at 519, 521. For a table of copyright agreements that the United States has with foreign countries, see U.S. Copyright Office, Library of Congress, *International Copyright Relations of the United States, Copyright Office Circular 38a* (visited Feb. 28, 1999) <<http://lcweb.loc.gov/copyright/circs/circ38a>>.

14. See KRASILOVSKY & SHEMEL, *supra* note 4, at 344–45.

Berne's provisions were incompatible with U.S. Copyright Law.¹⁵ The United State's resistance to conform was attributed to "a perverse pride in the fact that we did it our way."¹⁶ Originally, the term of copyright lasted only twenty-eight years with a twenty-eight year renewal opportunity.¹⁷ The 1976 Copyright Act extended this term to life of the author plus fifty years, the current Berne standard.¹⁸ Both the 1909 and 1976 Acts had extensive formalities, requiring registration, proper notice, and deposit of copies for maximum protection.¹⁹ Finally, there was a concern about the moral rights provisions contained within Berne, a concept that is alien to U.S. Copyright law.²⁰ In response, Congress adopted only those measures necessary to join the Berne Convention.²¹

B. The World Trade Organization (WTO) and the Uruguay Round's Trade-Related Aspects of Intellectual Property Rights (TRIPS)

Because many questions were left open by the Berne Convention, the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) negotiations resulted in the TRIPS agreement to provide a minimum level of copyright protection and

15. See Ralph Oman, *The Impact of the Berne Convention on U.S. Copyright*, 455 PLI/PAT 233, 241 (1996).

16. *Id.*

17. See 17 U.S.C. § 24 (1909) (revised 1977).

18. See 17 U.S.C.A. § 302 (West 1998).

19. See 17 U.S.C §§ 11, 13, 19 (1909) (revised 1977); 17 U.S.C.A. §§ 401, 402, 405, 407, 408 (West 1998).

20. See Oman, *supra* note 15, at 242-43; LEAFFER, *supra* note 8, § 12.4, at 378. Berne Convention art. 6 *bis* defines moral rights in part as:

(1) Independently of an author's economic rights and even after the transfer of said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where the protection is claimed

Id. § 8.27, at 275 n.308.

21. See Oman, *supra* note 15, at 243. Moral rights are currently encoded in 17 U.S.C. § 106A (1998).

enforcement consistent with the 1971 text of Berne.²² The two key features of TRIPs include national treatment and Most Favored Nation (MFN) status.²³ National treatment requires all member countries to give works from foreign authors the same degree of copyright protection that country would give its own authors.²⁴ Most Favored Nation treatment is a trade incentive, requiring that "any advantage, favor, privilege or immunity granted by a party to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other WTO members."²⁵ Pertaining to phonorecords, Article 14 of TRIPs requires protection against pirated sound recordings from all the member countries for fifty years.²⁶

In the recent past, this agreement created hostility between the United States and Japan.²⁷ Through the WTO, U.S. Trade Representative Mickey Kantor, threatened Special 301 trade sanctions²⁸ against Japan if it did not increase copyright protection for U.S. authors to parallel that given to domestic Japanese authors.²⁹ Japan finally responded in February of 1997 by protecting sound recordings made before 1971 by foreign authors for the full fifty years as prescribed by the Berne Convention for musical works.³⁰

The U.S. recording industry had good reason to complain about lack of copyright protection in Japan. Piracy in Asia has been blamed for slumping international sales of sound

22. See The Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods of the Uruguay Round of Multilateral Trade Negotiations, *opened for signature* Apr. 15, 1994, 33 I.L.M. 81.

23. See LEAFFER, *supra* note 8, § 12.10, at 396.

24. See *id.* § 12.3, at 373.

25. *Id.* § 12.10, at 396.

26. See Lionel S. Sobel, *Retroactive Copyright Protection for Recordings, Japanese Style: An American Diplomatic Triumph . . . Complete With Anomalies and Ironies*, 18 ENT. L. REP. 4 (1997).

27. See Lorraine Wellert, *U.S. Charges Japan with Musical Piracy*, WASH. TIMES, Feb. 10, 1996, at D7.

28. See KRASILOVSKY & SHEMEL, *supra* note 4, at 345. The office of the United States Trade Representative (USTR), under Section 301 of the Omnibus Trade Act, can place foreign countries that are determined to be deficient in providing protection for U.S. intellectual property rights on a priority watch list. If the country does not adequately respond within six months, trade sanctions can be imposed. See *id.*

29. See *U.S. to Take Japan Case to WTO*, L.A. TIMES, Jan. 25, 1996, at D14.

30. See Suzanne M. Easter, *Japan to Expand Copyright Protection for U.S. Sound Recordings*, Feb. 7, 1997, available in LEXIS, Hot Topics Library, Int'l Law File.

recordings.³¹ Even the Japanese recording industry itself realized that more protection was needed against piracy of phonorecords.³² In 1994 alone, the United States suffered losses of over \$1.265 billion due to intellectual property piracy in Japan.³³ Undoubtedly, Japan realized its own important self-interest in stronger protection for intellectual property because their corporations' copyrightable and patentable products were also subject to widespread piracy.³⁴

Special 301 threats appear to have been a very effective tool for the USTR in gaining concessions for increased copyright protection abroad.³⁵ This device should be used carefully, however, especially when dealing with developed nations such as Japan.³⁶ Frequently, what the United States perceives as a lack of copyright protection for intellectual property is seen by Japan as adequate coverage when compared to other nations.³⁷ To illustrate, The United States' demand for protection of pre-1971 sound recordings actually conflicts with the TRIPs goal of national treatment.³⁸ Furthermore, the United States currently protects only those sound recordings made by Japanese authors since 1962, whereas Japan protects sound recordings by U.S. authors made since 1947.³⁹ These inconsistencies illustrate how use of the

31. See *Slump in '96 Int'l Music Sales Could Be Piracy Related*, WEST'S LEGAL NEWS, Oct. 14, 1996, available in 1996 WL 584484.

32. See *Japan Recording Group Wants More Safeguards Against Piracy*, DOW JONES INT'L NEWS, Nov. 6, 1996.

33. See Eric H. Smith, *Worldwide Copyright Protection Under the TRIPs Agreement*, 29 VAND. J. TRANSNAT'L L. 559, 562 (1996). The exact figures for losses in musical recordings for Japan was not available, but its neighboring country, China, was estimated to cause \$345 million in losses. See *id.*

34. See Edward J. Fitzpatrick & Heidi C. Chen, *Licensing in Asia*, 454 PLI/PAT 381, 387 (1996).

35. See Smith, *supra* note 33, at 560-61. One story involved concerns about copyright protection in the Dominican Republic. Under the Omnibus Trade and Competitiveness Act, the USTR prohibited importation of bananas from the Dominican Republic. Bananas are the Dominican Republic's cash crop. The deleterious economic effects of the ban resulted in increased protection and enforcement of copyright laws in the Dominican Republic. See Lorin Brennan, *International Copyright Conflicts*, 17 WHITTIER L. REV. 203, 205 (1995).

36. See Brennan, *supra* note 35, at 205.

37. See Sobel, *supra* note 26, at 4.

38. See *id.* at 5.

39. See *id.* Further, the United States only began protecting sound recordings in 1972 whereas Japan has done so since 1934. Professor Sobel claims that Japan does not have a real basis to complain about the lack of protection of pre-1962 Japanese recordings because the number of unauthorized recordings of Japanese artists made in the United

Special 301 threat can produce offensive nationalism.

III. THE AMERICAN COPYRIGHT PHILOSOPHY AS IT PERTAINS TO SOUND RECORDINGS

Sound recordings have only enjoyed federal copyright protection in the United States for slightly over twenty-seven years.⁴⁰ Section 101 of The Copyright Act of 1976 defines sound recordings as “works that result from the fixation of a series of musical, spoken, or other sounds.”⁴¹ This is to be distinguished from a “phonorecord” or “phonogram,” which is the physical medium the work is embodied in (CD, DAT, vinyl, etc.)⁴² and the underlying musical work—the composition of the song itself.⁴³

A. Determining the Author of a Sound Recording

Under the Act, copyright ownership initially vests in the “author” or “authors” of the work.⁴⁴ It can be difficult to determine which person(s) is the author of a sound recording because the final product may involve input from not only the musical artists but from the record producer, and sometimes, from the record company itself.⁴⁵ Because “[t]he 1976 Copyright Act was not designed to establish the authorship or the resulting

States pales in comparison to the number of pirated U.S. recordings made in Japan. See *id.* at 5–6.

40. See KRASILOVSKY & SHEMEL, *supra* note 4, at 38. Sounds recordings fixed and published before February 15, 1972, may be protected by common law or state statute. See *id.*

41. 17 U.S.C.A. § 101 (West 1998).

42. See *id.* The phonogram itself does not have copyright protection.

43. See LEAFFER, *supra* note 8, § 8.9, at 235. It is not necessarily easy to distinguish between the sound recording and the musical composition it contains. Leaffer offers a helpful example. A record company that owns a copyright in a sound recording of Irving Berlin’s *White Christmas* would only have a cause of action for infringement if someone were to *exactly duplicate* the sound recording by direct copying without the record label’s permission. Anyone, after paying the statutory fee (or compulsory license, to be discussed *infra*) could *imitate*, with their own musicians, that specific sound recording, much like the ones used for television commercials. Irving Berlin, (or whoever owns the rights to *White Christmas*) however, would have a cause of action for infringement of his reproduction, performance, and adaptation rights if it were done without his permission (emphasis added). See *id.* But see *Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988), which held that imitation of a unique voice by a “sound alike” constitutes copyright infringement, despite defendant’s purchase of a compulsory license.

44. 17 U.S.C. § 201(a) (1995).

45. See KRASILOVSKY & SHEMEL, *supra* note 4, at 39.

ownership of the recordings,⁴⁶ authorship is usually left to the parties involved to negotiate.⁴⁷

In order for a record label to maximize the rights that copyright confers, almost all contracts between the record label and a musical artist provide that the sound recordings the artist produces are created for the record company as works for hire.⁴⁸ A work for hire is one prepared by an employee within the scope of his or her employment; or a work specially commissioned for use as a contribution to a collective work, where the parties expressly agree in a written instrument signed by them that the work shall be considered a work for hire.⁴⁹ Following this logic, the record company can then assert ownership either through an expressly written clause or as an employer.

Despite the presence of such a contract, case law has not dispositively determined whether these phonorecords are actually works made for hire. There are two competing theories for determining who is the author of a sound recording. One view supports the rights of the person who "fixes" the work.⁵⁰ This approach tends to favor the musical artist as the author because it is the artist who takes their music and words and "fixes the work in a tangible medium of expression"⁵¹ when they record their songs.

The other view is that the person or entity that finances the sound recording is the author entitled to ownership.⁵² This approach is consistent with the work for hire doctrine and would tend to favor the record company because it is they who usually invest the money to record the album through record advances and salaries to the musical artist.⁵³ Sometimes, the record

46. *Id.*

47. *See id.*

48. *See id.*

49. *See* 17 U.S.C.A. § 101 (West 1998).

50. *See* *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 737 (1989).

51. 17 U.S.C.A. § 101 (West 1998).

52. *See* GORMAN & GINSBERG, *supra* note 10, at 246-47.

53. *See* *Community for Creative Non-Violence v. Reid*, 490 U.S. 730. In that case, the court enumerated four factors courts should consider in making the determination of whether a work was created by an employee within the scope of his or her employment: (1) whether the hiring party retains the right to control the product; (2) whether the hiring party actually wielded control with respect to the creation of the work; (3) by examining the term "employee" as it pertains to common law agency law meaning; and (4) whether the employee could be considered a "formally salaried" employee. *See id.* at 738-39 (emphasis added). A further examination of this case and its analysis reveals that items such as the provision of benefits, the duration of the relationship between the parties, and

company will also provide the recording facilities.

B. Limitations on the Rights of U.S Sound Recording Copyright Holders

The author of the sound recording is more limited in their ability to exercise exclusive rights than other classes of copyright holders, including the owner of the underlying musical composition.⁵⁴ For example, the author of a sound recording must allow anyone willing to pay the statutory fee to imitate the sound recording.⁵⁵ This is known as compulsory license.⁵⁶ A person seeking to imitate the sound recording may adapt the arrangement to conform to their style. They may not, however, change the melody or fundamental character of the work so that it becomes a derivative work,⁵⁷ although they may obtain copyright in the new sound recording.

The sound recording copyright holder is further limited by a denial of performance right.⁵⁸ This is important because when a sound recording is played for commercial gain, as on a radio station, the sound recording copyright holder is not entitled to any fees.⁵⁹ These royalties instead go to the owner of the underlying musical composition.⁶⁰

the source of the instrumentalities and tools used to create the work, are also important considerations. Because there is usually a written agreement stating that a musical artist's sound recording is a work for hire, this type of analysis is not usually relevant. If, however, the recording contract does not so state, the employer/employee analysis tends to favor the record labels.

54. See 17 U.S.C.A. § 114 (West 1998). Of course, there is a good chance that the copyright owner of the underlying musical composition is also the author of the sound recording.

55. See 17 U.S.C. § 115 (1995).

56. See *id.* § 115(a)(1).

57. See *id.* § 115(a)(2). Notice the abundance of different recordings of the same popular song, i.e., *White Christmas*. Section 101 of the 1976 Act defines a derivative work as "a work based upon one or more preexisting works, such as a translation, musical arrangement, . . . sound recording . . . or any other form in which a work may be recast, transformed, or adapted. A work consisting of editorial revisions, annotations, elaborations, or other modifications which, as a whole, represent an *original* work of authorship, is a derivative work." 17 U.S.C.A. § 101 (West 1998) (emphasis added).

58. 17 U.S.C.A. § 114(a) (West 1998).

59. See LEAFFER, *supra* note 8, § 8.24, at 271.

60. See *id.* Usually, a performance society such as ASCAP, BMI or SESAC collects these fees from the licensing agency and distributes them to the owner of the musical composition. See GORMAN & GINSBURG, *supra* note 10, at 512-15.

It is inherently unfair to deny a sound recording copyright holder the exclusive right of performance.⁶¹ Although it could be argued that a sound recording lacks the quantitative creativity that the underlying musical composition entails, the standard defined by U.S. copyright case law is originality.⁶² The process of recording a song involves a number of creative decisions, including, but not limited to: (i) what sound effects will be used; (ii) which instruments to highlight at different volumes; and (iii) editing of the composition in terms of arrangement and length.⁶³ It is inconsistent to give a product like a book, which can be essentially a report of facts, full rights of performance,⁶⁴ yet deny one of the most publicly performed works, the sound recording, the same right. Even in Japan, the sound recording is given a right of performance.⁶⁵

C. Recording Contracts in the United States, Generally

It is not surprising in a society as litigious as ours, that a U.S. recording contract will contain a baffling array of negotiation points.⁶⁶ These contracts can reflect major issues such as how many albums the artist will deliver to those topics that border on the absurd.⁶⁷ The agreements can be hundreds of pages long as the record company seeks to protect itself from types of situations where they were hurt by the artist in the past.⁶⁸

61. See generally Steven J. D'Onofrio, *In Support of Performance Rights in Sound Recordings*, 29 UCLA L. REV 168 (1981).

62. See *Feist Publications, Inc. v. Rural Tel. Serv. Co., Inc.*, 499 U.S. 340, 345 (1990).

63. See KRASILOVSKY & SHEMEL, *supra* note 4, at 39.

64. See 17 U.S.C.A. § 106(4) (West 1998).

65. See Japanese Copyright Act art. 22 (1990) reprinted in Mitsue Dairaku, *Copyright Protection in Japan (II)*, JAPAN BUS. L. LETTER, Feb. 1990, at 6, 8; see also Japan Copyright Office, *Copyright System in Japan*, (visited Apr. 13, 1999) <http://www.cric.or.jp/circ_e/ecsij>.

66. See generally Gerald A. Margolis, *Counseling Clients in the Entertainment Industry-Sound Recording-Basic*, 479 PLI/PAT. 529 (1997) (showing an example of a Warner Brothers recording contract).

67. One artist went so far as to require that there be a bowl of M&Ms with the brown ones removed after their concert performances! See DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 342 (1997).

68. See generally Margolis, *supra* note 66; see also PASSMAN, *supra* note 67, at 120. One such issue could be when a key member of a group leaves. See Margolis, *supra* note 66, at 593-94.

1. Length of Service

For a new musical artist, U.S. record companies try to avoid committing to an act that might not sell enough records to warrant a continued financial investment. Even worse, however, would be to lose the rights to an act that becomes a venerable, multi-platinum seller. To resolve this paradox, the record company will usually only commit to a small number of releases (one or two) that they guarantee the artist will be paid for, but reserve the option to order eight to ten more.⁶⁹ More established artists may receive guarantees for a higher number of releases.⁷⁰

This is not to be confused with the term of the contract. The term of the agreement is how long a record company keeps an artist under exclusive contract to make albums for that company.⁷¹ Originally, these terms were stated in a period of years in which the artist was obligated to deliver the contracted amount of product, with options to renew for additional terms.⁷²

Problems arise in using a term of years.⁷³ Artists frequently do not deliver their material on time. Some artists fail to meet their deadlines because of the distractions that life as a celebrity incurs. Others may be afraid to follow a wildly successful release with a mediocre compilation.⁷⁴ For example, Olivia Newton-John successfully sued to be released from her contract with MCA records after the agreed upon five year period.⁷⁵ Unfortunately for MCA, she had not delivered the total number of albums she had contracted to complete. Frank Zappa illustrated the inverse

69. See PASSMAN, *supra* note 67, at 116–22.

70. See *id.* at 122–23.

71. See *id.* at 119–20.

72. See *id.*

73. See *id.* at 120.

74. See *id.* For example, the world-renown heavy metal act, Metallica, took six years to release their latest album after their multi-million selling self-titled release. It is interesting to see how long it takes for today's newer artists to follow up successful debuts. Alanis Morissette is one such example. Her album, *Jagged Little Pill* became the biggest selling debut ever, an estimated 16,000,000 copies sold to date. See Recording Industry Association of America (RIAA), *Gold & Platinum Database* (visited Apr. 13, 1999) [hereinafter RIAA] <<http://www.riaa.com/goldplat/search.htm>>. After a three-year hiatus, she finally released *Supposed Former Infatuation Junkie*, which has sold only 3,000,000 copies to date. See *id.* The group who previously held the record for a debut was Hootie & the Blowfish, whose *Cracked Rear View Mirror* sold over 15,000,000 copies. Many considered their follow up, *Fairweather Johnson* to be released too early, selling a “disappointing” 3,000,000 copies. See *id.*

75. See *MCA Records, Inc. v. Olivia Newton-John*, 90 Cal. App. 3d 18 (1979).

of this problem. Zappa went to his label, Warner Brothers, with four albums of compiled songs.⁷⁶ Zappa claimed he had fulfilled his contract and was now free to sign elsewhere.⁷⁷

In response to the previous lessons, record companies today rarely use exact time periods.⁷⁸ Instead, they usually provide that each period ends six to nine months after the delivery of the latest release and that there will be a minimum amount of time that must pass before each new album can be recorded.⁷⁹ This allows the record company to develop the artist through radio promotion and touring.⁸⁰ It also ensures that the label can withdraw from the deal if they suddenly find that their artist is no longer economically viable.⁸¹

The California Legislature addressed this concern by limiting personal service contracts to a length of seven years.⁸² Thus, a recording artist who signs their agreement in California can be released from their contract after that amount of time has passed, assuming there is no choice of law clause for a different state contained therein. New York has not addressed this idea with legislation, but its courts look to see if the restraints are "unreasonable and harsh" to the artists.⁸³

2. Royalties and Record Advances

Musical artists initially receive payment for their services through money advances against royalties for sales of albums.⁸⁴ The record advance may be used by the artist to pay for recording costs, living expenses, video expenses and concert touring.⁸⁵ The size of the advance largely depends on the status of the musical

76. See PASSMAN, *supra* note 67, at 122.

77. See *id.*

78. See *id.*; see also KRASILOVSKY & SHEMEL, *supra* note 4, at 9.

79. See KRASILOVSKY & SHEMEL, *supra* note 4, at 8; see also PASSMAN, *supra* note 67, at 122.

80. See PASSMAN, *supra* note 67, at 122.

81. See *id.*

82. See CAL. LAB. CODE § 2855 (West 1989); see also KRASILOVSKY & SHEMEL, *supra* note 4, at 9; Michael I. Yanover & Harvey G. Kotler, *Artist/Management Agreements and the English Music Trilogy: Another British Invasion?*, 9 LOY. L.A. ENT. L.J. 211, 232 (1989).

83. See KRASILOVSKY & SHEMEL, *supra* note 4, at 9.

84. See DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES § 8.3.1, at 562 (3d ed. 1996).

85. See *id.*

artist and the size of the contracting record label.⁸⁶ Ranges per album can be from \$5,000 for an unknown artist signing to a small independent label to \$18,000,000 for megastars like Michael Jackson.⁸⁷

As discussed in the previous section, a recording artist is at the mercy of the record label's fickle disposition on how long to keep the artist. Because the label stands to reap great financial sums should an artist become a hit act, especially if they are contracted to receive only a small initial record advance, the artist should have their attorney negotiate a sliding scale for future record advances.⁸⁸

A record advance is not necessarily money in the artist's pocket; it is more like taking a loan from a bank.⁸⁹ The money advanced to the artist to make the sound recording is recouped from future sales of albums against the artist's royalty rate.⁹⁰

Ideally, an artist with a ten percent royalty rate and a \$100,000 record advance would need to sell 100,000 records at a \$10 per album to break even with their record label.⁹¹ The fine points of a U.S. recording agreement, however, make this calculation improbable.⁹² The artist is expected to pay for the producer's royalty from their own royalty percentage, typically three to five percent.⁹³ In addition, the artist will be generally responsible for one-half the cost of video production and independent promotion.⁹⁴

86. See PASSMAN, *supra* note 67, at 111-12.

87. See *id.*; see also BIEDERMAN ET AL., *supra* note 84, § 8.3.1, at 562.

88. See PASSMAN, *supra* note 67, at 113-14. Thus, as album sales reach a certain level, (usually in increments of 100,000 units) the advance for future releases should also increase. See *id.*

89. See KRASILOVSKY & SHEMEL, *supra* note 4, at 329.

90. See PASSMAN, *supra* note 67, at 101. Royalty percentages (from the retail price of the album) range from nine percent for newer artists to twenty percent for artists like Michael Jackson. See *id.* at 109. This rate decreases for foreign sales in most recording contracts. See *id.* at 166-68.

91. Passman gives an example of a 14% royalty, \$200,000 advance and sales of 500,000 units at \$10.98 per unit. Despite such high sales, he concludes the artist would only earn about \$60,000! See *id.* at 114-15.

92. See *id.* at 114-15.

93. This is known as "all in." See *id.* at 110-11.

94. See *id.* at 114; see also Lionel S. Sobel, *Recording Artist Royalty Calculations: Why Gold Records Don't Always Yield Fortunes* (2d ed.), 12 ENT. L. REP. 3 (1990), reprinted in BIEDERMAN ET AL., *supra* note 84, at 563.

Recoupment for the artist is also hindered by what is known as the "free goods" factor.⁹⁵ Instead of selling a record store 100 albums at \$8.50 per album, the record label (or distributor) sells the retailer eighty-five albums at \$10.00 each and gives the store 15 "free" albums.⁹⁶ The record label still receives the same amount (\$850), but the artist cannot recoup royalties on the fifteen free albums. Under this system, the artist must sell more albums to break even.⁹⁷ An artist should have their counsel put a ceiling on the amount of free goods allocated when negotiating their contract with the record label, otherwise there is a potential for abuse, forcing the artist to sell more records before any proceeds will be paid.⁹⁸

As suggested *supra*, to avoid a record label's initial advantage over the musical artist, the artist's counsel should negotiate a sliding scale for royalties.⁹⁹ This is more beneficial to the artist than the advance sliding scale because the artist will see immediate returns, instead of having to wait for future releases.¹⁰⁰

IV. JAPANESE COPYRIGHT PHILOSOPHY

Japan generates a tremendous amount of intellectual property, although the majority comes in the form of technology patents.¹⁰¹ Japanese musical works have more limited worldwide appeal, perhaps due to language barriers, but have seen a large increase in demand in other Asian nations.¹⁰² It is also important to note that large Japanese companies, such as Sony, have acquired significant interests in U.S. musical compositions, which enjoy widespread popularity in Japan.¹⁰³ With this in mind, one

95. See PASSMAN, *supra* note 67, at 93-96.

96. These dollar figures are used for illustrative purposes only. See *id.* at 94-95.

97. See *id.* at 94. Even if one has a superstar royalty rate of twenty percent, twenty percent of \$0 = \$0. It is industry custom to give away about fifteen percent of all units. This also includes promotional copies given to radio stations and the press. See *id.*

98. See Richard C. Wolfe, *Negotiating and Litigating Music Royalties*, 69 FLA. B.J. 56, 57-58 (Jan. 1995).

99. See *id.* at 58; see also PASSMAN, *supra* note 67, at 119.

100. See Wolfe, *supra* note 98, at 58. These increases are known as "sales bumps" and usually indicate an increase of one percent in royalty for each 250,000 albums sold. See *id.*

101. See Dan Rosen & Cikako Usui, *The Social Structure of Japanese Intellectual Property Law*, 13 UCLA PAC. BASIN L.J. 32, 33 (1994).

102. See Joseph Sofer et al., *Asian Technology Update*, 3 J. PROPRIETARY RTS. 33, 34 (1994).

103. See Rosen & Usui, *supra* note 101, at 55, 62.

would think Japan would favor strong copyright laws.¹⁰⁴ Compared to the United States, however, "the Japanese version of intellectual property law is porous and the attitude is often ambivalent."¹⁰⁵

In the United States, copyright law exists to give a creative monopoly on a sound recording so that an individual may exploit their works as a property right.¹⁰⁶ By beginning with the individual, it is thought to "promote the progress of science and the useful arts."¹⁰⁷ Japan's copyright law, in contrast, seeks to "maximize efficiency, productivity and the common good rather than isolating and rewarding the occasional star."¹⁰⁸ Under this notion, "Japanese copyright law, like Japanese society, considers the interactions of individuals and the society *simultaneously* and values the correlative responsibilities at least as highly as the individual rights."¹⁰⁹

A. Copyright Protection for Sound Recordings in Japan

Although article 10(1) of The Japanese Copyright Act of 1970 does not explicitly state that sound recordings are eligible for authorship, it does mention musical works.¹¹⁰ The "categorization is to be applied liberally as merely setting forth examples of protected works."¹¹¹ Further evidence that sound recordings are protected by copyright came from a 1934 amendment to the then existing copyright law.¹¹² Under this amendment, U.S. authors of sound recordings would be protected under neighboring rights.¹¹³ As a member of the Convention for the Protection for the Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (the Geneva Convention mentioned *supra*),

104. See *id.* at 33.

105. *Id.* at 33-34.

106. See GORMAN & GINSBURG, *supra* note 10, at 15.

107. U.S. CONST. art. I, § 8, cl. 8.

108. Pantea M. Garroussi, *Technology Transfers to Japan: Legal and Cultural Frameworks*, 26 COLO. LAW. 77 (Jan. 1997).

109. Rosen & Usui, *supra* note 101, at 36 (emphasis added).

110. See Mitusue Dairaku, *Copyright Protection in Japan (I)*, JAPAN BUS. L. LETTER, Jan. 1990, at 8.

111. *Id.*

112. See TERUO DOI, INTELLECTUAL PROPERTY PROTECTION AND MANAGEMENT-LAW AND PRACTICE IN JAPAN 163 (1992).

113. See *id.* at 151.

U.S. authors would receive sound recording protection.¹¹⁴

B. Rental of Records in Japan

The Japanese Copyright Act is concerned with "due regard to a just and fair exploitation of [sound recordings] to contribute to the development of culture."¹¹⁵ With this in mind, consider that the average cost of a foreign compact disc in Japan ranges from \$24 to \$30.¹¹⁶ It only costs about \$3, however, to rent a copy of a sound recording.¹¹⁷ To promote this cultural concern, Japan's copyright law "generously allows an individual to make one copy of a copyrighted work for his own personal use."¹¹⁸

This allowance understandably infuriated U.S. record labels and their artists because the only royalty paid to them would be for the initial sale to the rental store, much like that for videocassettes of movies in the United States.¹¹⁹ Obviously, the ability of the consumer to duplicate a rental unit meant a tremendous loss in income for U.S. concerns. In 1992, the record rental business was estimated to generate \$600 million of business.¹²⁰ The Japanese Music Record Rental association countered that most rental revenue only comes in the CD's first month of release, and that the rental ban should be reduced in length in exchange for higher copyright royalties.¹²¹

Major revisions to the Japanese copyright law took effect on January 1, 1992 to address this dispute.¹²² The new law granted foreign musical artists and manufacturers exclusive rights for one

114. See Mitsue Dairaku, *Copyright Protection in Japan (IV)*, JAPAN BUS. L. LETTER, Apr.-May, 1990, at 11-12. Article 8 of Japan's Copyright Act does not use the term "sound recording" but instead uses "phonograms" and "producers of phonograms." The cited article was published before Japan had made some significant amendments to their Copyright Act. The 1991 amendment and the language surrounding it ("instrumental and vocal performances and recordings") seem to encompass sound recordings as defined by U.S. copyright law. See DOI, *supra* note 112, at 153-54. For an updated English translation of Japanese copyright law, see Japan Copyright Office website, *supra* note 65.

115. Rosen & Usui, *supra* note 101, at 35.

116. *See id.* at 62.

117. *See id.* at 61.

118. *Id.* at 62.

119. *See id.*

120. *See id.* at n.110; see also Steve McClure, *Japan's Eventful Year Included Rental Rein-In*, BILLBOARD, Dec. 26, 1992, at 53.

121. See *Foreign Producers Remain Firm on Japanese Rental Ban*, 5 J. PROPRIETARY RTS., May 1992, at 36.

122. See McClure, *supra* note 120, at 53.

year to withhold their releases from the rental market.¹²³ After that time, they “would be entitled to royalties for the use of their products for commercial purposes, including rental.”¹²⁴ Of course, U.S. companies would prefer that these limitations extended for the life of the work.¹²⁵

The U.S. artists and labels have a valid concern here. When Japan does not give rental prohibition rights to the author “for the life of the work, they are not really granting reproduction rights and are therefore outside of their international agreements.”¹²⁶ Japan should give U.S. authors of sound recordings the full protection against rental that an author receives in the United States.¹²⁷

In responding to the threatened Special 301 trade sanctions, the Japanese may have felt that providing a one year rental-free period for foreign authors would be adequate protection. This policy is consistent with what Japanese domestic authors receive and with their concern for society’s ability to use a copyrighted work.¹²⁸ Arguably, the bulk of sales for a sound recording may occur during the first year after its release.¹²⁹ The twelve-month withholding period from the rental market would thus adequately protect the copyright owner’s economic interests for these sales.

A sound recording copyright owner, however, should be entitled to the full royalty value of a record sale for the life of the work in Japan. There are many reasons to justify this position. Record rental shops in Japan generally pay a flat fee to the sound recording copyright holder that amounts to less than the wholesale price of one compact disc, regardless of how often the work is rented.¹³⁰ Considering that some records continue to sell substantial numbers well after their initial release, the sound recording copyright owner and the artist, are deprived of a significant source of income (royalties).¹³¹

123. *See id.*

124. *Id.*

125. *See id.*

126. *Id.*

127. Under 17 U.S.C. § 109(b)(1)(A), rental of sound recordings for profit is prohibited without the permission of the copyright owner for the life of the work.

128. *See* DOI, *supra* note 112, at 166.

129. *Cf. Foreign Producers Remain Firm on Japanese Rental Ban, supra* note 121.

130. *See generally* Easter, *supra* note 30.

131. Before the recent changes to Japanese copyright law, an estimated 6 million unauthorized recordings from the pre-1971 period were made and sold annually in Japan,

Timeless artists like Elvis Presley continue to have substantial selling power in Japan.¹³² At the same time, newer artists frequently develop into major acts, thus igniting an interest in their previous works. Because the rental system in Japan would allow a person to rent a copy of an older work and make a copy of it, resulting in a decreased royalty, the twelve-month protection period is inadequate.

1. Softening the Impact of Record Rental

To reduce lost sales through rental, U.S. sound recording owners must find a way to make the Japanese consumer want to permanently retain their phonorecord. One novel approach that has developed is to make the album's packaging unique. Alternative rock acts The Red Hot Chili Peppers and Tool have recently released compact discs with collectable packaging.¹³³ Both releases sold over one million copies worldwide.¹³⁴

For this peerless packaging, the plastic compact disc cover is slotted and the underlying artwork has been overlapped so that when the package is tilted, the picture appears to be animated, much like a hologram. The Tool CD jacket contains multiple, albeit disturbing,¹³⁵ images for the phonorecord owner's amusement. Other possibilities to make the packaging collectable are inserting posters and merchandise catalogues. These are benefits that are unavailable for someone who rents a record and copies it.

The Japanese legislature has recently provided some means to lessen the financial impact of copying of sound recordings.¹³⁶ An amendment to the Japanese copyright law established a tariff on digital recording equipment, including blank tapes.¹³⁷ This tariff is then distributed to Japanese collecting agencies (like JASRAC, the Japanese equivalent of ASCAP) that then distribute the levy

costing U.S. industries an estimated \$500 million in sales. See Easter, *supra* note 30.

132. See Paul Blustein, *Jazz, Oldies Pirated by Japan, U.S. Complains*, AUSTIN AM. STATESMAN, Feb. 10, 1996, at C2.

133. See RED HOT CHILI PEPPERS, ONE HOT MINUTE (Warner Bros. Records 1995); TOOL, AENIMA (Zoo Ent. 1996).

134. See RIAA, *supra* note 74.

135. Among the images (that can be printed here) is a satellite view of the western United States that depicts California falling into the Pacific Ocean.

136. See Tsuneo Sato & Seiji Ohno, *Entertainment Aspects of Japan's New Copyright Law*, 3 ENT. L. REP. 89 (1993).

137. See *id.* at 90.

to U.S. collection agencies.¹³⁸ If the buyer of the digital recording equipment can prove the copying is for private use, however, they get the levy back.¹³⁹ The only real barrier to obtaining the refund is reporting to the collecting agency designated by the Director-General of the Cultural Affairs Agency.¹⁴⁰

The tariff should be imposed against all buyers of digital equipment, whether used for private use or commercial profit.¹⁴¹ Theoretically, most record rental consumers will only make a copy for their own use, thus entitling them to a perfect reproduction of the rental copy via digital technology, the amendment is of little consolation to sound recording copyright holders. These copyright holders will still lose income, despite the twelve-month rental withholding period for the reasons discussed *supra*.

Even the TRIPs agreement leaves sound recording copyright owners undercompensated with regard to record rental in Japan. Under TRIPs, Member States, such as Japan, who currently subject rental of sound recordings to a system of equitable remuneration, may continue this practice if this practice does not materially impair the rightholder's exclusive right of reproduction.¹⁴² This exception was aimed at Japan, despite the criticism "over its existing remuneration provisions as being inequitable due to minimal charges on audio cassettes intended to compensate for lost sales, or low fees paid by rental businesses."¹⁴³

V. LITIGATING JAPANESE RECORDING AGREEMENTS

Remarkably, a typical Japanese recording contract is short on details. All the tireless provisions contained in U.S. recording agreements are substituted with a general idea to cooperate in good faith¹⁴⁴ or an application of an industry-wide standard.¹⁴⁵

138. See *id.* at 91.

139. See *id.* at 90.

140. See *id.*

141. See *id.*

142. See Alexander A. Caviedes, *International Copyright Law: Should the European Union Dictate its Development?*, 16 B.U. INT'L L.J. 165, 205 (1998).

143. *Id.* at 206. Record rental has also negatively impacted Japanese labels. Sales in the huge CD singles market dropped from 23 million in 1996 to 17 million in 1997. A spokesman from Recording Industry Association of Japan stated "[w]e think one of the reasons for the decline in million-sellers is increasing [mini-disc] penetration." Steve McClure, *Japan's CD Singles Market Hurt by MiniDisc, Rentals*, BILLBOARD, March 14, 1998, available in 1998 WL 10913086.

144. See Rosen & Usui, *supra* note 101, at 59.

For Japanese record labels, “[t]he glue that holds the contract together is not the law but rather the relationship.”¹⁴⁶ Many Westerners have adopted the view that “litigation threatens a fundamental Japanese concern for consensus and harmony.”¹⁴⁷ Commentators within and outside of Japan “are almost unanimous in attributing to the Japanese an unusual and deeply rooted cultural preference for informal, mediated settlement of private disputes and a corollary aversion to the formal mechanisms of judicial adjudication.”¹⁴⁸

Some authors assert, however, that it is a myth that the Japanese are averse to litigation.¹⁴⁹ These commentators instead feel that this notion can be attributed to the Japanese legal process.¹⁵⁰ There are significant structural hurdles in the Japanese system for civil litigation. Japan does not implement many of the procedural and economic incentives that facilitate the decision to litigate in the United States.¹⁵¹

To demonstrate, a Japanese litigant must pay high attorney retainer and filing fees. The retainer fee in Japan corresponds to the amount of damages claimed.¹⁵² This sliding scale is present, to a certain extent, in the United States, but many U.S. attorneys will accept a case for little or no money if the prospects for a favorable judgement are good. Contingent fee arrangements in Japan are not prohibited, but are rarely used because of its system of filing fees.

145. See Steve McClure, *Japan, The New Reality: Coping with the Crunch*, BILLBOARD, Sep. 26, 1998, at 117 (noting that the maximum royalty rate that Japanese record labels give artists is 5 percent).

146. See Rosen & Usui, *supra* note 101, at 59.

147. J. Mark Ramseyer & Minoru Nakazato, *The Rational Litigant: Settlement Amounts and Verdict Rates In Japan*, in COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 122, 124 (Kenneth L. Port ed., 1996).

148. John Owen Haley, *The Myth of the Reluctant Litigant*, in COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 108 (Kenneth L. Port ed., 1996).

149. See *id.*

150. See Nobutoshi Yamanouchi & Samuel J. Cohen, *Understanding the Incidence of Litigation In Japan: A Structural Analysis*, in COMPARATIVE LAW: LAW AND THE LEGAL PROCESS IN JAPAN 102 (Kenneth L. Port ed., 1996).

151. See *id.* at 107.

152. See *id.* at 105.

In the United States, there is a flat filing fee of \$150 in federal district courts, regardless of the amount of damages claimed.¹⁵³ In Japan, the filing fee increases with the amount of damages alleged in the complaint.¹⁵⁴ For example, a complaint for \$5 million (600 million yen at 120 yen per dollar) would cost \$25,000 to file.¹⁵⁵ This amount may be too great for an attorney, recording artist, or their label to risk. Lesser amounts of claimed damages would mean a reduction in the filing fee calculation rate. A claim for \$25,000 would result in a more tolerable filing fee of \$175.¹⁵⁶ Thus, there is a strong incentive to limit the amount of damages claimed in Japanese courts. It is not difficult to see the attractiveness of mediating disputes in Japan. The Japanese complaint system may be advantageous because it encourages good faith, non-frivolous suits, but at the same time may deter someone with a valid claim from pursuing their rights.

In a groundbreaking claim, the Japanese label, Taurus Records, sued its best-selling artist, Chikako Sawada, for failing to complete a record as expected.¹⁵⁷ Consistent with many Japanese recording contracts, the number of albums and singles Sawada was to compose for Taurus was not specified.¹⁵⁸ Taurus's practice was to negotiate a yearly release schedule and marketing plan with Sawada's manager.¹⁵⁹ Sawada felt her obligation to the label was over when her contract ended in 1993.¹⁶⁰

The record label's view, the traditional Japanese perspective, was that specifically enumerated provisions were not necessary.¹⁶¹ While record contracts in the United States are "negotiated at arm's length, Japanese contracts are entered into with arms linked."¹⁶²

In an analogous case, *Kawamoto v. K.K. Interface Project*, the Tokyo High Court held that the exclusive performance contract between an entertainer and a production company could terminate as provided in their contract, even though the production company

153. 28 U.S.C. § 1914(a) (1994).

154. See Yamanouci & Cohen, *supra* note 150, at 107.

155. See *id.*

156. See *id.*

157. See Rosen & Usui, *supra* note 101, at 59.

158. See *id.*

159. See *id.*

160. See *id.* at 59–60.

161. See *id.*

162. *Id.*

had invested a large amount of money to develop the entertainer's talent.¹⁶³ As in Sawada's case, the entertainer wished to be released from a contract with their production company.¹⁶⁴

This case examined Article 14 of the Labor Standards Law, which prohibits labor contracts for more than one year.¹⁶⁵ This law could be an effective tool for a recording artist in Japan because they could possibly abandon their contract if they were unhappy with income and support.

Before the artist can opt out of their agreement after one year, the contract must be determined to be a labor contract. Under a labor contract, the employer must have the right to direct and order the worker.¹⁶⁶ Whether an exclusive performance contract between an entertainer and their production company falls under Article 14 will often depend on how established the artist is.¹⁶⁷ Establishment seems to correspond with selling power and seniority.

According to the court opinion, an established artist will frequently be seen as on equal footing with the employer, and is thus deemed to be independent from their relationship with the production company.¹⁶⁸ If this is the case, the recording agreement would not be considered a labor contract and the one-year limitation would not apply.

The prospective artist would be more likely to be considered a party to a labor contract because it is less likely that they are established, and thus lack bargaining power.¹⁶⁹ This would be an effective tool for the new music artist who experiences immediate success in Japan, but desires a better deal in terms of record advances and royalties. After one year, that artist could conceivably leave their label in search of a more favorable agreement.

163. See 1 Tokyo High Court, 30 June 1993, *The Hanreijiho 1467-68 cited in Tsuneo Sato & Toshiyuki Fukai, Period of Contract Between an Entertainer and a Production Company: Nobuhiro Kawamoto v. K.K. Interface Project*, 6 ENT. L. REP. 244 (1995).

164. See generally, *Intellectual Property Rights In Asia*, 28 INT'L REV. OF INDUST. PROP. & COPYRIGHT L. 408 (June 1997).

165. See Sato & Fukai, *supra* note 163, at 244.

166. See *id.* at 245.

167. See *id.*

168. See *id.*

169. See *id.*

An interesting question remains, however. What about the U.S. music artist who once enjoyed success in the United States, but is new to Japan? Would they be considered established or prospective in Japan? The answer would probably depend on the amount of sales the artist previously generated in Japan and whether they had prior agreements with Japanese music entities.

VI. CONCLUSION

The Berne and Geneva Conventions were a good beginning to predictable international treatment of sound recordings. As this Comment has shown, however, different cultural attitudes towards copyright in sound recordings have left open many gaps. Special 301 trade sanctions and threats have proved an excellent vehicle for U.S. ideals, but should not be used recklessly.

Although Special 301 threats may force Western copyright views upon Japan, more importantly, the United States' cultural influence on Japanese society will cause changes in Japanese recording contracts. As Japanese musical artists become more international, their expectations will change. Japanese labels would be wise to be more explicit in their requirements when drafting recording agreements. There is evidence that some Japanese record labels are beginning to adopt this view. Sony Music Entertainment Japan President Shigeo Maruyama stated he wanted the label to move toward an American style of record production.¹⁷⁰ By this he means a system where "the artists, producers and record companies share both rewards and risks on a more equitable basis than the system that now prevails in Japan."¹⁷¹ Maruyama may have been inspired to bring about change to the Japanese label system in light of the departure of Dreams Come True, Sony's biggest act in a "move that shocked the Japanese music business."¹⁷²

At the same time, U.S. sound recording copyright holders should demand more of U.S. and Japanese copyright law. The U.S. should grant a performance right to sound recordings, as Japan allows. Additionally, the sound recording artist should hope

170. See McClure, *supra* note 145, at 117.

171. *Id.* For example, the maximum artist royalty rate in Japan is only 5 percent, which is extremely low compared to other countries. See *id.* This reflects the higher amount of risk that Japanese record labels maintain than their American counterparts.

172. Steve McClure, *Japanese Biz Regroups Under Economic Woes*, BILLBOARD, Dec. 27, 1997, available in 1997 WL 12792730.

that record rental restrictions will continue to increase in Japan. Until this practice is eliminated, artists and labels alike stand to lose windfalls.

*John D. DeFrance**

* J.D. candidate, Loyola Law School, Los Angeles, 1999; B.A., University of Southern California, 1993. I wish to extend my sincere gratitude to my family and friends for all of the love and support they have given me. This Comment is dedicated in loving memory to my brother, Michael S. DeFrance.