

*Principles, policies and practices in the determination of fair terms in
exclusive multi-option recording and music publishing agreements: an
Anglo-American study*

Subathira Amarasingham

University College London

Ph.D. degree

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Abstract

Exclusive multi-option recording and music publishing agreements display extraordinary characteristics in the law. These contracts depict not only the exclusive nature of the professional service(s) restraint of musical artists, but also the exclusive control over the copyright in the musical work(s). They illustrate the operation of two distinct forms of exclusivity which are unique to the practices of the music industry. Both types of restraint are significant because they usually operate over a number of years, and are influential in the shaping of musical careers. This thesis considers the principles, policies and practices which influence the interpretation of fair terms in these contracts.

The function of specific contractual terms and their roles within the operation of the agreement will be examined. In particular, the interaction between the two types of exclusivity and the terms of contractual remuneration is considered in depth. This examination is quite unique not only because it considers the role of exclusive copyright within the operation of contract doctrines but also in terms of the recognition of the conceptual link between copyright and royalty payments.

Bargaining priorities will also have to take into account crucial socio-economic background factors (including the effects of information technology), against which these contracts are being negotiated, as well as the theoretical foundations of legal interpretation. With regard to the latter, the theoretical model endorsed in this thesis is one based on liberal egalitarianism. This theory emphasises a primary concern for contractors as individuals and interprets a successful contract as a product of a co-operative rather than a competitive relationship.

The laws and practices of the UK and the US (New York and California), which are the economic leaders in the 'pop' music industry (the focus of my study) will be discussed. The volume of work, expertise and experience in these jurisdictions has provided the most important illustrations of law and practice in the music industry.

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Introduction

Commercial and employment relationships are regulated in law by specific legislation addressing particular terms and practices necessary to make a 'fair' contract. By enacting specific legislation to regulate economic relationships which are of great economic disparity, the state has recognised the potential for unfair contractual obligations and practices. Particular state regulation has been targeted at the prime socio-economic institutions of general employment and consumerism. However, most long-term creative contracts within the entertainment sector do not fall within this general field of public policy making. The contractual regulation of fairness in exclusive multi-option recording and music publishing agreements in both the UK and the US is not generally governed by specific legislative policy. This is a curious point since the entertainment industries in both countries are perhaps one of the most lucrative sectors in their own respective national economies, as well as the global economy.¹

In the UK, academic scholarship in the music industry has been quietly expanding in the past few years, whilst the US boasts a flourishing academic community in this field. However, there has been little attempt in either the US or the UK to consider exclusive multi-option recording and music publishing agreements in the light of contract doctrine, industry practices and the broader socio-economic climate. In this thesis, the determination of fair contract terms will be considered with regard to all three issues and will aim to provide a

¹ For example, in the US, the entertainment industry is the second largest industry contributing to the economy; and the music industry is the second most profitable exporter in the UK. Furthermore, the UK music industry is considered 'one of the most important sources of creative talent in the world'. A report by the Department for Culture, Media and Sport in 1998 estimated the share held by UK artists of the world music market at 16%. In the UK, aspiring 'rock' and 'pop' performers constitute 50% of the full-time 'employees' within the industry. The UK and US combine to control 40% of international sales. See further the *First Report of the Creative Industries Task Force* (Dept. Culture Media and Sport) November 1998.

guide for those who negotiate, draft and interpret exclusive multi-option recording and/or music publishing agreements, to identify the requirements of fairness in such contracts in both the UK and US (New York and California). I shall consider the interaction between the principles, policies and practices which underpin this assessment

I have chosen to consider these contracts as an Anglo-American study for a number of reasons. Firstly, both these jurisdictions share (to a large extent) the history and theory of the common law of contract which provides the basis for the doctrinal analysis of exclusive multi-option recording and music publishing agreements. In particular, the rich theoretical literature interpreting the principle of fairness and standard form contracts in twentieth century US contract jurisprudence, complements the recent developments in this field in the UK. Secondly, the corporate policies in the US have a global effect particularly with the existence of the five multi-national 'industry majors' and the large independent companies. It may be arguable that the negotiating cultures in both countries are mutually exclusive, but a crossbreeding at least at a corporate policy level is inevitable. Thirdly there is an increasing interest both amongst practitioners as well as academics in the US as to developments in the UK; but curiously this intellectual enthusiasm is not always reciprocated in the UK. I have hopes, albeit modest ones, that this thesis will go some way to redress this imbalance.

I have limited my discussion to the 'pop' music industry, because classical and jazz performers, for the most part, generally seem to pose less controversy in the contracting process and in the performance of contractual obligations.² The types of contracts offered to classical and jazz artists are generally very different to that offered to 'pop' artists.³ Moreover, difficulties commonly found with regard to 'pop' recording contracts, i.e. the failure to release material on the basis of 'marketable' quality; issues of 'creative' freedom; and the figures for royalties and advances do not often occur in the case of classical and jazz recording agreements. Classical and jazz artists, even the young newcomers are generally

² The term 'popular' or 'pop' music generally refers to the rock, pop, rap and hip-hop genres. According to statistics provided by the Recording Industry Association of America (RIAA) the sale of 'pop' or 'popular' music amounted to 47.5% of the US market in 2001. See further www.riaa.org

considered by the music industry as low maintenance and low risk talent with lengthy careers ahead of them, whereas the novice 'pop' artist, particularly in the recording industry, is often perceived as a short term project but one which has the potential to secure high profits.⁴ The clear distinction which the music industry has drawn between the 'pop' artist on the one hand and classical and jazz artists on the other argues against any general cross-sectoral analysis of artist contracts.⁵

The perception, particularly in the recording industry, that the new artist is a short term interest is not only incorrect; it also undervalues the copyright in the work he/she creates because the profitability from the exploitation of the work continues beyond the expiry of the recording contract and even that of the artist's career, until the expiry statutory copyright period. In this sense all recording artists, even the 'one hit wonders' are capable of lengthy careers and this is a point which songwriters have long recognised. The exploitation of back-catalogues of sound recordings are well capable of producing a useful royalty stream not only for famous artists such as the Beatles but also the lesser known bands such as 'Liberty' which disbanded almost twenty years ago and yet receives royalties from sales to the niche market it occupies.

Artists and commentators alike in the UK as well as the US often ignore the negotiating status of copyright as a valuable asset within the recording contract. Indeed the general focus appears to be directed merely at the fairness of the personal service contract aspect of the relationship between artist and his/her recording company and consequently their discussion has only considered the function of contract options in determining the contractual duration. The copyright control aspect of the contractual relationship has yet to be analysed in

³ For example the majority of contracts with jazz artists tend to be non-exclusive.

⁴ The lengthy careers of some pop artists suggest that this industry perception is not helpful nor correct.

⁵ 'Pop' artists are often seen as highly costly short term interests which may or may not prove highly profitable within that term. A successful 'pop' artist would, of course, produce far more profits for his/her record company than a successful classical or jazz musician. A highly successful classical artist such as Evgeny Kissin would not create the level of profits for Sony as even a relatively new artist such as Britney Spears would for Zomba Records. However, Kissin's contract would give him a level of artistic control over his recordings which Spears would never receive, at this stage, from any record company.

sufficient depth, and consequently I shall endeavour to refocus the interpretation of fairness in exclusive multi-option contracts to redress this important factor which has been so often overlooked in the past. In a sense we are almost dealing with two parts of a contractual relationship: an exclusive personal service contract and a transfer or assumption of exclusive copyright in the works produced. Both types of obligations on the artist invite specific forms of benefit and indeed an important aspect of this thesis is the identification and measurement of fair remuneration in multi-option recording and music publishing agreements. In considering the nature of remuneration, I am seeking a contractual model which best represents the concerns of the law.

Four principal themes underlie the analysis of contract terms in this thesis. They are: (i) the distinct but interdependent roles played by procedure and substance in the doctrinal evaluation of contractual fairness; (ii) the nature of the contractual relationship between the parties; (iii) the identification and measurement of remuneration; and (iv) the function and negotiability of terms pertaining to copyright ownership and royalties. These issues are considered in their social, economic, and theoretical contexts and they underpin the evolving bargaining status of the contracting parties and the gradual shifts of negotiating power in favour of those artists who become commercially successful.

Chapters 1 and 2 consider contemporary issues affecting the music industry. Chapter 1 considers the natural allocation of bargaining power amongst the various participants in the music industry against the current socio-economic climate. In this context the advent of the internet and its tremendous influence on the distribution of and access to music has made a striking commercial impact on the industry. In the light of these developments, the policies of the evolving market place are then discussed with regard to corporate strategies and the potential shifts of bargaining powers. This diffusion of commercial control by the advent of internet distribution has helped to provide a catalyst for the redefinition of the roles and negotiating potential of the participants in the music industry. Chapter 1 sets the socio-economic background for a general consideration of the contractual relationship between the

artist and his/her record company or music publisher in the following chapter. Chapter 2 includes an overview of the nature of the specific contractual relationship. This chapter also provides general definitions of standard contract terms and obligations, and their functions within the contract.

Chapter 3 is an exposition and analysis of the leading cases in England, whilst chapter 5 provides a similar study of the respective laws in New York and California. Both these chapters illustrate the role of procedural and substantive fairness in determining the validity of exclusive music industry agreements. In this regard the interpretation of contract doctrine and the setting of judicial standards are examined. These chapters also identify specific contractual terms and practices which have given rise to legal concern. The decisions of the courts identify the doctrinal differences between procedural and substantive fairness, but this distinction is not always clear in judicial interpretations of fairness. However, the technical distinction between procedural and substantive fairness becomes more apparent in chapters 4 and 6 which consider the more practical process of contracting.

Substance and procedure tend to be treated, in practice, as exclusive and unrelated aspects of the contract. Chapters 4 and 6 discuss the current trends in the process of negotiating and drafting exclusive multi-option recording and music publishing agreements in the UK and the US (New York and California) respectively. These chapters identify and consider negotiation policies and practices as well as standard 'boilerplate' terms, and negotiable terms, in order to analyse the link between the decisions of the courts and standard industry terms and practices, and the extent to which one affects the other.

A fairly extensive discussion which identifies and affirms the normative reasons for the law's concern with procedural and substantive fairness is provided in Chapter 7. In this regard, the judicial interpretation of contract doctrine will be principally considered in terms of three 'established' legal theories in current legal discourse: economic efficiency; liberal perfectionism; and the contextualist approach to contract law. This chapter attempts to

bring together procedural and substantive considerations, and pinpoint a paradigm of fairness in the context of both internal contract principles and the external socio-economic practices of the music industry. Chapter 8 draws the theoretical and practical strands of the thesis to a conclusion.

Much of the practical industry data for this thesis was obtained as a result of an empirical survey of contracting practices in the music industry which I conducted between August 1999 and August 2001. I gained the research data from the following sources: (i) formal and informal interviews; (ii) the answers to questionnaires which I drafted for the different categories of respondents; (iii) standard exclusive multi-option recording and music publishing agreements supplied by some of the lawyers working in the industry; and (iv) public sources such as the internet, print media and trade journals. Due to the commercial sensitivity of some of the material which I obtained through this survey, the data thus obtained has been used only in general sense (without reference to named sources) in order to assist my arguments.

The principal participants in the interviews and questionnaires were music industry lawyers in both the UK and USA. These lawyers were drawn from both in-house recording and music publishing companies and private practices and I am grateful for their co-operation in my research.

Chapter 1

The Socio-Economic context of contract making in the Music Industry

I (i) Introduction

Fair terms in exclusive multi-option recording and music publishing agreements cannot be realistically considered in isolation from the practical context in which they are formed. The dynamics of the music industry and its interactivity with its participants are important considerations which provide the necessary background against which these contracts are drawn. This opening chapter will briefly and generally consider the recent developments in the music industry which have influenced the creation of exclusive multi-option recording and music publishing agreements and their effects on the status of the contracting parties. The exposition of this background for contract making will be discussed in terms of the evolving digital environment in which popular music is being produced and distributed. In particular, the global effects of the internet have placed particular pressures on the music industry in the UK, US and elsewhere; and almost all sectors of the music industry have had to respond to these changes. This chapter is divided into two parts, the first of which considers the effect of the internet on the music industry; the second part addresses some of the other significant background issues currently shaping the practices and policies of the music industry.

I(ii) Music in the Digital Age: new pressures and new opportunities

The doyen of US music industry lawyers M. William Krasilovsky rightly points out that technological developments have always had an impact on the music industry not only in the manner in which musical instruments have been created and developed but also in the means of commercial distribution of music.⁶ The exploitation of music with new technologies have also increased the scope of music copyright. The increasing popularity of the internet and the onset of convergence technologies have brought a wider audience with virtually instant access to commercial music.⁷

The advent digital technologies such as the internet and MP3 file format have greatly reduced the costs of producing and distributing music.⁸ These means of distribution and storage have enabled listeners to download and store music with ease. The problems of effectively controlling and benefiting from these new technologies have concerned the music industry for some time, and this has influenced its strategic business policies particularly amongst the major record companies. It is in the interest of record companies to control internet distribution of their sound recordings and this aim has been achieved by various means.⁹ For instance, the Warner Entertainment conglomerate acquired the Internet Service Provider AOL in 2000 and then together with EMI plc, Bertelsmann (BMG) and RealNetworks formed a joint venture MusicNet in 2001 in order to stream licensed music to individual customers online, whilst Sony and Universal-Vivendi formed the joint venture Duet which went on to create Pressplay, a similar service, in association with the search engine Yahoo and Microsoft Networks in 2001.¹⁰

The vast opportunities for releasing music over the internet has been particularly

⁶ Krasilovsky, M.W *et al This Business of Music*, 8th ed. (New York: Billboard Books, 2000) at 4

⁷ Convergence technology allows the end user to access both the internet and television broadcasts by using the one device. This technology carries with it a greater scope for interactive use by the end user. In particular the end user is able to access and customise the digitally distributed material to their own requirements. See Gibbons, T. *Regulating The Media* 2nd edition Sweet & Maxwell (1998) at 14-19 and 300.

⁸ MP3 is a software format which allows users to store and transfer music (or any other) files over the internet with ease.

⁹ On this point see Gartner, J. 'Digital Music Will Cost You' www.wired.com/news/print/0,1294,32674,00

¹⁰ See further Zeidler, S. 'MusicNet to perform at hearing' *Reuters Los Angeles* 16 May 2001 www.cnet.com/news/0-1005-200-5952016.html

useful for those artists without recording or music publishing contracts in order to find audiences for their music. The standard music distribution contracts of most internet service providers are non-exclusive, 'one-off' ventures which rarely make provisions for any form of income for the artist. In these circumstances the internet is seen as an open stage- a free environment where the artist has the ability to expose his/her music to a cyber audience. For many internet users free exchange is an essential ethos of cyberspace. The value of such claims may appear doubtful. However this attitude questions the extent to which the internet may provide effective protection of music copyright and it remains strong amongst a significant group of internet users.¹¹ The freedom of access on the internet has already successfully fostered the wide availability of software (such as shareware and freeware) for general usage. However, such positive developments also have a dark side which can encourage the cyberpiracy of music and the infringement of music copyright. Recent cases such as *Napster* emphasise the huge potential for the loss of revenue for all producers of music through cyberpiracy; and record companies, music publishers and artists alike are united in their concerns about this problem.¹²

The illegal downloads of music files have brought more technical responses from the music industry such as the inclusion of encrypted material to deny access to music files to all but authorised users, and this measure has been underpinned by the international community's attempt to address the great potential for cyberpiracy of music with the introduction in 1996 of the World Intellectual Property Organisation Copyright Treaty and the Performances and Phonograms Treaty.¹³ Provisions were made to introduce measures for digital rights

Warner EMI BMG Sony and Vivendi-Universal are the largest music producers in the world and together they form the industry 'majors'.

¹¹ There are similar concerns in the film industry, see McWilliams, B. 'Spidey already being swapped by online pirates', *Washington Post* May 6, 2002.

¹² The Napster service allows users to freely swap MP3 music files with the assistance of a server (Napster). More sophisticated file swapping services, such as bear.com, which have followed Napster do not require a central server.

¹³ The World Intellectual Property Organisation is an intergovernmental organisation which administers international efforts to harmonise copyright laws at a minimal global level. The great majority of the international community (including the US and the UK) are members of WIPO. The minimum mandatory provisions of the WIPO treaties may be enforced by the WTO implementation of GATT-TRIPS sanctions provisions against nation states which fail to enforce the minimum treaty standards agreed to in the WIPO treaties. The increasing number of members to WIPO and the more

management and the copyright protection of encryption technology into national laws.¹⁴ The US was one of the first countries to implement the treaty obligations and under the provisions of the Digital Millennium Copyright Act (DMCA) 1998 it has provided for sanctions against those who decrypt or provide services for the decryption of encrypted files and also against those who interfere with digital rights management material such as digital watermarks.¹⁵ These provisions have been successfully applied against infringers in the US and yet continue to raise hotly contested concerns regarding the issue of freedom of speech on the internet particularly in the US where constitutional debates on freedom of speech are frequent.¹⁶ The recent example of the 'gagging' by the Recording Industry of America (RIAA) of the Princeton University scientists who were attempting to publish their research on deciphering of digital watermarks further illustrates this controversy.¹⁷

With the implementation of the Copyright in the Information Society Directive 2001/29/EC the UK will soon be required to enforce similar provisions regarding encryption technology and digital rights management.¹⁸ The practicalities of implementing these laws will require methods to limit mass on-line infringement of copyright and the extent to which

efficient implementation of WTO sanction policies make global harmonisation of copyright law secure and diminishes concerns with regard to jurisdictional issues. See further *supra*, n.6, at 228 and 229.

¹⁴ The WIPO Copyright Treaty art. 12 refers to rights management information as 'information which identifies the work, author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public'.

Encryption technology prevents the unauthorised use of software by means of an encoded lock which is incorporated into the software. For instance, the Contents Scramble System (CSS) and digital watermarks are technological encryption methods.

¹⁵ 'Watermarking involves embedding data into a digital file that cannot be removed without damaging the file. Watermarked files are likened to a digital fingerprint and can contain copyright ownership information, customer identification, and royalty tracking information'. Computers or devices which play music (MP3 players) must have software which read digital watermarks on files. Authorised copies of files will have proper watermarks whereas illegal copies will have corrupted watermarks which alert the software and the user as to its origins; and as a consequence the file would not be opened. See *supra*, n. 6, at 452 and 458.

¹⁶ See further *Motion Picture Association of America v. Corley and 2600 Enterprises Inc* 2001, August 2000. The court granted a permanent injunction to prevent the inclusion of decryption software on sites for others to access. This case is mentioned in Hanbridge, N. 'Protecting rights holders' interests in the Information Society: anti-circumvention threats post-*Napster*, and DRM' *Ent.L.R.* [2001] 223.

¹⁷ There is currently a Bill being proposed in the US Congress which is directed towards the mandatory installation of watermark recognition devices by all computer manufacturers in their machines. See further *infra* n. 21.

¹⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society arts. 6 and 7.

such means would be successful is questionable. Moreover, there is some evidence that the free access of music files over the internet need not necessarily damage legitimate sales of music.¹⁹ However, the growth of the internet has alerted all participants within the music industry as to its great commercial potential and the importance of controlling it. Indeed it may appear that in many respects even so-called 'rogue' internet services are making attempts to legitimise their operations.²⁰ Nevertheless the economic damage of cyberpiracy continues to concern the music industry. For instance recent albums by Bruce Springsteen and Deff Leppard amongst others, were illegally released on the internet by cyberpirates prior to the legitimate release dates which their respective record companies had previously announced and in this climate it is not surprising that the US Congress has bowed to the requests from music publishers, record companies as well as artists by proposing a powerful new bill to combat cyberpiracy.²¹ The proposed 'anti-hacker' bill permits copyright holders to disrupt peer-to-peer networks on suspicion of cyberpiracy activities.

I(iii) Other Socio-Economic issues

This part of the chapter will discuss other socio-economic issues affecting the music industry and some of these matters are strongly connected with rise of the internet and its socio-economic effects. The section will be divided into three parts (a) global corporate monopolistic practices; (b) the economic significance of copyright; and (c) socio-political activism.

(a) Global corporate monopolistic policies

My earlier discussion regarding the corporate strategies being employed by the

¹⁹ See further Garlick, M 'Pricing Recorded Music in an Online World' *ENT.L.R.* [2000] 175.

²⁰ For example Napster made valiant but unsuccessful attempts to transform itself, with the help of BMG, into a legitimate file swapping service.

²¹ See further, Wiltz, T. 'Music debate heads to the hill', *Washington Post* August 21, 2002.

‘industry majors’ with regard to the online distribution of their music suggests that in forming the Pressplay and Duet services they may have arguably created a very powerful duo-poly.²² Concerns regarding the creation of a monopoly for the digital distribution of services were also raised during the recent Warner-AOL merger.²³ However, the drive for increasing mergers and joint ventures in the music industry has been present long before the advent of the internet. Indeed the last twenty years in particular have ushered such changes as a result of a climate of global economic interdependence and an early illustration of this phenomena is the joint venture between two giants of the electronics industry the Corporation Sony and N.V. Phillips Electronics which introduced the CD in the US and Europe in 1984.²⁴ Phillips already possessed a very successful record label which could be used to fully exploit this new technology, whereas Sony did not own any labels at that time and it is not surprising that it consequently began acquiring record companies such as CBS Records.²⁵ The Phillips record label was subsequently sold to Polygram Records which was later acquired along with MCA Geffen Records by Universal Music.

The most unusual purchase of recent times is that of Universal Music by the multi-national Canadian drinks company Seagram, and the even more curious acquisition of the latter by the French public works company Vivendi.²⁶ The shopping spree is still continuing, for instance, the ‘industry’ major BMG acquired the very successful UK independent company Zomba Music in July 2002.²⁷ The latter instantly benefits from the digital

²² Commentators suggest that if the Duet and Pressplay services cross license their music, together they would control 80% of all songs. The US Music Online Competition Act 2001 provides for compulsory licensing to third parties.

²³ Warner was at that time attempting to also acquire the UK company EMI and the FCC in the US was clear that Warner would not be able to acquire both AOL and EMI. The latter considered merger with BMG some time later, however the European Commission (Competition Directorate) vetoed that plan. See further Drozdiak, W. ‘Big music merger is called off’, *Washington Post* May 2, 2001.

²⁴ Erik S Schetina *The Compact Disk* Prentice Hall 1989 at 4. ‘Two companies N.V. Phillips of the Netherlands and Sony Corporation, combined resources to produce a product aimed at the masses...’ CDs were first introduced in Japan in 1983.

²⁵ Unlike the other majors Sony has no associated music publisher.

²⁶ Vivendi Universal also acquired the pay TV company Canal Plus. The French media giant has recently had its share of problems, see further Burt, T. ‘Vivendi Utility seeks to amend terms of bond’ *Financial Times* August 12, 2002.

²⁷ See further Benoit, B. and Grimes, A. ‘Bertelsmann to acquire Zomba for \$3bn’ *Financial Times* June 12, 2002. Zomba has had a thriving existence now for about two decades and boasts such artists as Britney Spears and N’Sync.

distribution access enjoyed by BMG. However, at a general level it is arguable that sources of supply for recording and music publishing services are being eroded away by such activity. Moreover, this situation may affect the further standardisation of contract terms. On the other hand it is also arguable that good contracting practices which the 'majors' can afford to undertake could be enjoyed by artists who are already under contract to these new 'acquisitions'. The fact remains that the realignment of commercial power within the global music industry which these corporate developments have produced will continually improve the bargaining powers of the industry 'majors' at the expense of artists. If contract terms and practices are sufficiently standardised as a result of such ventures then artists may lack adequate sources of supply for recording and music publishing contracts, and there is no guarantee that industry wide standards would be reasonable.²⁸

(b) The economic significance of copyright

The fundamental business of recording and music publishing companies is to promote the commercial exploitation of the copyright in musical works, and indeed to advance its production in the first place. Copyright laws confer the right to assign or license works for wide, numerous, repeated and simultaneous uses which bring instant opportunities for enormous profits. Consequently the economic significance of musical copyright cannot be overstated. The party controlling the copyright would thus also control the commercial distribution and exploitation of the work; and so it is this party which would hold the discretion to release the work. Consequently the artist's ability to earn and profit from the exploitation of his/her music (with the payment of royalties) depends on the exercise of this discretion. This is an important economic link between the exploitation of copyright and the payment of royalties for the artist. Eventually with increasingly easier opportunities to access inexpensive and readily available internet distribution networks those artists who do not require funding to produce their works can by-pass the services of record companies and music publishers, and enjoy complete control over the copyright in their works, and

²⁸ This would not prevent artists from distributing their works via the internet.

ultimately be able to control the entire profits produced from the commercial exploitation of their works.

The issue of copyright ownership has become particularly intense with regard to back catalogues. The enduring popularity of artists such as the Beatles long after the expiry of their recording and song writing contracts illustrates the continuing profitability of back catalogues. The copyright in the back catalogues of successful music can mature into very valuable assets for the record company or music publisher. It is therefore not surprising that veteran artists such as Don Henley (from the 1970s band 'The Eagles') and Sir Paul McCartney have been attempting to gain control of their back catalogues. Although most artists appear supportive of the efforts of recording and music publishing companies to combat the infringement of copyrights by cyberpirates it would appear that there remains some tension within the industry with regard to back catalogues and this is because copyright control is rarely regained by the recording artist.²⁹

(c) Socio-political activism

Political lobbying is a recognised aspect of the legislative process, particularly in the US. It is not surprising that the dominant participants of the music industry such as recording and music publishing companies, their industry representatives and even official labour organisations and unions representing artists are able to voice their concerns and even exert a measure of political pressure at a legislative level. Beyond democratic participation at this formal stage the political culture in the US also encourages social activism and artists groups have never shied away from attempting to influence legislative policy in this manner. Currently there appears to be a well organised effort within the recording artist community to influence the course of legislation and artist interest groups such as the Artist Empowerment Coalition (AEC) and the Recording

²⁹ Superstars are able to negotiate purchase provisions for the copyright in their sound recordings but only on rare occasions, see Chapter 2.

Artists Coalition (RAC) are attempting to make such an impact on the music industry.³⁰

During 2000 the RAC amongst others was able to impose sufficient political pressure on the US Congress in order to repeal an unfavourable 'technical' amendment to legislation pertaining to copyright ownership of sound recordings.³¹ Presently in California the RAC and the AEC are seeking to raise important issues with legislators with regard to various aspects of recording contracts such as fair royalty figures, accounting standards and entitlements under certain provisions of the California Labor Code.³² The activities of artists groups such as the RAC and AEC have given these issues a public profile.

I(iv) Conclusion

In this first chapter I have attempted to sketch the background against which exclusive multi-option recording and music publishing agreements are being concluded and have sought to point out the pertinent social and economic factors which affect and will continue to affect such contract making. The external socio-economic conditions play an important role in allocating *a priori* market bargaining strengths between the respective parties, and to some extent the fairness of exclusive multi-option recording and music publishing agreements will be influenced by their responses to these external factors. Moreover, the rapid technological changes within the music industry particularly with regard to easy access to effective, popular and numerous distribution networks are redefining the roles of its participants. For instance, alternative access to a variety of inexpensive and easily accessible distribution networks will give artists the opportunity to by-pass record companies and music publishers in order to exploit their music whilst also

³⁰ The RAC and AEC are not official music unions but rather coalitions of artists who have formed these lobby or pressure groups in order to hasten legislative changes.

³¹ I have referred to this episode in my forthcoming work 'Whose is it anyway? Interpreting Sound Recordings as 'Works made for Hire' under section 101(b)(2) of the US Copyright Act 1976', *EIPR* [2002] 423.

³² I discuss the California Labor Code in Chapter 5.

being able to retain copyright in their works. Many music publishers have already recognised this prospect and are transforming their services to focus on rights management, licensing and fee collecting activities. The recording sector has been slow to adapt its business models to the nature of internet distribution and consequently artists who have the ability to fund the production of their works from other sources will no longer have to rely solely on record companies to distribute their works. The more successful artists may well fall into this category and thus avoid exclusive multi-option recording contracts altogether and opt to distribute their works independently on-line instead.³³ It is only the unestablished artist who requires funding and he/she may then be obliged to accept an exclusive multi-option recording or music publishing contract.

³³ Artists such as David Bowie have already done so and with success, see *supra*, n. 6 at 447.

Chapter II

The Contractual Relationship: co-operation, collaboration and competition

II(i) Introduction

In this chapter I shall consider the exclusive contractual relationship between the artist and the record company and/or music publishing company by reference to standard contractual terms as well as from the general nature of contractual performance. In the first part I shall describe the major contract terms which have provoked disputes in the relationships between artists and their recording or music publishing companies. Much of the discussion centres on the technical definition of terms and consequently the language is necessarily technical.

The second part of this chapter is an introductory discussion regarding the nature of the relationship in practice. The general discussion provided in this chapter, will be considered in greater depth in chapters 4 and 6.

II (ii) The Exclusive Contract

The artist contracts with the recording or music publishing company in order to distribute his/her work(s) to the public for profit. These companies have the financial means to produce and market the work which is an advantage that most artists rarely enjoy. Music publishers will principally market the work by promoting and licensing the right to manufacture sound recordings of the work (the mechanical copyright).³⁴ Record companies will make available funds for the artist in order to hire the equipment and personnel to produce the master tape of the work, or on increasingly rare occasions they will provide the

facilities and personnel themselves. Record companies manufacture the CDs etc. for sale to the public as well, and in the past, almost all the major music publishers and record companies have also traditionally controlled almost the entire vertical distribution chain in order to directly market the work to the public. However, the internet/information technology revolution is rapidly changing the circumstances in which music is commercially distributed.³⁵

The primary contractual obligations of the recording or music publishing company is to market the work to the public. Therefore, in addition to the actual distribution of the work, record companies for instance may also contract to support the artist(s) by funding promotional tours and the making of music videos and these additional financial obligations in fact assist in the overall promotion of the work in the market place.³⁶ It is sometimes argued that where a singer-songwriter is concerned the overall promotion of sound recording, for instance, should also include a provision for a collateral music publishing agreement. There are arguments for and against this type of arrangement which I shall discuss in due course later in this thesis.

(a) Advances

The finances which are required to create the work take the form of an advance payment.³⁷ This obligation can amount to a substantial investment in the work of the artist, especially in the recording industry. Advances are recoupable from the profits generated from the exploitation of the artist's work, however, if an artist's music fails to make sufficient profits for such recoupment then he/she is not generally obliged to return the unused

³⁴ The preparation of musical scores for publication, e.g. by copying the parts, and the printing the score for sale plays a very minor role in the duties of music publishers

³⁵ See Chapter 1.

³⁶ There is a difference between taking up additional obligations in order to adequately market the work and the inclusion of terms (such as provisions regarding the merchandising of the artist's image) which are calculated to benefit from the artist's popular status in the market place.

³⁷ In some rare cases retainer payments are offered instead of advances. These retainer payments tend to be far more modest because they do not usually include specific contractual obligations for the

advances. Recoupable advances have become more or less standard in the record industry. At the 'superstar' end of the market, a performer such as 'The Artist Formerly Known as Prince' reputedly contracted to receive \$10 million per album for six albums under his 1992 contract with Warner Music (USA),³⁸ and similarly very well established songwriters with international reputations and perhaps even recording careers are able to negotiate advance payments in excess of £150,000 in their music publishing agreements. The 1990s proved to be particularly fruitful for the recording industry 'superstars', and this trend is still continuing, for instance Mariah Carey's short lived contract with Virgin (EMI) Records in 2001 brought her £14,000,000 per album over a reputed six album agreement.³⁹

In a typical recording contract, the advance payment which is received by a recording artist for each album usually covers recording and promotional costs and these expenses are also recouped by the record company from the profits made from the sale of the work(s) of the artist. Consequently, his/her royalty payments are only paid after the expenditure on the advances have been completely recouped. An artist can be seen as spending his/her potential 'pre-payments' of future royalties when using the advances to fund the production of the work and videos etc., and therefore the cautious expenditure of the advance fees benefits both the artist and record company alike. However in the case of new artists, advance payments are probably the only means of finance which they will receive until royalty payments are made. Striking a balance in using the advances to create a product which achieves maximum profits whilst at the same time reducing costs to the minimum can be quite challenging for the artist. Moreover, record companies are particularly concerned that young inexperienced artists may overspend the level of advances paid in the first place and as a result new recording artists are usually paid 'exclusive' advances.

completion of a particular number of works. Retainer payments in the 'pop' sector becoming increasingly rare and even then they are only offered in music publishing agreements.

³⁸ This figure was cited in Kretschmer et al, 'The Changing Location of Intellectual Property Rights in Music', *Prometheus* Vol. 17(2), 1999, 163, as reputable 'industry gossip'. Despite this payment the artist was not happy with the terms of his contract, he proceeded to sue Warner, unsuccessfully, in order to be released from his contract.

³⁹ Carey was released from her contract a few months later as a result of her nervous illness. EMI was contractually obliged to pay a generous release fee in order to terminate the contract.

Exclusive advances only cover the costs involved in the production of the mastertape.⁴⁰ These costs include expenses for studios, equipment, facilities, other musicians, producers, sound engineers etc. All other expenses such as those spent on promotional tours and the making of videos are funded and organised by the record company independently of the payment of the exclusive advance. Furthermore, it has also become increasingly common for 'industry majors' to retain control of and supervise the new artist's expenditure of the exclusive advance. Established artists with budgeting experience are generally provided with 'inclusive' advances, which cover all creative production costs, e.g. recording and promotional costs. Therefore 'inclusive' advances naturally reflect a higher level of advance payment.

The American entertainment lawyer Arthur Campbell offers some interesting observations on the contractual status of advances in the negotiating process.⁴¹ He suggests that artists 'invariably regard advances as "payment". Consequently, both the artists and their agents focus heavily on the amount of the initial advance as a major negotiating point' and therefore, the advance for the first album often tends to be contractually fixed and advances for subsequent albums may also be fixed or may operate according to a 'mini-max' formula. The application of the 'mini-max' formula for advance levels may be termed in the following manner: the contract may state that the advance for the second album would amount to a percentage of the royalties earned from the sale of the first album with a contractual minimum 'floor' limit and a contractual maximum 'ceiling' limit. The boundaries set by the ceiling binds the artist to a pre-determined maximum percentage but the fixed floor guarantees a minimum percentage. The 'mini-max' formula is seen as a relatively expeditious manner by which 'to reward success and penalise failure' in the marketplace'.⁴² The extent to which the artist is remunerated is then measured according to consumer preferences.

⁴⁰ All subsequent copies are produced from the single mastertape.

⁴¹ Campbell, A. *Entertainment Law: Cases and Materials*, (3rd ed.), Austin & Winfield. San Francisco-London (1994).

⁴² www.arkangel.com/law

(b) The Control of Copyright

The significance of the control and exploitation of music copyright is one of the key themes of this thesis. Copyright is a valuable aspect of the bargain which is often overlooked particularly by recording artists and even by the courts on several occasions. When artists sign their recording or music publishing contracts they are not merely agreeing to perform a personal service but also to create a valuable asset in which they have proprietary rights. In a sense the (future) copyright in the work(s) forms part of the contractual consideration between the artist and recording or music publishing company because the artist transfers the copyright control in his/her work to the record company or music publisher in exchange for a share of the profits in the form of royalties.

Copyright has a commercial worth which is useful during the negotiation process and this exchange value is not often recognised by the artist during contract negotiations. The commercial significance of copyright is that it controls the ability to exploit and profit from the work and arguably it has the potential to ultimately affect artistic freedom as well. Consequently the exploitation of copyright is linked to conceptions of autonomy as well as remuneration.

Copyright exists independently in written musical scores as well as in sound recordings.⁴³ The owner of the copyright in the work grants an exclusive right to commercially exploit it in the following manner: to copy the work; to issue copies of the work to the public; to perform, show or play in public; to broadcast the work or include it in a cable programme service; and to make an adaptation of the work or to do any of the foregoing in relation to an adaptation.⁴⁴

⁴³ Copyright is protected under the Copyright, Designs and Patents Act 1988 in the UK; and the Copyright Act 1976 and the Digital Millennium Copyright Act 1998 in the USA.

⁴⁴ Section 16 of the Copyright Designs and Patents Act 1988. In the USA there are similar provisions under section 106 of the Copyright Act 1976. Musical scores also attract 'moral' rights of 'integrity' (the right to object to derogatory treatment of the work), of 'paternity' (the right to be identified as the author of the work) and to object to false attribution to the work. These rights are inalienable to the original statutory copyright owner of the work, i.e. the songwriter. In the UK these rights are specifically protected under the Copyright Designs and Patents Act (CDPA) ss 77-95. In the United States these rights were not extended, under the 1976 Copyright Act, to authors of musical works and

The copyrights in a musical work such as a song, for instance exists in the original written musical score (a work consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music) and the words to the song.⁴⁵ All adaptations, arrangements, public performances, recordings, and broadcasts of the song will require the consent of the copyright owner(s) of the song for the duration of copyright.⁴⁶ Those who wish to adapt, arrange, publicly perform, record, and broadcast the song may do so by obtaining the consent of the copyright owner or by acquiring separate licenses for each respective right, of copyright, under the statutory compulsory licensing scheme. In most exclusive music publishing contracts the standard terms will require the songwriter, as the initial statutory copyright owner, to assign the copyright in his/her compositions to the publisher.

Sound recordings will also attract copyright protection and under UK law the person who makes the arrangements to produce the work would be considered the copyright owner, whilst US law entitles the designated 'creator' of the work to claim ownership of the copyright.⁴⁷ The benefits of these statutory rights of the artist, are subject to contrary contractual terms; and in almost all cases the record company would include provisions in the contract to acquire the copyright in the sound recordings as well as to retain them for the full statutory copyright period.

sound recordings, because it was claimed that they were already protected under the common law as defamation and passing off. 'Moral' rights are designated under article 6bis of the Berne convention.

The Berne Convention for the Protection of Literary and Artistic Works is an international treaty which attempts to harmonise national copyright laws by implementing a minimum standard of principles and rules at a national level, and by establishing a system of 'national or reciprocal treatment' for authors from other member countries of the Berne Treaty. Both the UK and the US are members of 'Berne'. The convention is administered and periodically updated under the auspices of the World Intellectual Property Organisation (WIPO).

It must be noted that performers in the UK are not entitled to such statutory protection of their 'moral rights' in their material. The situation with regard to performers 'moral rights' is quite different in civil law countries. For instance, in France the classical music conductor Claudio Abbado recently sued his record company for a breach of his moral rights in his performance, under the French Intellectual Property Code 1985 art. L212-2, when the latter decided to issue a compilation of Abbado's interpretations of the *adagio* movements of all the Mahler symphonies. The French courts have traditionally favoured a robust interpretation of moral rights in favour of the artist. However, on this occasion the court decided against Abbado.

⁴⁵ Copyright Designs and Patent Act 1988 section 3(1) and Copyright Act 1976 section 101(a)(2).

⁴⁶ In both the UK and the US the general statutory time limit of copyright protection is seventy years from the death of the songwriter(s). These provisions are subject to some qualifications.

The commercial justification for retaining the copyright ownership in the work for the full statutory period may be the fact that the industry thrives on the income made from the commercial exploitation of back catalogues.⁴⁸ The success of back catalogues is then used to fund the development of new 'talent. The artist's ability to acquire the copyright in his/her music, even after a limited post contract 'rights' period, would be extremely rare and only realistically possible if he/she is considered an industry 'superstar'. However, artists continue to receive royalties from the continuing commercial successes of their music long past the expiry of their contracts. Furthermore, there are a few rare examples of 'artist friendly' record companies which raise the fairly meagre royalty figures of formerly contracted artists when their works continue to provide great profits.⁴⁹ The commercial value of copyright ownership has been further increased with the ease of online distribution.

The concept of copyright interest illustrates the long term effects of a recording or composing career and the artist should be able to benefit, continually and adequately, in some way from the work he/she has created in the past. Sadly the overwhelming majority of recording artists fail to or seem unable to adequately address their legitimate copyright interests in their music.

The artist's copyright interest in the work has an essential link to the provision of contractual royalties because one is traded for the other and the evaluation of this exchange is an important aspect of the contract.

(c) Royalties

Once the work has been produced and commercially exploited; and the advance payments recouped, the artist is then entitled to a share in the profits arising from the sale of the work. The concept of royalties transforms the collaborative relationship between the artist and his/her recording or music publishing company into a profit sharing enterprise. However

⁴⁷ Copyright Designs and Patents Act 1988 section 9(1)(a)(a) and the Copyright Act 1976

⁴⁸ See chapter 1.

⁴⁹ This 'upgrading' of the royalty figures would never reflect the same terms as those enjoyed by artists under currently operating contracts. For instance, an 'artist friendly' major reputedly lifted its royalty

it is debateable whether the concept of royalties can be classified as (i) a reward or (ii) remuneration for the work; (iii) or return for an investment.⁵⁰ The concept of royalties has a significant function in recording and music publishing contracts, and problems over royalty payments have provided the 'bone of contention' in many a dispute in the music industry.

The royalty structures within the music industry can be distinguished between those offered in music publishing contracts and those in recording contracts. Within the music publishing branch of the industry royalty rates apply to four separate categories of income: the sale of sheet music, the mechanical reproduction of the music (i.e. the production of CDs and other forms of sound recordings), synchronisation fees (the use of the music in advertisements, films, television broadcasts etc.) and the public performance and broadcast of the music. Leslie Cotterell suggests that it is the division of royalties in the last three categories of income 'which is crucial in music publishing agreements' and this is not surprising since they constitute the most profitable part of the music publishing industry.⁵¹

The mechanical reproduction rights is perhaps the most lucrative rights available for the artist. In the United Kingdom a songwriter's royalty earnings arising from the exploitation of the mechanical reproduction rights and public performance (to perform and broadcast the work) rights will be calculated on the basis of the licensing income collected by the Mechanical Copyright Protection Society (MCPS) and Performing Rights Society (PRS) respectively, which is then forwarded to the music publisher.⁵² In addition, the PRS pays a 'writers share' of 50% of this income directly to the songwriter.⁵³ The publisher

figures for past performers of newly acquired record companies from 4-5% to at least 10%.

⁵⁰ Leslie Cotterell describes the evolution of the concept of royalties and the ongoing economic interest that a songwriter may have in his work long after selling it to the publisher in , *Performance. The Business and Law of Entertainment* (3rd ed.) Sweet and Maxwell, London (1993), 494. He explains that formerly publishers paid a lump sum to buy the work from the songwriter. With the advent of royalty collecting societies, in the late nineteenth century, 'royalty payments have replaced the lump sum payment thereby ensuring that songwriters receive compensation commensurate with the success of their individual works'.

⁵¹ *Ibid.* at 494

⁵² The Mechanical Copyright Protection Society and Performance Rights Society set and administer the collection of the licensing fees for the respective exploitation of the mechanical copyright and the public performance and broadcasting copyrights in the musical score(s).

⁵³ Therefore, after it collects the fees and makes standard deductions for its administration fees, the PRS proceeds to forward 50% of the income directly to the songwriter and the other 50% to the publisher. The songwriter's royalties will then be calculated on the basis of the latter sum and quite

is then able to pay the artist the royalties as per his/her music publishing agreement from the remaining 50% and in this regard the PRS recommends that as an industry practice the apportionment of this sum in profits should be weighted in favour of the artist. The manner in which music publishers allocate these sums to their respective composers will be discussed in chapters 4 and 6.

The calculation of royalties in recording agreements are unusually complicated. Initially the profits are calculated on the basis of either a 'retail' price or a 'dealer' price to form a 'royalty base' price. The 'retail' price is the amount paid by the consumer in the shops, whilst the 'dealer' price is the figure paid by the retailer to the record company.⁵⁴ The record company makes deductions from its established 'royalty base' price in order to cover the costs of packaging,⁵⁵ discounted marketing copies, returned copies and sales tax i.e. VAT. The artist's royalty is then calculated from the remaining amount. Royalties in recording agreements work on the principle of payment, at a fixed percentage, for each unit containing the copyright work which is in fact sold. Some sales such as those pertaining to 'budget priced singles' are not usually included in the calculation of royalties. Third party royalties, i.e. a record producer's royalty payment, are deducted from the artist's royalties. The payment which a recording artist finally receives will reflect these and other deductions and consequently it should not be surprising that artist groups are increasingly concerned as to the lack of transparency in the calculation of their due payment under the industry standard royalty structures employed by recording companies and indeed in the application of sound accounting practices in their contracts.

'Controlled composition' clauses may further reduce royalty payments for US

independently of the 'writer share' which would have been previously forwarded to him/her by the PRS.

⁵⁴ In the UK 'retail' prices are fixed at a 'notional' level by reference to industry agreements between the MCPS and the record company trade association, the British Phonographic Industry (BPI). Evidence suggests that record companies as diverse as EMI, Universal and Zomba favour the 'dealer' price as the 'royalty base' price in their accounting practices. 'Dealer' prices are lower than 'retail' prices and therefore, royalty figures are often increased to take into account this lower 'royalty base' price. See *supra*. 42.

⁵⁵ Packaging deductions are typically 10% for 7" singles, 15% for albums, 10% for tapes and 25% for

recording artists for the sound recordings they make of their own composition(s). The artist would receive separate royalties for the mechanical reproduction of the work as a songwriter as well as the royalties from his/her recording agreement. The 'controlled composition' clause in his/her recording contract would reduce his/her recording royalties if he/she were to record his/her composition. This is because the record company would have to pay licensing fees to use that artist's composition and the inclusion of 'controlled composition' clauses is an attempt to off-set (in the artist's recording royalties) the benefit which he/she has gained (from the licensing fee for recording his/her composition) in his/her music publishing agreement. Therefore, artists who compose and perform their own material, and who are also subject to a 'controlled composition' clause, can prove extremely profitable for the record company as they need only pay them a reduced licensing fee for the mechanical reproduction of their own (the artist's) compositions.⁵⁶

Royalty figures are not often increased when the contract is renegotiated. Some record companies attach a mini-max formula to the royalty rate as a term of the contract. The 'mini-max' formula term escalates or decreases the royalty rates of future works which are produced and marketed within the duration of the contract. For example, an industry major claims that in applying the mini-max formula, an 18% royalty rate can increase to 18.5% when the album reaches 'gold' and 19% on reaching 'platinum', all within the operation of the one contract. Therefore, a sliding scale is achieved in order to peg an artist's reward in royalties on the basis of the his/her immediate market success without the need to enter formal contractual renegotiations.

The concept of royalties in the bargaining process not unlike that of copyright has been unacknowledged and undervalued particularly by new artists in their recording contracts. This may be because its significance only becomes apparent once commercial success and profits have been acquired and when concerns for obtaining fair royalty payments

CDs.

⁵⁶ Any reduction in the artist's royalty rates under the 'controlled composition' clause is of course subject to the rights of those who control the copyright in the work: the artist's music publishers. Moreover the royalty rate cannot fall below a minimum statutory rate. See further *supra*. n.6 at 25.

are considered. Copyright and royalties are the 'cinderella' terms during the negotiation process and this downgrading of status has served the recording industry well but there is a very important conceptual link between copyrights and royalties which ought to be underlined. In almost all cases the copyright legislation has bestowed the initial control of the copyright to the artist as the creator which he/she can transfer by contract to the record company or music publisher. This transfer should be reciprocated by some valuable benefit for the artist which reflects the nature of this interest. The concept of royalties performs this role. Receiving royalties is not a privilege but a contractual right for which the artist has paid consideration by transferring the statutory copyright control in the work. This is an important aspect of the contractual remuneration which is rarely considered by courts and unestablished artists alike.

(d) Artistic and Financial Control

The contract will set out the terms of creative and financial control which may be exercised by the parties in the production and marketing of the work. The extent of an artist's creative control in the production of the work will differ significantly depending on whether the contract is a recording contract or a music publishing contract, and on his/her market status and budgeting ability.

Music publishers are more likely to give the artist a free hand in creating the musical composition. The low costs involved in the creation of a written musical composition may be an obvious reason for this extent of contractual freedom. Indeed popular songwriters very rarely face severe artistic control in their contracts, if at all, and consequently music publishers may be viewed as posing very little direct contractual control in the creation of the work.

Record companies make a far greater financial investment (in the form of advances) than music publishers, in the actual creation of the work. Currently the making of a mastertape of an album can cost anywhere between £200,000 and £2,000,000 and it is not surprising that record companies draft contract terms which give them a greater extent of

artistic control in the work than those included in standard music publishing agreements.⁵⁷

A typical recording contract would include a quality standard clause which would require the artist to deliver mastertapes of a commercial and technical quality. In effect, the record company sets the artistic standard for the work and consequently maps the course of the artist's creative professional career. Furthermore, in the case of new artists the record company may also hold the contractual power to select the songs for an album, the record producer, the studio, backing musicians, and the re-mixes; as well as the power to control artwork, photographs and videos. However, many record companies do add 'good faith consultation' clauses to such contracts.

The negotiating status of an artist is often reflected in the amount of creative control which the record company will be prepared to concede to him/her, and an artist with a 'superstar' status in the music market would probably be able to negotiate a contract with considerable creative control and perhaps also with a fair extent of financial control as well by securing a generous inclusive advance.

In the majority of cases, particularly with new artists, the recording or music publishing company will retain complete financial control with respect to the operation of the contract, both by offering exclusive advances and by retaining control of the recording expenses. Arguably, in such circumstances this level of financial control could eventually infringe the artist's already limited amount of creative control as well.

Artistic control in the production of the material and the discretion to reject it for commercial distribution on the basis of a 'marketable quality' criteria are considered by artists as two very important considerations during contract negotiations. The former is of particular concern in recording contracts and many artists, even those who are relatively well established appear to concede other significant negotiating points in order to gain more artistic control over the production of the work. It is submitted that this approach is erroneous

⁵⁷ It is true, of course that many young unknowns are able to produce 'home-made' 'demo' tapes of a fairly reasonable quality without the resources of a record company. This is particularly apparent with regard to certain genres of popular dance music. However, in this work I am addressing the extent of the record company's actual investment in the artist's sound recording.

since in practice record companies are highly unlikely to actively compel their artists to produce work contrary to their (the artist's) artistic preferences. Conceding important negotiating points with regard to remuneration or duration or copyright interests in order to gain more artistic control on the face of the contract is ill-advised. Furthermore, the terms which allow the record company to reject material on the basis of commercial and technical quality need not pose an obstacle in practice either.

(e) The Extent of Exclusivity

The recording and music publishing contracts of new artists are typically world-wide agreements and royalty terms may remain fixed, especially with regard to markets outside the 'home' territory.⁵⁸ It is only in the case of more established artists that 'split-territory' contracts may be negotiated. 'Split-territory' agreements give the artist two separate 'royalty streams' and is particularly useful when more favourable terms may be contracted by him/her for a particular territory. For example, a higher royalty figure may be negotiated for lucrative markets such as Japan or North America.⁵⁹ This may prove particularly beneficial for an artist because it may save him/her the expense of negotiating separate territorial contracts in order to gain the advantages of a particular market.⁶⁰

The practice of world-wide exclusive contracts is pragmatic, in that time and resources are not expended in negotiating contracts in every territory. The issue of territory has rarely proved controversial in exclusive contracts in the music industry, but the lengthy duration periods of exclusive contracts have often compounded the misery of relationship breakdowns which sometimes arise between the artist and the recording or music publishing company.

⁵⁸ In general, the royalty rates for the home market will be higher than those for overseas markets.

⁵⁹ When royalty figures are negotiated the US and Canada markets are treated as a single collective market.

⁶⁰ An additional benefit, for the artist, from 'split' royalties is that the royalties from the specified market, i.e. Japan, is paid independently of the royalties from the profits of another less lucrative market, i.e. the rest of the world. The designation of a 'split' royalty stream will prevent cross subsidisation of losses made from a poor national market with the profits made in a lucrative national market(s). Agreements which provide for 'split' royalty streams enjoy the benefits of profiting from a lucrative market whilst also profiting from the benefits of world-wide exclusivity in the one contract.

A typical music publishing agreement, in the popular music industry, for a new artist initially operates for a one year term. This 'term' begins from the date of the signature. Quite frequently, the publisher will also include a contractual term for the exercise of a limited number of options for further one year periods and the decision to exercise an option would be at the publisher's discretion. Most 'first time' music publishing agreements do not usually extend beyond four or five 'one year' option terms of one year each. However, the music publisher is usually unwilling to exercise an option to extend the agreement without evidence of the current marketability of the songwriter. Consequently the successful performance of 'minimum commitment' obligations, on the part of the songwriter or a singer-songwriter, is a crucial factor in any decision by a publisher to exercise a new option.

The 'minimum commitment' requirement in most music publishing contracts for singer-songwriters requires him/her: (a) to record an album, a specified percentage of which must consist of his/her own compositions; and (b) to release an album in the UK or the USA through a 'major record company' or an established independent label within a specified time period.⁶¹ Tying the music publishing agreement with the sound recording success of the work, places a number of external market pressures on the artist as music publishers are rarely willing to exercise further options to retain unproductive and unmarketable artists.

Record company agreements typically specify the duration of a contract by reference to delivery commitments for albums by the artist and the exercise of options by the record company.⁶² The record company will initially contract to finance the first album and the length of option periods are often limited, on paper, to one year.⁶³ Current contractual practice also tends to specify a maximum time limit within which the contractual exclusivity may be enforced and therefore, a quantifiable 'cap' is placed on the duration of the contract. On the basis of the success of a 'first' album the record company could then elect to exercise a

See *supra*. n.42.

⁶¹ These are the 'minimum commitment' requirements in most 'pop' music publishing agreements for singer-songwriters in the UK. See *supra*. n. 42

⁶² The delivery of one album rather than one single per option period is more common in agreements with major record companies.

⁶³ Record companies typically refer to the length of a contract on the measure of option periods rather

contractual option to finance the next album and so on , until all the options under the contract are in fact exercised by the record company. Since the production and release of each album under a single option period usually takes eighteen months at least, the actual completion of a four option period contract, for instance, may last up to seven to eight years altogether.⁶⁴

The policy which guides the record company's discretion when exercising the right to 'take up' option periods is based on the popular success of the artist and his/her work. For instance, in the case of a new artist an independent record company would rarely exercise a third option period if the artist has failed to generate sufficient profits for the record company to recoup the investment made in his/her first two albums. Therefore, the length of the exclusive contract depends on a combination of two factors: the current success or failure of the artist; as well as the stated number of contractual option periods or the maximum number of years stated in the contract for the enforcement of contractual exclusivity.

The artist is under a contractual obligation to deliver material at a 'commercial' or 'technical' quality which can be rejected at the discretion of the record company or music publisher if it fails to meet this standard. The failure to release material would adversely affect the artist both financially and artistically,⁶⁵ and this is because a tied artist who is unable to have his/her works released is arguably artistically sterilised since his/her works are thus being prevented from reaching the public. Moreover the lack of release would in turn deny the artist of any royalty payments which could have been made from the possible profits if the work had been in fact released. The inability to control the exploitation of copyright of the work for profit raises concerns regarding the financial sterilisation of the artist. This is particularly so with recording artists, who are rarely able to gain copyright ownership of unreleased works and thus denied the opportunity to earn, in these cases, from their creative labours.

than years.

⁶⁴ Furthermore, record companies usually contract to include a period of roughly six months from the release of the album to the final date on which the option must be exercised. This period is used to test the artist's current market popularity. Therefore, the contract may be extended yet further.

⁶⁵ The rejection and failure to release of an album would also lengthen the duration of the recording contract, particularly if the artist has to re-record the work at his/her own expense.

The problems associated with the failure to release the work and the intellectual property rights in the material is an important element in the contract. When the record company holds the discretion in the exercising of options and the release of the work(s) to the public, questions regarding the artist's professional freedom arise, at least in theory. Alternatively one could argue that the extent of the contractual investment made in the artist by the recording or music publishing company must be respected and repaid before the artist is released from his/her obligations.

Some contracts include guaranteed release rights which allow the artist to terminate his/her contractual obligations if the record company fails to release his/her work(s) within a specified territory. Guaranteed release rights provide artists with the freedom to pursue their careers elsewhere. The inclusion of these rights are invaluable to the artist and reduces the potential severity of long-term exclusive contracts.

II(iii) The enterprise

(a) The Payment of Remuneration

Industry sources suggest that the level of advances and royalty figures have been continually improving during the past decade. In particular, the 'superstar' status enjoyed by an increasing number of artists have helped to raise the overall rates.⁶⁶ Nevertheless the extent to which this trickle down effect has sufficiently brought remuneration standards to a fair level particularly with regard to unestablished artists is unclear.

The advances for new unestablished recording artists are usually paid in instalments and often according to the record company's continual assessment of their commercial

⁶⁶ For example, Kretschmer (*supra*. 38) mentions Michael Jackson's 1991 contract with Sony in which he received 22% of the retail price of each CD.; and Janet Jackson who signed an agreement with Virgin (EMI) in 1996 for 24% of the retail price of her sound recordings whilst gaining a right to acquire the mastertape after ten years. The latter also managed to include a \$35,000,000 'signing on' fee into her contract.

capabilities and in this respect most established recording or music publishing companies can be on occasion quite generous. For instance, record companies regularly forward additional instalments of the agreed advance in order to simply support the immediate financial needs of unestablished artists and according to industry sources record companies are often compelled to increase these payments even further by paying beyond the contractual advance limit. However it must be borne in mind that such payments are made to artists who are assessed as good financial risks because such costs would have to be recouped from the profits made from the sale of the artist's music.

I have suggested elsewhere in this chapter that the concept of royalties has a particular link with copyright interests in the work and indeed the creator of the work(s). The conceptual status of royalties as a reward or long term remuneration or a return of investment is unclear because much depends on the status of the artist and his/her contribution to the contract. For instance a reward may be given to the artist who assigns his/her copyright to the record company or music publisher for commercial exploitation whereas a *quasi* employment relationship may consider royalties in terms of remuneration and a *quasi* partnership relationship would deem royalties as a return for the artist's creative investment in the production of the work.

Royalties indicate the artist's continuing interest in the work and its commercial success. Consequently it bears a strong relationship to the control over copyright which the artist would have relinquished. It is not surprising that the accounting of royalties sometimes causes a great strain on the contractual relationship. Royalties tend to be calculated and paid on a quarterly or half yearly basis established by the international trading sector and the constant performance monitoring of artists on the basis of quarterly and half yearly accounting practices is an effective method with which a recording or music publishing company can review and minimise market risks on a short-term basis.⁶⁷ Moreover concerns regarding the lack of transparency in the complex royalty payment structures particularly in exclusive recording agreements have been recently raised by artists groups. These complaints,

particularly with regard to fair and open accounting practices in the calculations of deductions prior to the payment royalties, were addressed to members of the California legislature.⁶⁸

Artists groups claim that the payments which finally reach artists do not (a) reflect the actual royalty percentage figure in the contract, so that the accounting practices are either erroneous or fraudulent; and/or(b) that the standard accounting model used by the industry is so heavily weighted against the artist that the distribution of profits is unfair and disproportionate.

These claims arose in part as a reaction to the action which the very successful US 'country rock' girl band the Dixie Chicks brought against its record company Sony. After the huge commercial success of their debut album the band claimed that Sony's accounting of the profits from the sale of their music produced a distorted sum in royalties which was well below the payment they should have received under the terms of their exclusive recording contract particularly in light of the actual sales figures for their music, and the band requested access to Sony's financial records in order to determine whether this was indeed the case. The problem could have resulted from a faulty accounting standard which produced disproportionately low and unconscionable levels of payments or by fraudulent accounting practices by Sony. An application was made to the California courts for an order to enable the band to examine Sony's accounts in order to ascertain whether the accounting practices were fair or unfair or fraudulently applied. However, the action was settled in June 2002 without Sony having to disclose this commercially sensitive material. This was because the band agreed to settle when Sony offered to raise their royalty percentage figure to a reputed 20% of the profits from the sale of their music.⁶⁹

The opportunity for judicial inquiry into the fairness of royalty accounting and the allocation of profits was thwarted, however the circumstances of this settlement illustrates how well the possibility of such an investigation could provide a positive incentive for record companies (and music publishers) to ensure that fair royalty figures and practices are offered

⁶⁷ *Supra*. n.42.

⁶⁸ See further Zeidler, S. 'Record Companies Say Past Contracts Fair Deals', *Reuters (Los Angeles)* 23 July 2002.

⁶⁹ www.news.findlaw.com/entertainment/s/20020017/mediadixiechicksdc.html

to the artist and maintained throughout the contract. Moreover, the outcome of this affair suggests that the artist should play a more vigilant role in monitoring their contracts and careers.

Overall commercial profits are measured in terms of the number of units which have been produced and sold. The commercial success of a work would be reflected in the volume of sales, and so the more popular the work: the higher the volume sold. The increase in sales will lower unit costs and with the advent of internet distribution these costs may fall even more drastically. Royalty deductions are based on percentages per unit and despite the fall in actual production costs per unit in high volume sales these percentage figures remain the same. Royalty structures are arguably set up for the distribution of low volume sales and when the high volume sales are achieved the unit costs for each unit sold could even amount to almost zero, particularly when one considers the current ventures into internet distribution; and in these circumstances the record company profits could be enormous and some would argue even disproportionate participation in the profits. Artists such as the Dixie Chicks who were achieving high volume sales may have considered it unfair that their royalty payments did not reflect the high profits per actual unit sold.⁷⁰ The royalty structures which are offered to artists are complex and a number of artists have suggested that the lack of transparency which appears to be quite common in the music industry is an attempt to conceal unfair practices.⁷¹ Reform of the royalty structure is not only important for individual contractors but also for regaining confidence in the industry as a whole. The changing effects of the operation of the royalty structure from low volume to high volume sales may be one of the reasons for artists concerns particularly as they achieve high volume sales and it is at this stage when an artist would be likely to complain that he/she had been chained to an unfair contract. The

⁷⁰ In these circumstances even the inclusion of mini-max provisions may not necessarily allay the concerns of artists' because a mere 1 or 2 % increase by means of the mini-max formula may not be sufficient to reflect the profits derived from extraordinarily high volume sales. In this sense royalties are being measured, by artists, in terms of proportionate remuneration or even fair rewards for their contribution to the work. This latter view draws parallels between current concerns of recording artists and the emergence of the profit participation culture amongst Hollywood movie actors in the later 1940s and early 1950s.

⁷¹ See *supra*. n.68

recent concern amongst artists for greater transparency in the accounting of royalties suggests that this aspect of contractual remuneration will become a more prominent negotiating element in time.

(b) Freedom

The artist's freedom and corresponding dependence on a record company or music publishing company is a complex relationship. Through their A and R (artist and repertoire) personnel, record companies and music publishers advise their artists on the requisite creative demands of the market.⁷² The advice offered by the A and R personnel more or less contributes to the building of the career as well as the image of the artist and this latter point is so, particularly in the case of recording contracts. It is not surprising that often the A and R personnel from recording companies do exercise a strong creative influence on the artist. However, there have been instances when artists have sought to defy the advice of their record company's A and R personnel. In such circumstances, record companies are less likely to enforce their contractual right for creative control when the artist is already an established performer with a popular market.⁷³

The record company's contractual right to veto the release of material delivered by the artist, on the grounds that it lacks commercial quality, places an arguably important control on the artist's creative freedom (at least on paper). However in practice, it appears that most 'majors' are more likely, than not, to release the work(s) since almost all the material delivered by the artist is almost automatically deemed 'marketable'. A number of record company's suggest that this flexible attitude results from the need to recoup (by means of commercial distribution) the high costs which have already been invested in the production of the mastertape. Since industry majors appear to invest principally in artists who are perceived

⁷² A and R personnel are acknowledged as act as 'talent scouts' for the record company. Once an artist is 'discovered' the A and R person continues to act as the 'go between' for the record company.

⁷³ For instance, when Kylie Minogue chose a 'change of direction' from her 'pop' image to a pseudo 'indie' image her record label (RCA) agreed to this doomed venture despite its better judgement. The market unpopularity of her failed attempt at a 'change of direction' convinced Kylie Minogue not to defy the artistic advice of the record company and she made a very successful return to her 'pop'

as low risks in the marketplace there will arguably always be some potential to recoup at least part of the production costs.⁷⁴ The failure to market material in which this level of initial investment has been made can only be justified if the work is so atrociously bad that it will not sell at all and in these circumstances the opinion of the A&R advisor becomes crucial. Therefore in practice, it appears that even a work of mediocre 'artistic' quality would be usually released under the practices of most industry majors in order to recoup, at least, some of the initial costs.

When the investment in an artist is made the measurement of his/her risk of commercial failure goes hand-in-hand with the ability of the record company or music publisher to cushion this loss. In practice when an investment has been made in a sustainable loss, then concerns for creative freedom, release rights and the artist's ability to earn from the sales of his/her music rarely arises.

As I suggested in the first chapter music publishers have introduced a number of different strategies to combat the gradual and inevitable decline of the music publishing industry and it would appear that they are being increasingly forced to diversify into other media and managerial sectors. In this climate it is not surprising that music publishing contracts offered to singer-songwriters have begun to include provisions pertaining to future agreements with the artist, to record the work(s). This is a particularly prevalent attitude with many of the 'industry majors' in the US, where these companies appear keen to control every stage of the musical production process of the work.⁷⁵ However, it must be emphasised that these 'music publishers' claim that they are not attempting to evolve into record companies as well and as Danny Strick, president of BMG's US music publishing arm suggests:

origins.

⁷⁴ Once the mastertape has been produced the actual CD manufacturing cost is considered paltry by most of the 'industry majors'.

⁷⁵ EMI Music (North America) has now started EMI Publishing and Productions, a company which contracts to publish and record the work so that the company is able to 'shop finished masters to the labels', according to Evan Lamberg, a vice president of EMI Music Publishing (North America). When publishers taking on the role of producing mastertapes to 'shop to labels' they are in fact fulfilling their contractual obligations to exploit the most profitable copyright in the work, i.e. the mechanical copyright. Therefore, this 'hybrid' type of contract enables the music publisher to completely perform

‘We have not developed a production entity in-house, as I believe it is important for us to continue our core business and avoid evolving into a record company. However, this approach would not preclude us from taking an override on a particular deal if the artist was comfortable with that approach. Obviously the level of financial support would dictate what type of deal we would structure with a developing artist’.⁷⁶

Therefore, this prevailing attitude amongst music publishers with regard to contracts with the developing singer-songwriters encourages the introduction of appropriate contractual provisions at the earliest stages of a relationship (and the artist’s career), to cover ‘deal structures’ regarding copyright, royalties and advances well before the artist realises his/her full commercial negotiating potential. However Strick argues that it is ‘also positive for a publisher to be involved creatively and emotionally with writers at an early stage. I think that a strong bond develops in these situations’.⁷⁷ Consequently there appears to be a particularly strong influence within this peculiar hybrid types of exclusive contracts between singer-songwriters and these so called ‘music production’ companies. These music companies acknowledge a high level of contractual and extra contractual artistic control over the artist’s career and indeed they may be making a significant contribution to the building of the songwriter’s career, particularly if he/she has no agent or manager. This type of contract also tends to engender circumstances in which the artist may become financial and professionally dependent on the music company to a great extent. In these cases music production companies have to be cautious in order to avoid decisions in which a conflict of interest may arise.⁷⁸

Despite the artistic and financial controls set within the terms of the contract, in practice there is a significant amount of freedom which is available, even to the unestablished artist.

his/her contract, See further ‘When Publishers act like Labels’, *Billboard*, August 14, 1994 at 51

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

⁷⁸ The creative influence of A&R personnel where music publishing agreements are concerned is usually not very strong.

II(iv) Other matters

In the music industry supply far exceeds demand. Moreover, it is an accepted fact that unestablished artists are more than happy to sign any contract offered to them and their aspirations for a career in the industry is usually strong enough to concede to this assertion.⁷⁹ Consequently an unestablished artist is very often at a natural disadvantage at the pre-negotiation and negotiation stages of the contract and in most cases, a great economic disparity between the parties exists at the outset of a contractual relationship.

Once the contract has been signed other issues may continue to affect the relationship between the artist and the recording or music publishing company. The recording or music publishing company would also have to consider such matters as: the potential for adverse publicity,⁸⁰ its commercial priorities; its assessment of the long term career prospects of the artists; the level of investment already made in the artist; the artist's market appeal; the increasing ability of the artist to access other means of finance and distribution; and the wider business concerns of the music industry. The advent of the specialist lawyer must be added to this equation.⁸¹

It is often observed, within the industry, that the strong involvement of lawyers sometimes encourages an 'arms length' relationship between the artist and his/her recording or music publishing company and such a relationship could very well encourage a competitive rather than a co-operative or even collaborative association between the two parties. The fact that record companies and music publishers usually offer standard form contracts which are drafted by their in-house lawyers in accordance with their business priorities suggests that artists too should be similarly protected with legal advice merely in

⁷⁹ This view was confirmed by representatives of the major recording companies in the UK.

⁸⁰ Adverse publicity, i.e. an established artist's express lack of support could turn the market against the 'recording or music publishing company'.

⁸¹ Some of the industry majors and large independent companies even agree to pay for the artist's solicitors when a contract is being negotiated. These companies claim that this standard practice is included in order to protect themselves from the possibility of any future legal action by artists claiming that they signed the contracts without access to adequate legal advice. In the past artist litigants have found success in the UK courts on this issue.

order to keep a sense of balance. Moreover, the phenomena of options which allow record companies and music publishers to make short-term assessments of their artists is a concept which does not necessarily proffer long term collaborative ventures, and the current concerns with regard to royalty accounting practices suggest that professional legal advice is hardly an obstacle to a flourishing contractual relationship. Indeed sound legal advice, from the very outset of a contract, may ultimately engender successful long term collaborations.

The nature of this contractual relationship becomes particularly crucial when the contract is to be renewed because a music publisher or record company which hopes to renew a contract on favourable terms must also consider the greater bargaining power of the artist and the possibility of an ensuing bidding war with rival recording or music publishing companies.⁸² The emerging bargaining power of the artist, to negotiate more favourable terms, will continue to influence the professional relationship. The extent and complexity of this professional collaboration will influence the manner in which negotiations, and particularly renegotiations, for a fair contract are conducted.

⁸² However, Kretschmer's research (*supra* 38) suggests that the major bidding wars of the early 1990s are unlikely to be repeated.

Chapter III

Exclusive multi-option recording and music publishing agreements in the UK

III(i) Introduction

In the past three decades the courts have interpreted the fairness of terms in exclusive multi-option recording and music publishing agreements in accordance with the doctrines of restraint of trade and of undue influence. Fairness has been considered with regard to procedural and substantive aspects of the contract; and issues of future freedom, dependence, remuneration and socio-economic public policy have played an important role in determining fair contract terms.

III(ii) Concepts of Fairness in Caselaw

The leading case in the field of exclusive agreements in the music industry is *Schroeder Music Publishing v Macaulay*.⁸³ This decision of the House of Lords established the legal considerations relevant to this field. *Schroeder* concerned an exclusive music publishing contract between a young songwriter, Tony Macaulay (also known as Anthony Gordon Instone, during the trial) and the music publisher Schroeder. In 1966, the year in which the contract was concluded, Macaulay was a twenty-one year old unknown songwriter. Macaulay signed a 'standard-form' contract with Schroeder. His contract tied him to an exclusive publishing agreement for a minimum period of five years. The contract stated that if his royalty payments exceeded £5000 at any time during those five years then his contract would be automatically renewed for a further five years. Therefore, if Macaulay were to become commercially successful he would lose his future freedom to contract elsewhere, at

least for a further five years. On the other hand Schroeder could terminate the contract at any time with one month's notice. The recoupable advance level was set at £50 and Macaulay also received fifty per cent of the net royalty income from the sale of his compositions.⁸³ Furthermore, the payment of each advance was to be withheld until the previous advance had been completely recouped. Therefore, with the exception of the initial advance payment, all subsequent advances had to be generated from the commercial success of Macaulay's music. In effect, Schroeder paid no more than an initial advance because each recoupment merely serviced the subsequent advance payment. Schroeder held the copyright in all the works composed by Macaulay during the period of the agreement. However, it was not under any obligation to publish them. Schroeder also held the right to assign the copyright to third parties. Macaulay's compositions found popular success. However in 1972, Macaulay commenced proceedings against Schroeder and sought a declaration that the contract was void as contrary to public policy and as an unreasonable restraint of trade. Plowman J granted the declaration sought by Macaulay and his judgement was affirmed by the Court of Appeal. Schroeder appealed to the House of Lords.

In the House of Lords, Lord Reid and Lord Diplock delivered the leading speeches. Lord Reid's judgement emphasised two important features of the contract; the duration of the term of exclusivity, and the lack of reciprocity of contract termination and product release rights.⁸⁵ Used in combination, these elements of the contract appear to form the key concern of Lord Reid: the potential sterilisation of the composer's capacity to earn from his music. Although he recognised the fact that Schroeder might have legitimate reasons for withholding commercial release of Macaulay's works, that was not an overriding concern of the doctrine of restraint of trade according to Lord Reid. In other words, unconditional control of copyrights in unreleased works were not automatically protectable interests under the doctrine.

⁸³ [1974] 1 WLR 1308.

⁸⁴ *Ibid.* at 1309. Apparently a few minor and insignificant modifications were made to the standard *Schroeder* contract.

Lord Reid identified the two principal problems with the duration of the term of exclusivity as the automatic renewal rights after five years, if Macaulay proved even mildly successful; and the non-reciprocity of termination or release rights. These problems were compounded by Schroeder's right of assignment to third parties because, as he stated, 'we cannot assume that an assignee would always act reasonably.'⁸⁶ The potential for the abuse by the dominant party existed within the terms of the contract. Whether the dominant party happened to be Schroeder or a third party was immaterial to Lord Reid's argument. It is for this reason that Lord Reid interpreted the contractual terms strictly. Therefore, the potential for an abuse of an inherently dominant bargaining position was determined on a strict interpretation of the contractual terms rather than on a practical commercial potential for abuse.

Lord Reid's particular emphasis on the reciprocity of rights appears to suggest, at first glance, that long-term contractual freedom cannot be contracted away, especially in the case of restraints affecting a person's professional life.⁸⁷ This is an important but controversial point because it challenges the concept of long-term contracts for artists' exclusive services altogether. Lord Reid's position suggests that, specifically setting a legal standard which demands the reciprocity of contract termination rights and product release rights provides a basic protection for the artist from commercial exploitation and insecurity, because in almost all cases the artist would be in an inferior bargaining position, and the contractual terms would have to actively compensate for this a priori inequality. Lord Reid determined abuse of a dominant bargaining position from the substantive unfairness of the contractual terms. Substantive unfairness was largely determined by the potential length of the contract and the opportunities for the public release of the artist's material. The underlying public policy on which Lord Reid based his judgement was the potential for the professional sterilisation of the artist. Therefore, the issue of an artist's professional freedom determined the law's

⁸⁵ *Ibid.* at 1312. He did not seem to be otherwise too concerned about the actual nature of the obligations under the contract.

⁸⁶ *Ibid.* at 1313.

⁸⁷ *Ibid.* at 1313

concern for upholding or striking down the agreement made between the parties. Lord Reid's position suggests that the law will not assist parties to restrain trade under an exclusive contract when, in theory, the tie may potentially 'sterilise' the 'professional' activities of the party restrained, and hinder his/her ability to earn a living from the contract.

Lord Diplock considered the public policy behind the doctrine of restraint of trade as one based on fairness and conscience.⁸⁸ Therefore, any contract which could exploit the trading capacity of an individual could fall within the doctrine and consequently come under the scrutiny of the courts. The issue under consideration was the potential exploitation by one party, of the other party's capacity to trade. Consequently, Lord Diplock emphasised the court's particular concern with the possible procedural deficiencies in the negotiation of the contract itself. In particular, the gross disparity of bargaining power between the parties was considered a special concern for the courts, because the potential for the abuse of a dominant negotiating position could be so easily achieved, in such circumstances. He equated the abuse of an inequality of bargaining power with procedural unfairness.

In *Schroeder* the use of standard form contracts was thought to have indicated a dictating of terms by Schroeder, the dominant party. In circumstances of such dominance in negotiations, a potential for the abuse of a superior bargaining position was thought to be strong. Lord Diplock paid particular attention to the two categories of standard form contracts in general commercial circulation.⁸⁹ The first type of contract is the sort that is evolved from a long period of usage or negotiation by equally matched parties.⁹⁰ The second class of contract is akin to the consumer standard form, where the terms are not negotiated but rather drafted by the dominant party to the contract: the 'take it or leave it' contract. It is the presence of this type of contract which required extra vigilance from the courts, according to Lord

⁸⁸ *Ibid.* at 1315

⁸⁹ *Ibid.* at 1316

⁹⁰ A 'standard' term music contract which could fall into this first category is the sort of agreement which includes conditional terms negotiated by the Musicians' Union and the British Phonographic Industry, the trade associations of the industry. The usefulness of such contracts is limited when the contractual benefits far exceed the industry minimum standards, as in the case of a number of popular solo artists and bands. See further L. Cotterell, *Performance, the Business and Law of Entertainment* (London: Sweet & Maxwell, 3rd ed. 1993)

Diplock, simply due to the fact that there had not been any formal negotiation of terms by the parties. This is not however to exempt individually negotiated non-standard form contracts from the scrutiny of the courts. Lord Diplock merely called for greater vigilance from the courts so that the party with the ability to dictate terms does not in fact drive an unconscionable bargain with the convenient and increasingly common practice of using standard form contracts. The principal issue was the greater potential for unfairness which could have been derived from the second class of standard form contract. Ultimately, procedural unfairness is deduced from the substantive unfairness of the terms. Lord Diplock's position suggests that the procedural imbalances which commonly occur from the reality of a prior inequality in economic resource distribution, must be policed in order to prevent substantive unfairness. However, the abuse of a dominant bargaining position itself is determined by the substantive fairness of the contractual exchange and consequently procedural unfairness in negotiations is evidenced from the substantive unfairness of the terms. Procedural fairness and substantive fairness were seen by Lord Diplock as two sides of the same coin. In examining both the adequacy of the substantive exchange between the parties as evidence of an abuse of a dominant bargaining position, and the circumstances which give rise to an abuse of a dominant bargaining position, Lord Diplock formally linked substance to procedure and *vice versa*.

In the context of the doctrine of restraint of trade Lord Diplock reiterated the standard of substantive fairness according to the 'reasonableness' of the agreement between the parties. The 'reasonableness' of the restraint depended on whether it was reasonably required in order to protect the dominant party's legitimate interests and moreover, the restraint could not be disproportionate. Therefore, his Lordship's position may be considered thus: procedural fairness between the parties involves the examination of the bargaining position of the parties and it requires the court to decide whether the economically dominant party has in fact abused its superior bargaining position in order to extract a more favourable bargain from the weaker party. If the bargaining powers are fairly matched then a strong presumption is raised that the terms are fair and reasonable. Lord Diplock stated the test of substantive fairness as 'whether

the restrictions are both reasonably necessary for the protection of the legitimate interests of the financier (Schroeder) and commensurate with the benefits secured to the artist (Macaulay) under the contract'.⁹¹

In *Schroeder*, the fundamental point that both Lords Diplock and Reid appeared to be emphasising is that dominance and power in the market place is not to be abused. Therefore, according to Lord Reid, the dominant party (Schroeder) would have to justify to the court, that 'the restraint was no more than what was reasonably required to protect its legitimate interests'.⁹² Unlike Lord Reid, Lord Diplock was not overly concerned as to the inclusion or exclusion of any particular class of term. In his view the contract was to be considered as a whole, in order to determine whether the restraint was reasonably necessary for the protection of the dominant party's interest; and in any case no more than commensurate to the contractual benefits conferred on the artist.⁹³ According to Lord Diplock this balance was a question of substantive fairness which he interpreted as proportionality between the benefit received by and the burden imposed on the artist. In his Lordship's view proportionality was not a trade-off between distinct contract terms, such as the inclusion of termination or default release rights against a contract of relatively long duration, but rather the combination of terms within the particular contract at issue. In the present case, Schroeder's recoupable costs were the advances, as well as the publishing and distribution costs, if and when the compositions were actually marketed. The severity of the tie would have to reflect this level of contractual consideration from Schroeder and that is the reason Lord Diplock took into account Schroeder's direct costs in his evaluation of reasonableness between the parties. He held that the benefits enjoyed by Macaulay, under his contract, were not commensurate to the severity of the potential ten year tie. Lord Diplock's focus was not on the reciprocity of rights but the proportionality of consideration as exchange, and the fairness of the overall bargain, whereas Lord Reid emphasised the importance of including specific terms which he considered as essential features to a valid contract. Despite

⁹¹ *Supra.* n.83 at 1315

⁹² *Ibid.* at 1310

their different foci both Lord Diplock and Lord Reid were concerned with the issues of procedural and substantive fairness in determining the validity of exclusive contracts in the music industry. However, the particular substantive concerns of abuse that each judge emphasised appear to reflect the two different but equally important priorities.

The *Schroeder* decision is an important judicial acknowledgement of two important issues in the interpretation of the doctrine of restraint of trade: the substantive fairness of consideration and the procedural fairness for the economically weak negotiating party. Substantive fairness required a measurement of exclusivity in terms of remuneration. The procedural issue considered the important point that the weak bargaining party (the industry newcomer) should be able to negotiate his/her contract fairly and freely.

Over a decade later in *O' Sullivan v Management Agency and Music Ltd* the Court of Appeal emphasised another aspect of procedural unfairness and the abuse of a dominant bargaining power.⁹⁴ The *O' Sullivan* case concerned the singer/songwriter Gilbert O'Sullivan and the exclusive recording, publishing, agency and management contracts he made with the respective defendants.⁹⁵ In 1970, at the date of most of the contracts O'Sullivan was a 23 year old singer-songwriter who had yet to find popular success although he had previously been under contract with CBS Inc. for a recording agreement and April Music Ltd for a publishing agreement. Beginning in 1970, he signed various exclusive agreements with the respective defendants. These agreements included recording, publishing, and management contracts which were directly or indirectly controlled by one of the defendants, Gordon Mills, an internationally recognised manager/producer. Most of the agreements operated for a period of five years with an option, exercisable by the respective defendants, to extend the term by another two years.

⁹³ *Ibid.* at 1315

⁹⁴ [1985] 3 All ER 351. There have been recording and publishing contract cases which have been fought successfully on the basis of undue influence prior to and after *O'Sullivan*. I have limited my discussion of undue influence to this one decision because it considers the problems of procedural unfairness in recording and publishing agreements quite thoroughly and post *O'Sullivan* decisions have yet to add significantly to this discussion.

⁹⁵ There were actually six defendants in this case, Management Agency and Music Ltd, MAM (Music Publishing) Ltd, Gordon W Mills, Ebostrail Ltd, MAM (Records) Ltd and CBS Inc.

The main focus of O’Sullivan’s grievance was centred on the agreements with Gordon Mills, and the private trust company which received O’Sullivan’s overseas earnings Ebostrail Ltd that was represented by one of its directors William Smith.⁹⁶ The five year renewable management agreement was signed with Mills in 1970, the six year service agreement with Ebostrail was signed in 1973.⁹⁷ At an early stage in their relationship Mills realised that O’Sullivan had enormous potential. He moved O’Sullivan into a cottage on the grounds of his country estate. O’Sullivan received £10 per week as ‘pocket money’ and all his outgoings were paid by the defendant companies. ‘In addition, he was entitled to draw, and did draw cheques for any moneys he required by way of advances on his royalties.’⁹⁸ Mills undertook the role as the producer without any additional fees.⁹⁹ ‘O’Sullivan had total confidence in Mills and trusted him implicitly’¹⁰⁰ and this close relationship produced great commercial successes both in the UK and the USA. However, in 1974 artistic differences began to arise between O’Sullivan and Mills, although both parties managed to produce music of varying success during the ensuing two years and by this time O’Sullivan was also unhappy with his contractual arrangements. He became ‘disillusioned with Mills and did not trust Smith.’¹⁰¹ Moreover, he was also alarmed to discover that his expenditure was increasing whilst his income levels decreased and so in 1979 he commenced proceedings against the defendants.

⁹⁶ *Ibid.* at 351 and 354. Gordon Mills also managed amongst others Tom Jones and Englebert Humperdinck, two popular singers of that era. Furthermore, Mills was the co-writer of the 1965 ‘hit’ song for Tom Jones, ‘Its Not Unusual’. Mills operated through three companies in which he was a substantial shareholder and chairman of at least one of them. Mills was mainly concerned with the artistic side of the operation. Smith was a shareholder in, and managing director of, these companies and was responsible for the management aspects of the business. Ebostrail was a private trust company which had been set up to receive the overseas earnings of Jones, Humperdinck and O’Sullivan. As a director Smith was entitled to profits from the company as a beneficiary of discretionary trusts in which his wife and family also had interests. Although this information was disclosed in the reports and accounts of the first defendants (Management Agency and Music Ltd, O’Sullivan’s sole agents), it was not known to O’ Sullivan.

⁹⁷ There were further alterations to the contracts which arose from the need to organise distribution arrangements with EMI.

⁹⁸ *Supra.* n 94. at 355

⁹⁹ The management agreement already entitled Mills’ to a twenty per cent fee on O’Sullivan’s earnings.

¹⁰⁰ *Supra.* n 94 at 355

¹⁰¹ *Ibid.* at 356

At first instance, Mars-Jones J held that the agreements were unreasonable restraints of trade on the basis of *Schroeder*. This aspect of his decision was not disputed by the defendants. Mars-Jones J went further when he added that the agreements were obtained as a consequence of ‘undue influence’ exerted on O’Sullivan by Mills; and he based this part of his decision on the Court of Appeal judgement in *Lloyds Bank v Bundy*.¹⁰²

In the *Bundy* case, Lord Denning had described the category of ‘undue influence’ as one in which the weaker party had an economic/professional or emotional dependence on the other party; and where the stronger party used this trust relationship to gain an advantageous bargain at the expense of the weaker party.¹⁰³ The agreement is then seen as an abuse of a presumed trust relationship and the product of a conflict of interests rather than a negotiated bargain.¹⁰⁴ It is then left to the dominant party -the *quasi* ‘fiduciary’- to rebut this assertion of ‘undue influence’. A clear rebuttal could be achieved by proving that the party suffering from an inferior bargaining position was not actually being personally ‘pushed to the wall’.¹⁰⁵ Therefore, *Bundy* suggests that the courts will not consider an inquiry into the substantive exchange of the agreement on the basis of ‘undue influence’, unless an *a priori* potential for procedural unfairness existed in the relationship between the parties.

¹⁰² *Ibid.* at 357. *Lloyd Bank v Bundy* [1974] 3 All ER 757. It would appear that Lord Denning’s minority judgement in *Lloyds Bank v Bundy* influenced the court in this instance. However, this is not surprising since he linked his judgement with regard to inequality of bargaining power, expressly to *Schroeder*.

¹⁰³ Lord Denning’s view suggests that much depends on the subjectively dependent state of mind of the confidante. Lord Denning’s judgement remains controversial and certain segments of his judgement have been expressly rejected by the House of Lords in *National Westminster Bank v Morgan* [1985] AC 686.

¹⁰⁴ A fiduciary’s personal profit arising from his fiduciary position would amount to a conflict of interests despite his acting in good faith and any benefits his actions may have bestowed on the beneficiary, see *Boardman v Phipps* [1967] 2 AC 46.

¹⁰⁵ In *Morgan, supra.* n 103, the unanimous opinion of the House of Lords which was delivered by Scarman, has established the legal position with regard to ‘undue influence’ in the contracting process. According to Lord Scarman, ‘it is the unimpeachability at law of the disadvantageous transaction which is the starting point from which the court advances to consider whether the transaction is the product merely of one’s own folly or the undue influence exercised by another’. In Lord Scarman’s view the law would not limit a party to freely agree to a disadvantageous transaction.

O’Sullivan was decided in the same year as *National Westminster Bank v Morgan*. However, failed to refer to the decision of the House of Lords, which had, in fact, been reported earlier. Moreover, the actual rationale in *O’Sullivan* remains unchallenged. Consequently, its role in examining procedural and substantive fairness in the context of exclusive agreements in the music industry may still be justified.

In the *O'Sullivan* case, although no actual pressure had been exerted on the claimant to sign the agreements, Mars-Jones J held that 'undue influence was to be presumed because of the 'special' relationship between O'Sullivan and the defendants.'¹⁰⁶ In the Court of Appeal, Dunn LJ interpreted the relationship of trust as one in which the defendants 'knew they were dealing with a young and inexperienced man who was content to put himself entirely in their hands and relied entirely on them to give him a fair deal';¹⁰⁷ and where 'they knew that it would be unfair and unjust to expect O'Sullivan to know where his best interests lay without independent legal and professional advice.'¹⁰⁸ In *O'Sullivan*, the lack of independent legal advice was an important factor in finding the contract invalid on the basis of procedural unfairness.¹⁰⁹

Similarly, Fox LJ held that a fiduciary relationship existed between O' Sullivan and the defendants, due to the particularly vulnerable circumstances of the former. The defendants were placed under a so called 'fiduciary duty' to redress the prior disparity in negotiating powers. Therefore, the burden of proof lay with the defendants to demonstrate that the agreements 'were the consequence of the free exercise of O'Sullivan's will in the light of full information regarding the transaction' which benefited the fiduciary defendants.¹¹⁰ This was not a question of fraud 'or of the absence of *bona fides*...' The liability arose from the mere fact of a profit having been made as a consequence of this relationship. The profiteer, however honest and well intentioned, could not escape the risk of being called to account'.¹¹¹ This rationale was similar to that offered by Lord Denning in *Bundy*.

O'Sullivan suggests that the inquiry into substantive fairness extends beyond the need to redress common imbalances in the market place such as the use of 'standard-form' contracts, which was an important consideration with regard to the doctrine of restraint of

¹⁰⁶ *Supra.* n. 94, at 357

¹⁰⁷ *Ibid.* at 358. The implication is that the party in the 'fiduciary' position (Management Agency and Music Ltd) did not act in the 'best interests' of the beneficiary (O'Sullivan).

¹⁰⁸ *Ibid.* at 358

¹⁰⁹ In *Bundy*, Lord Denning held that the lack of independent legal advice for the promisor would be fatal to the promisee's case. However, he added that the presence of independent legal advice would not in itself save the promisee's case, *supra.* n 102 at 763.

¹¹⁰ *Supra.* n 94 at 369

¹¹¹ *Ibid.* at 370

trade in *Schroeder*. *O'Sullivan* suggests that the courts may also consider the weaker party's personal circumstances and the actual consequences of a disparity in bargaining power which could result in the promisor being 'driven to the wall'. This was the underlying reasoning of Lord Denning's judgement in *Bundy*, because the same standard terms or negotiating practices might not have driven another promisor personally 'to the wall'. The particularly vulnerable personality of the weaker party imposes a 'fiduciary' duty on the stronger party not to impose obligations which could create situations of exploitation that were personally onerous on the former, given his individual circumstances of dependency. The underlying point in *O' Sullivan*, recognised by the Court of Appeal is the inequality of bargaining power which arises as a consequence of the 'fiduciary' relationships in which record companies and music publishers may commonly find themselves, and their failure to avoid the conflict of interest which a profitable agreement would thus provide and consequently, an *a priori* 'fiduciary' relationship may be presumed in such agreements. This position has implications both for the initial negotiations and subsequent renegotiations of exclusive multi-option recording and music publishing agreements.

The court in *O'Sullivan* was principally concerned with procedural unfairness. The nature of the music industry sometimes fosters relationships of personal dependency between the musician and his/her record company or music publisher. These circumstances often arise when the artist enjoys a particularly dependent relationship with the 'A and R' (Artists and Repertoire) personnel from record companies or with their music publishers. The emergence of music production companies could also foster such close relationships. In *O'Sullivan*, O'Sullivan's relationship with Mills at the time when the contracts were concluded was particularly dependent as a large degree of trust had developed on O'Sullivan's part and it was this prior 'special' relationship which imposed an extra duty on Mills, the dominant party. The existence of a prior trust relationship becomes particularly relevant in the context of contract renegotiations as well. For example, if the person offering the recording agreement was also the record producer and the manager of the artist, then a prior 'fiduciary' relationship may be presumed, on the basis of *O'Sullivan*, when the contract is renegotiated.

In *O'Sullivan*, the Court of Appeal held that the lack of independent legal advice could be a significant factor in determining procedural fairness. The judgement suggests that the existence of such circumstances could give rise to a presumption of 'undue influence' on the musician by the economically stronger record company or music publisher. The court's concern with regard to substantive fairness appears to be less specific. However, the potential for particularly severe personal consequences on the part of the weaker party, arising from the contract, appears to be the test for substantive fairness.

In *O'Sullivan*, it must be remembered that the contracts were already considered void as unreasonable restraints of trade. The court strongly suggests that the restraint of trade doctrine was considered independently of the presumption of 'undue influence'. *O'Sullivan's* 'fiduciary' dependence on Mills, which was presumed from their particular artistic, economic and personal relationship, provided yet another ground for judicial intervention but this time it was based only on the claim of lack of procedural fairness.

O'Sullivan attempts to measure the effects of undue influence in terms of fairness and in this sense its outcome may be distinguished from the position of the House of Lords in the *Schroeder* case which measured contractual exclusivity in terms of fairness. Both cases illustrate the need to consider both substantive and procedural fairness in the interpretation of the doctrine of restraint of trade as well as undue influence.

The effect of substantive fairness of the contractual terms, both independently and collectively, was an important issue in *Zang Tumb Tumb Records v Johnson*, the *Holly Johnson* case.¹¹² The case was concerned with exclusive multi-option recording and music publishing agreements concluded between the band "Frankie Goes to Hollywood" and ZTT Records and ZTT Music Publishing, respectively.¹¹³ The defendant Holly Johnson was a member of the band.¹¹⁴ The directors and shareholders of both the ZTT companies were the husband and wife team of Trevor Horn and Jill Sinclair. Although the ZTT companies were a

¹¹² [1993] EMLR 61. The case was actually decided on 26 July 1989.

¹¹³ The agreements were with ZTT Records and its sister company ZTT Music Publishing. Both companies formed the one corporate enterprise Zomba.

¹¹⁴ Holly Johnson was the lead singer and also one of the composers in the band.

new enterprise and the agreements with the band were his first venture in independent record production Horn was already a well established record producer. Sinclair 'had considerable experience in relation to the production of records' and had been employed in financial administration.¹¹⁵

"Frankie Goes to Hollywood" which was relatively unknown at the time of the contract, was keen to have its music produced by Horn. The band was represented at the negotiations by a manager who was assisted by a solicitor and it had been made very clear to the band, during the negotiations, that a recording contract would not be offered to it unless it also entered into a publishing agreement with ZTT. The parties entered into both agreements in 1983.

The recording contract was divided into eight periods; the initial seven month period was followed by seven optional periods which could each operate for a maximum duration of sixteen months. The initial period and the first and second option periods each required the band to deliver one single as a 'minimum recording commitment' whilst the subsequent option periods required the group to produce an album as the 'minimum recording commitment'. Each option was renewable at the discretion of ZTT and so the recording agreement could have potentially continued for nine years. ZTT held the sound recording copyright in the material produced by the group during the contract period; however it was under no obligation to commercially release this material. ZTT also held the right to assign the copyright to third parties. The restraint tied the band members to the contract both jointly and severally, which meant that each member would remain under contract to Zomba even after leaving the band. The choosing of the record producer and the amount of money spent on recording costs were ultimately at the discretion of the record producing company as well. ZTT provided access to recording and marketing facilities, the expertise of Trevor Horn, non-returnable but recoupable advances (for the recording costs) which ranged from £250 to £30,000 throughout the entire recording period depending on whether the material delivered were singles or albums. Therefore, ZTT's expenditure on the band amounted to the

¹¹⁵ *Supra.* n. 112 at 65

distribution costs and the recoupable advances for the recording costs which it also controlled. If the band proved successful, as it did, then ZTT would recoup its actual costs and make a profit. On the other hand, if the band failed in the market place, then it may not have generated sufficient sales for ZTT to even recoup its direct costs.

The potential duration of the music publishing contract was five years and the restraint tied the members of the band jointly and severally to the agreement. The band assigned the world-wide copyright ownership of the works composed during this period, for the entire statutory duration, to ZTT;¹¹⁶ however, the non-exploited works would revert to the band but only after three years from the expiry of the contract. The agreement included a clause which imposed a duty on ZTT 'to use its best endeavours in so far as is reasonably practicable to exploit or cause to be exploited and administered the works'.¹¹⁷ In addition to a share in the profits in the form of royalties, ZTT paid £5000 to the band as consideration.¹¹⁸

The band found popular success with its first two singles and its first album; however, the defendant became increasingly concerned about the steady increase in the recording costs. He claimed that the agreements were unenforceable and attempted to renegotiate the terms without success. His relationship with the other members of the band had also begun to deteriorate by this time and subsequently he left the band. ZTT claimed that the terms of the restraint tied him both jointly and severally to the contract. ZTT Records and ZTT Music Publishers brought proceedings seeking injunctions to restrain Johnson from recording or composing songs for any other company but Johnson counter-claimed for declarations that the agreements were unenforceable as being unreasonable restraints of trade. However ZTT claimed that the restraints were justifiable and reasonable for a number of reasons. For instance, ZTT submitted that in an industry which experienced a ninety per cent market failure rate it was in the interests of all those engaged in the industry that successful artists subsidise market failures. ZTT claimed that this argument for the 'cross-subsidisation'

¹¹⁶ At the time of the contract and the judgement the statutory duration of the musical copyright was the life of author(s) and fifty years.

¹¹⁷ *Supra.* n.112 at 76

¹¹⁸ This sum appears to be a 'one-off' advance payment.

of interests could justify the restraint of trade which was reflected in the long-term exclusive contracts and on the respective royalty rates fixed at the beginning of the band's career.¹¹⁹

Another argument centred around the need to identify the record company with the particular success of that artist since profits were usually generated not from the first 'hit' but rather from the success which followed it; indeed ZTT suggested that record companies would be unwilling to make long term investments in unknown artists unless they could also record their subsequent works.

The trial judge held that both agreements were unreasonable restraints of trade and void for uncertainty. ZTT appealed to the Court of Appeal. Dillon LJ delivered the unanimous decision of the Court of Appeal and he stated the overall concerns of the court with regard to procedural and substantive fairness:

'There is no suggestion in this case that Mr Horn and Miss Sinclair or anyone else exercised undue influence over the group or acted fraudulently or in bad faith. What is said is that the terms of the recording agreement and the publishing agreement put forward by the recording company and the publishing company, even after such concessions as were made during the negotiations, were so one-sided and unfair that consistently with the principles applied by the House of Lords in *Schroeder Music Publishing Co. Ltd v Macaulay* [1974] 1 WLR 1308 they cannot stand and cannot be enforced against the defendant.'¹²⁰

The court did not find a *quasi* 'fiduciary', 'undue influence' element to the relationship and consequently fairness was not used to determine whether unfair advantage had been taken of the weaker dependant party. However, the court used the measure of fairness in the context of the doctrine of restraint of trade in order to gauge whether the benefits obtained by Johnson were commensurate with the burdens of the respective contracts.

¹¹⁹ *Supra*. n.112 at 74. The 90% failure rate was accepted by the court as a fact. However, there are those within the music industry who consider an overall representation of industry losses practically impossible to quantify with any degree of accuracy.

¹²⁰ *Ibid.* at 66

There were particular terms within the agreements which concerned Dillon LJ. The assignment of the exclusive copyright for the entire statutory copyright period in the publishing agreement was deemed as an unreasonable restraint. The effect of such a clause was that the artists were unable to perform their own compositions, composed during this period, without the consent of ZTT, even after the expiry of the term of the contract.

ZTT held complete artistic control over the material produced for commercial release in the recording agreement. Although Dillon LJ noted that the 'bands of reasonableness were wide' this power was to be exercised 'reasonably'. Moreover, the recording contract failed to provide reciprocal termination and product release rights for the band. In light of the potential nine year duration of the contract Dillon LJ considered the recording agreement 'one sided' and the contractual benefits enjoyed by the band as inadequate to the severity of the restraint.

Dillon LJ recognised the valuable investment made by the recording and music publishing companies in young unestablished artists and noted that the band had benefited from its association with ZTT and vice versa. However, Dillon LJ firmly rejected ZTT's claim for the 'cross-subsidisation' of interests because the logic of it could tie the artist for the duration of his career: it was an argument that could not justify the degree of protection claimed by ZTT. An unduly lengthy tie without a commensurate exchange of benefits for the artist would be both unfair and could sterilise his/her earning capacity.¹²¹ However, Dillon LJ thought that, even in the context of the highly speculative nature of the music industry, such stringent provisions as those in the agreement may have been justifiable if the duration had been shorter.¹²² In fact, he acknowledged the fact that severe restraints may be necessary in the short-term to test the market potential of a particular artist but Dillon LJ held that this *particular* bargain was unfair.

There were two different issues with regard to the substance of the contract which Dillon LJ emphasised: the potential sterilisation of the artist's trading capacity and the lack of

¹²¹ *Ibid.* at 74

¹²² *Ibid.* at 73

a commensurate exchange in benefits .¹²³ The court's concern considered the combined effect of both these issues on the artist: an artist should not be bound by the terms to which he/she agreed at the beginning of his/her career, before realising his/her commercial earning potential. The artist's professional worth could not be simply measured in monetary terms at the onset of his/her career and then set in stone for a substantial period. This judgement suggests that the artist's continuing success in the marketplace should translate into his/her ability to bargain on a fairly regular basis according to his/her professional worth. Therefore chaining the artist to low royalty figures and a long term exclusive contract was considered by Dillon LJ as a potentially exploitative practice which could undervalue the professional worth of the artist. Perhaps this aspect of the judgement may be seen as actually questioning the wisdom of encouraging long-term agreements in the music industry. Moreover, Dillon LJ thought that the level of contractual benefits enjoyed by the band was too inadequate to justify the length of the tie.

Signing both recording and music publishing agreements with ZTT could have produced circumstances in which a potential conflict of interest could have arisen particularly with regard to the exploitation of copyright in the written score and it is not surprising therefore that Dillon LJ also paid particular attention to the fact that the recording contract would not have been offered if not for the band also signing ZTT's music publishing contract. This concern was compounded by a contractual restraint which tied Johnson both jointly and severally to ZTT.¹²⁴ These two elements of the contract and the weaknesses in the negotiating process were also influential in the court's decision to dismiss the appeal.

The *Holly Johnson* case considers the validity of a restraint of trade in multi-option exclusive contracts in accordance with principles of fairness in the following manner: the industry novice is always at a bargaining disadvantage and any abuse of this weakness can be discerned from the substantive terms of the contract which fail to link adequate remuneration

¹²³ Dillon LJ expressed similar concerns to both Lords Reid and Diplock in *Schroeder*.

¹²⁴ *Supra*. n.112 at 72. For instance, any prospective member of 'Frankie Goes To Hollywood' and any new band which may have been formed by Johnson would have been subject to the approval of ZTT, and would have had to agree to the outstanding terms of the 1983 contracts.

levels to the length of the contract. Even so the court also suggests that lengthy restraints are not advisable in the first place, because of the inability to predict with any degree of certainty the future commercial worth of an artist. This may render the restraint potentially unreasonable, and where industry novices are concerned this is probably a fair point. The industry novice is a vulnerable bargaining party and the negotiation of contracts in these circumstances probably ought to be conducted with particular caution on the part of the recording or music publishing company.

The court in *Silvertone Records v Mounfield* attempted further to identify circumstances in which procedural unfairness could arise, and to identify particularly exploitative terms as well.¹²⁵ The case concerned the respective recording and music publishing contracts between the band, the Stone Roses, and Silvertone Records and Zomba Music Publishing. It had been made clear to the band that the recording and publishing agreements formed a 'package' deal and so one agreement could not be entered into independently of the other.

In *Silvertone*, the agreements signed by a then relatively unknown band, the Stone Roses, were negotiated by a solicitor who was not an experienced music industry lawyer and in a business where specific knowledge is important in the negotiation of contracts, a lack of such industry knowledge in one party means that the parties were not negotiating on an equal footing. Indeed, Humphries J held that the band and its solicitor had failed to understand the complex nature of the contractual terms. This conclusion was supported by the admission of Silvertone/Zomba's lawyers that they were surprised that the band's solicitor had not haggled over the terms (in accordance with the usual practice) for a more favourable contract.¹²⁶

Procedural fairness required independent and properly qualified legal representation for the

¹²⁵ [1993] EMLR 152. The case was actually decided in 1991. The Stone Roses signed a recording agreement with Silvertone Records and its assignees, and a music publishing agreement with Zomba Music Publishers. Zomba Music Publishers was a sister company to Silvertone Records. For the purposes of this discussion I shall refer to 'Zomba' as the single corporate entity representing both the record company and the music publishers.

¹²⁶ The band's lawyer had not heard of the *Holly Johnson* case which had only been decided shortly before the conclusion of the Stone Roses' contracts, whereas one of Zomba's lawyers had been actually involved in the *Holly Johnson* litigation.

weaker party and consequently this meant that the artist required appropriate advice from a specialist music industry lawyer.¹²⁷ The lack of procedural fairness during the negotiations was supported by the substantive unfairness of both the agreements.

The recording contract as a whole was construed as an unreasonable restraint of trade and particular terms of the recording agreement invited specific criticism from Humphries J. These terms, in themselves, could have rendered the contract unenforceable as an unreasonable restraint of trade. For example, the period of exclusivity was uncertain because the option periods were calculated from the date of the US release of the material. Since Zomba was not under any obligation to release the material in the US or elsewhere the contract could have potentially continued for an indefinite period and this was one of reasons for the contract being held by Humphries J as unreasonable. However, the contract also included an alternative method of calculating the option periods, which determined the potential length of the agreement to a maximum of seven years. Humphries J considered the seven year alternative interpretation of the duration of the contract as equally unreasonable and oppressive as well. Indeed he held that the potential length of the recording agreement could have sterilised the earning capacity of the band for the duration of the contract since it did not contain any release obligations, whilst the Stone Roses did not enjoy any reciprocal termination rights. Furthermore, Zomba could have assigned and re-assigned its rights to third parties and Humphries J held that the actions of future assignees were unpredictable, and therefore the agreement could have been potentially executed in an oppressive manner. The restrictions on re-recording was for a ten year period from the expiry of the agreement. Humphries J considered this term excessive particularly in light of the maximum period of five years which was regarded as customary in the industry. The agreement also included a product endorsement clause which authorised Zomba to endorse any products on behalf of the band. Humphries J ruled that 'such clauses should not appear in a recording agreement.'¹²⁸ The band was also required to make an unlimited number of promotional and commercial videos.

¹²⁷ *Supra.* n.125 at 163.

¹²⁸ *Ibid.* at 166.

The royalty rate was limited to only ninety per cent of the records sold and unreturned and there were other measures which effectively ate into the available profits from the sale of the sound recordings. According to Humphries J, the band's ignorance of the effect of such clauses within the agreement was the result of inadequate legal advice during the negotiation stage of the contract. The terms of the contract were so onerous and one-sided, and against the band's interest that 'no competently advised artist in the position of the group would have signed it'.¹²⁹ The onerous terms provided substantive evidence of procedural unfairness.

Humphries J considered the music publishing agreement as far less severe than the recording contract since Zomba was placed under a very limited obligation to exploit the work.¹³⁰ Nevertheless it too was judged as an independently unreasonable agreement. Under the terms of the contract Zomba could alter the works and it was thought that the potential for oppressive conduct suggested by this extent of artistic control was compounded by Zomba's right to assign and re-assign its rights to third parties. Moreover, the fact that both agreements were offered as 'package deals' implied that if one was found to be onerous then the other would fall as well, regardless of the merits of the latter. The substantive 'unfairness' of one agreement could thus be used as evidence against the validity of the terms of restraint in the other agreement. The negotiating 'pressure' on the band to sign both agreements suggested a degree of procedural unfairness which imposed an additional duty on the dominant party to prove the substantive fairness of each contract.

Humphries J did not expressly purport to inquire into the adequacy of consideration. However, he was concerned that the payment received by the band was far below the rates considered as 'normal' or 'reasonable' within the industry, and the acceptance of this level of remuneration was considered as evidence of procedural unfairness. If the band had received expert legal advice at the outset, this remuneration rate would have been rejected and to this extent Humphries J does offer an evaluation of the adequacy of contractual consideration.

¹²⁹ *Ibid.* at 156.

¹³⁰ There was also a right of reversion of the copyright in unexploited works.

Humphries J agreed with Lord Diplock's position in *Schroeder* that the examination of the substantive fairness of the overall agreement would determine any abuse of procedural inequalities of bargaining power: procedural unfairness. Any examination of the substantive terms appeared to be directed at determining whether minimum standards had been met. In much of his judgement the measure of minimum standards was equated with standard industry practices. However, Humphries J suggests, albeit in passing, that he would expect the remuneration level to achieve a 'living wage' before other factors concerning the validity of a contract is considered.¹³¹

The restraint of trade doctrine was applied to identify procedural unfairness by examining the substantive terms of the contract and whether they met the minimum industry practices. Humphries J stated that:

'Without investigating the adequacy of considerations or determining the length of the terms, I have no doubt that the contract allowed the plaintiffs to prevent the Stone Roses from pursuing their primary output of their talents- making records and the like- for many years.'¹³²

The conceptual underpinnings to a 'fair bargain' in this judgement suggests a primary concern for the industry novice and his/her ability to attain a minimum standard of 'adequate' or 'sufficient' financial consideration relative to the restraint.

The reasonableness of the restraint was given an interesting interpretation which extended beyond the issues of procedural unfairness and the immediate commensurability of substantive contractual terms in *Panayiotou and others v Sony Music Entertainment (UK)*, the George Michael case.¹³³ The 'fairness' of the agreement was expressly measured in terms of distinct economic and public policies as well.

In 1982, Wham! a group consisting of George Michael and Andrew Ridgley, signed an exclusive recording contract with Inner Vision, a minor label which was a licensee and

¹³¹ *Supra*. n. 125 at 160

¹³² *Ibid*. at 160

¹³³ [1994] EMLR 229.

'talent spotter' for CBS Records (UK) (Sony's predecessor). However within eighteen months Wham! had begun proceedings against Inner Vision on the ground that the contract was an unjustifiable restraint of trade. In 1984, CBS intervened in the dispute and settled with Inner Vision on the understanding that Wham would then sign an exclusive contract with CBS. The restraint in the 1984 agreement tied the group jointly and severally to CBS. Under the terms of the contract Wham! had to produce six albums of marketable quality in no less than yearly intervals and the duration of the tie was to extend until the six albums were thus delivered. CBS owned the copyrights in the recording produced during the contract period and held the discretion to determine the commercial release of material and therefore, the tie could potentially last indefinitely.

When Wham! disbanded in 1986 Michael remained contractually tied to CBS and continued to achieve commercial success and in 1987, the third album delivered under the 1984 contract, 'Faith', proved phenomenally successful. Meanwhile he had already begun the renegotiations for an improvement on his contract terms with the new owner of CBS, Sony; and despite the acrimonious nature of the renegotiation process he signed an exclusive recording agreement which was not unlike his 1984 contract except for a few important adjustments to the obligations of both parties. The eight option contract was capped to a fifteen year maximum period and 'Faith' was deemed as the first album under the 1988 contract. A guaranteed release right was limited to his singles on the UK market, his home market. Much to Michael's disappointment the royalty rate was considered non-negotiable and remained at the 1984 level. However, he did receive eleven million pounds in advances, and a subsequent increase on this sum in a contract variation of 1990. Nevertheless, Michael's relationship with Sony was steadily deteriorating. In 1992 Michael claimed that the 1988 contract was an unreasonable restraint of trade and commenced proceedings against Sony.

During the course of the trial Michael's lawyers amended his claim to include the 1984 agreement as a restraint of trade in itself.

Michael submitted three claims with respect to the doctrine of restraint of trade:

(1) the 1988 agreement was an unreasonable restraint of trade because the benefits he received neither reflected the lengthy tie nor his 1988 market status- it was substantively unfair. Furthermore he claimed that a restraint which could have lasted fifteen years was, in itself, too severe because it could sterilise his trading capacity for the greater portion of his professional life. For instance Sony could decide not to exploit Michael's works for one reason or another,¹³⁴ or choose to assign the copyrights to third parties who could then fail to release the works. He also asserted that his royalty figures should have reflected a parity in the contractual relationship by expressing an equal partnership. It would appear that Michael was attempting to make a clear distinction between the personal service contract to produce sound recordings for Sony and the profit participation aspect of the contractual arrangement;

(2) the 1984 agreement with Sony's predecessor, CBS, was also an unreasonable restraint of trade. Michael claimed that the contract was too 'one sided' against him and the duration of the restraint was uncertain. It was not only substantively unfair, it was also procedurally unfair as Michael claimed that the pressure of the pending trial with Innervision, compromised his bargaining power to such an extent that the agreement was procedurally unfair. He argued that he was forced to accept the CBS settlement under circumstances of unequal bargaining power. Furthermore, Michael also argued that the restraint tied him jointly and severally to CBS and that a similar type of clause had raised much concern in the Court of Appeal in the *Holly Johnson* case;¹³⁵ and

(3) moreover, if the 1984 agreement with CBS was an unreasonable restraint of trade, then Michael would have negotiated his 1988 contract as a 'free' agent and not as an already exclusively contracted artist and this enhanced bargaining power would have been favourably reflected by a higher level of contractual benefits such as higher royalty figures and advance levels. Michael argued that the fact that he assumed that the 1984 contract was still valid during the renegotiations for the 1988 agreement was evidence of procedural unfairness arising from 'a lack of knowledge'. This lack of knowledge was detrimental to Michael's

¹³⁴ Michael was concerned that Sony would not support his 'new artistic direction' by refusing to market his recordings.

ability to renegotiate his contract in 1988 because as a result, he was willing to accept more restrictive terms as an already contracted artist, than he would have if he had been a free agent negotiating on the open market.

Michael claimed that both exclusive agreements were unreasonable restraints of trade which were negotiated on the basis of an inequality of bargaining power. He argued that the procedural unfairness of the respective contracts was supported by evidence of substantive unfairness of the terms; and the substantive unfairness of the agreement was to be determined on the basis of commensurability of the contractual benefit and burdens, and in particular the unusually long tie and the presence or absence of specific terms within the contract which had been deemed unfair in previous caselaw.

Sony based its determination of the substantive fairness of the eight option exclusive contract on an argument favouring the 'cross subsidisation' of interests and claimed the following as some of its legitimate interests: the desire to have an available proven successful 'product' for as long as possible; the desire and need to compete on equal terms in the international environment with other record companies with similar long-term 'signings'; the desire to be known for continued high calibre releases by long-term successful artists in order to maintain its reputation with consumers, dealers and unsigned artists; the need to cross-subsidise market losses with successful products; and the desire to accumulate property rights (copyright) as an asset.¹³⁶ Sony emphasised the commercial argument that record companies would cease investing in untested talent if they were unable to guarantee a recoupment of their business expenditures.¹³⁷ Since the increase in costs would otherwise fall on the consumer, it was preferable that the more established talents subsidise the market failures of the more humble end of the profession. It would not be in the public interest to expect the

¹³⁵ See *supra*. n.112

¹³⁶ *Supra*. n. 133 at 360

¹³⁷ This is a particularly odd claim since the young unknown talents are the lifeblood of the popular music industry. Another interesting point worth noting is that large record companies such as Sony rarely take great risks with unknown artists.

public to subsidise market failure.¹³⁸ Sony asserted that the prioritising of public interest over and above the 'direct' measure of benefits claimed by an artist was the substantive basis of a fair contract.¹³⁹ Therefore, according to Sony, a contract which was based on these 'civic' interests could hardly amount to an abuse of a dominant bargaining position. Sony's argument for determining the validity of the contract was based on economic efficiency and the preservation of its market dominance. However, this economic argument was couched in the broad language of public policy.

Parker J agreed with Sony's economic efficiency standards for determining a fair agreement and endorsed its broad consumer/public policy outlook. Indeed policy matters played a decisive role in his decision. Michael's claim was dismissed on the following grounds:

(1) with regard to the 1988 agreement, Parker J did not consider the maximum duration of fifteen years as an unreasonable restraint in the light of the substantial advance payments which Michael received. Furthermore, he thought that the level of consideration, including the royalty figures, offered by Sony did accurately reflect Michael's professional standing. According to Parker J, in 1988 George Michael had yet to reach 'superstar' status within the industry. Moreover, this agreement was a renegotiation, Michael was not bargaining in the 'open market'.

'In a renegotiation an artist cannot expect to be treated in exactly the same way as he would be on the open market free from any contractual ties. There is bound to be a degree of discount to reflect the fact that the artist is already bound by an

¹³⁸ Michael's reaction to this was apparently not very helpful. He thought that the market was already flooded with too many 'unknowns', and that he was not keen to compensate the failure of Sony's 'talent scouts'.

¹³⁹ In considering the length of a tie and the extent of direct benefits obtainable by the artist therefrom, an artist, such as Michael, would determine substantive fairness of the exchange on the basis of his/her professional status, whereas, a record company would measure the 'direct' benefits due to the artist against the amount of investment made in the artist. In Sony's case the argument here was that the length of the tie ought to reflect the 'indirect' investment made in the artist as well. 'Indirect' investments extend beyond the specific investment in the particular artist to the overall and continuing economic success of the company. Sony claimed the latter interests of the company as a 'legitimate interest', within the terms of the restraint of trade doctrine; and an interest which could be protected within the terms of the agreement with Michael, notwithstanding his professional standing and personal commercial value to Sony.

existing recording agreement. What form that discount will take, and how great it will be, will depend on the circumstances of that particular renegotiation'.¹⁴⁰

The lengthy tie need not have artistically sterilised Michael because he was not actually prevented from recording his music; and the duration could have been reduced by Michael if he had completed his obligations earlier. Furthermore, Sony was required to release a minimum of three singles delivered by Michael each year.¹⁴¹ A failure to comply with this requirement would have given Michael the right to terminate the contract. Therefore, the agreement offered limited product release and termination rights which did not completely sterilise Michael's professional activities. Moreover, the remuneration received by Michael was sufficiently significant, and in these circumstances the fifteen year duration of the contract, could not be considered in isolation.¹⁴² Parker J also thought that it would be highly unlikely that Sony would fail to release Michael's music or assign the copyright to third parties who in turn may fail to exploit the material.

(2) Parker J did not think that the 1984 agreement was an unreasonable restraint of trade as the agreement was seen as a legitimate compromise between the parties. The 1984 contract was seen as a 'compromise' in exchange for CBS's settlement of the Innervision litigation and, as a matter of public policy, it was the duty of the law to uphold such compromises. According to Parker J, this was the 'broad brush' public policy approach to interpreting contractual freedom. Moreover the pending litigation against Innervision did not produce the conditions for procedural unfairness and Michael's bargaining power was not being curtailed by the pressure of litigation and therefore the settlement 'package' offered by CBS was not accepted under any form of pressure. The disparity of economic power was a common fact of life and could not in itself be considered as procedurally unfair and an abuse of a dominant bargaining power.

¹⁴⁰ *Supra.* n.54 at 351

¹⁴¹ The issuing of singles, as opposed to albums, is a far less costly affair for the record company. The risk of market loss may remain unchanged, but the amount of investment is far less.

¹⁴² In 1988 alone Michael received over £11 million in advances. Further, albeit, lesser, sums were advanced in the following years.

(3) Parker J held that even if the 1984 contract was found to be an unreasonable restraint of trade, such a conclusion would not invalidate the 1988 contract on the basis that Michael negotiated the latter agreement with a 'lack of knowledge' that he was already tied to an unfair and unenforceable contract. The circumstances did not give rise to procedural unfairness because Michael received expert legal advice at all material times during the contract negotiations and that fact was evidence of procedural fairness. Once procedural fairness was thus established then the court would automatically assume the substantive fairness of the agreement.

Parker J held that both the 1984 and the 1988 agreements were procedurally fair, and consequently substantively fair as well. This was because Michael received expert legal advice at all the material times during the negotiations. He was not otherwise interested in conducting an extensive inquiry into the specific substantive terms of the contract since they conformed to common industry standards which he thought was the appropriate basis for measuring the substantive fairness of the contract terms. The substantial monetary benefits which Michael received from his 1988 contract provided ample evidence that this agreement was not unfair. Furthermore, the 1984 agreement was seen as a perfectly lawful compromise and an example of contractual freedom. Michael always had the freedom to choose between the contract and the litigation against Innervision. It was the duty of the law to uphold this exercise of contractual freedom and legitimate arrangements between the parties.

Parker J did not reject the argument concerning the 'cross-subsidisation of interests' made by Sony with regard to its 'indirect' costs. He was not overly concerned as to the potential for artistic and economic sterilisation which some of the express contractual terms suggested because he thought it highly unlikely to occur in practice.¹⁴³

Commercial policy played a dominant role in this judgement as well and it was interpreted in terms of freedom of trade and this was held by Parker J as an overreaching principle of the doctrine of restraint of trade, the legal grounds on which Michael fought his

¹⁴³ These included terms such the Sony's right to withhold the release of Michael's albums and the right to re-assign the agreement to third parties.

case. The 'wider aspects of commerce' and industry would dictate the interpretation of the restraint of trade doctrine. If the agreement did not hinder the wider commercial concerns of free trade and consumerism then it would be considered as a fair restraint. It was this interpretation of the 'rule of reason' which Parker J adopted. He thought that the restraint was actually serving a public interest in generating cheaper sales of CDs etc., because the vast market failure suffered by failing artists was subsidised by the profits from Michael's success rather than from the public. Furthermore, there was also a strong public policy element to upholding the 1984 agreement as a lawful compromise for CBS's settlement of Wham's litigation with Innervision. Parker J stated that:

'...where disputes have arisen and those disputes have been disposed of by means of an *inter partes* settlement, public policy favours giving effect to that settlement and to refusing to allow a party to resurrect issues whether identical or similar to those which the settlement has been intended to lay to rest.'¹⁴⁴

This element of the judgement has potential consequences for customary industry practices of renegotiations and the intervention of third parties in contractual disputes between artists and their record companies or music publishers. As a form of public policy and practical necessity, Parker J emphasised the general importance of certainty of contract and upholding settlements founded on legal advice.

III (iii) Conclusion

The courts have interpreted the doctrines of both restraint of trade and undue influence in accordance with procedural and substantive fairness. In considering the doctrine of restraint of trade the reasonableness of the terms of exclusivity is measured in terms of the contractual remuneration. The courts have emphasised the need to take account of the artist's

present and future opportunity to earn from his/her contract and maximise his/her earning potential. In this context Heydon's explanation of the doctrine of restraint of trade considers the issue of professional worth and the ability of individuals to capitalise on their trading capital.¹⁴⁵ This interest appears to be particularly important where young contractors negotiate long term exclusive agreements of a professional nature which could have a significant effect on their earnings. Heydon cites the example where the restraint of trade doctrine could be used to strike down as unreasonable, any exclusive ties between professional football players and football clubs which prevent the players from capitalising on the fact that there were other clubs which were 'willing to bid for their services'.¹⁴⁶ In this sense professional freedom is tied to the professional's ability to earn an appropriate level of remuneration. Heydon suggests that not only must this level of remuneration meet a minimum standard, but moreover that all artists should be able to earn in accordance with their market worth. Consequently, it would appear that a restraint would not be struck down as unreasonable without evidence of inadequate remuneration.

The courts have almost always tended to measure contractual remuneration only in terms of the advance payments. However Dillon LJ in the *Holly Johnson* case makes some reference to the unfairness of lengthy periods of exclusivity coupled with low royalty rates and this observation is a recognition of the long term income aspect of such contracts and the need to ensure contractual fairness over the entire course of a contractual relationship. The artist must be able to enjoy the long term benefits from the creation of the work, either in terms of very generous advance levels as the court suggested in the *George Michael* case or from the royalties derived from exploiting the copyright in his/her music. The latter form of income can only be earned if the work is in fact commercially released.

The importance of earning from the release of the work was an important element in

¹⁴⁴ *Supra*. n. 133 at 343. Parker J cited two cases as authority for this proposition, *Binder v Alachouzos* [1972] QB 151 and *Colchester Borough Council v Smith* [1992] Ch.4.

¹⁴⁵ Heydon, 'Recent Developments in the Doctrine of Restraint of Trade' 21 *McGill Law Journal* (1995) 325 at 328.

the House of Lords decision in the *Schroeder* case, and interestingly it was a point which George Michael also raised when he complained that the guaranteed release rights with regard to the release of ‘budget priced singles’ would not provide him with royalties because budget priced sales did not usually attract royalty payments. Furthermore, Michael thought that his ability to terminate the contract would have ceased on release of the budget priced material; and that Sony was more likely to release his music as ‘budget priced singles’ rather than not release his work(s) at all.¹⁴⁷ Michael’s argument here was that even if the singles had been released, the budget pricing of sales and the royalty structure in his contract would have denied him any royalties on these sales. Consequently he would not have earned any income from these budget priced releases. A strong argument could be made that the remuneration levels of the royalty structure, was in fact a distorted account of his professional worth.¹⁴⁸ Michael had identified a major problem with the royalty structure in his contract; however, neither he nor the court appeared to investigate the matter any further.¹⁴⁹ It is possible that the court may have adopted this approach because Michael’s access to very large sums in advance payments was sufficient to satisfy any review into the long term earning potential from his undoubtedly lengthy exclusive tie.

The access, or lack of access, to independent legal advice has played an important procedural role both with regard to the interpretation of both the doctrine of restraint of trade as well as undue influence. Access to appropriate legal advice has been seen as a means of alleviating any possible bargaining disparities and this would be so whether the circumstances indicated a particular dependence on the dominant party by the weaker or whether the

¹⁴⁶ Heydon discusses this point with regard to the Australian case, *Buckley v. Tutty* [1971] 125 CLR 353, 372, in which the court applied the doctrine of restraint of trade to exclusive ties in contracts between professional rugby league players and rugby league clubs, see *ibid.* 328.

¹⁴⁷ High volume sales of budget priced singles may have proven more profitable than non-budget releases simply because Sony would have not been under an obligation to pay royalties under those circumstances.

¹⁴⁸ *Supra.* n.133 at 370, 371. Sony had agreed to the 1988 renegotiation of the contract on the understanding that the 1984 royalty structure would remain static and therefore not negotiable. Michael may have jeopardised his argument by claiming a partnership rather than a profit participation status with regard to royalty allocation.

¹⁴⁹ See further clause 11.01 of George Michael’s 1988 agreement with CBS/Sony, which was filed at the Supreme Court of Judicature. Parker J did not refer to this clause in his decision and consequently it did not appear in his judgement. I am grateful to Jo Okpaluba for drawing my attention to this

dominant party set the major terms of the contract. In the *George Michael* case the court went as far as to suggest that merely having access to independent advice from an experienced lawyer was sufficient to indicate not only procedural fairness but also the substantive fairness of the contract on which he/she had offered his/her advice. This view could be compared with that expressed by Lord Denning MR with regard to undue influence in the *Bundy* case. Lord Denning thought that the access to independent legal advice would not always lessen the effects of undue influence on a contracting party.¹⁵⁰

Perhaps it could be argued that with regard to exclusive recording and music publishing agreements, the issue of access to independent legal advice would weigh far more heavily in finding an exclusive restraint reasonable, than it would in determining the presence of undue influence in a contractual relationship.

information.

¹⁵⁰ *Supra.* n.102 at 763. See chapter 4 for a deeper discussion on this point.

Chapter IV

The negotiation and formulation of exclusive recording and music publishing agreements in the UK

IV (i) Introduction

The courts have attempted to link issues of procedure and substance in their concern for fairness, and consequently, procedural issues in the negotiation process would be reflected in the substantive effects of the agreement. Cases such as *Schroeder* and *George Michael* have emphasised the primary concern for identifying the circumstances of procedural fairness before considering the substance of the contract. This judicial policy has been reflected to some extent in the common negotiating policies in the recording and music publishing industry.

This chapter will be divided into the following two principal sections: the first will consider issues regarding procedural fairness and the second will provide a discussion of contract terms in the context of substantive fairness.¹⁵¹ I shall be identifying and discussing the terms and practices, general and specific, which were considered significant by the courts in the UK, in the determination of fairness in exclusive long term agreements in the music industry. Furthermore, this chapter will attempt to identify the link between the decisions of the courts to the patterns of contracting practice currently shaping the UK music industry.

IV (ii) Negotiating ability and disability: issues of procedural fairness

Cases such as *Schroeder* have considered the changing commercial status of the artist, and the extent to which he/she should be able to legitimately exploit his/her popular successes. Consequently the contractual terms must also reasonably recognise the changing

¹⁵¹ Some general aspects of this section will be equally applicable to practices in the US. I shall discuss US contracting practices in chapter 6.

status of the artist. The concern for an artist's ability to capitalise on his/her increasing trading or professional 'capital' in Lord Reid's judgement in *Schroeder* is best interpreted in this light and led to his finding the 'five year automatic renewal' term unfair.¹⁵² Furthermore the general disapproval of indefinite or potentially perpetual periods of exclusivity was considered sufficient to strike down the contract in the *Stone Roses* case as unfair and an unreasonable restraint of trade.¹⁵³

These are issues of an artist's freedom to capitalise on his/her trading/professional capital and the extent to which this freedom may be 'fairly' restrained, however, the courts suggest that the issue of professional freedom must be weighed against practical matters when determining a fair and proportionate bargain, such as the extent of the investment made in the artist. Record companies and music publishers which include the mini-max formula within the assessment of advances and royalty figures arguably offer adequate evidence of recognising the changes in the artist's commercial status.¹⁵⁴ In other instances, the practical inevitability of contract renegotiations when the artist has attained a certain level of commercial success may be seen as an indication of recognising the need to improve the artist's level of contractual benefits accordingly.¹⁵⁵ However, the matter of renegotiation is never a contractual certainty and it is often only the threat of a rival 'buy out' or the need to keep a successful artist happy that prompts a renegotiation process at all.¹⁵⁶ In this sense, the circumstances surrounding George Michael's contract renegotiation of 1987/88 are unusual in the music industry because the renegotiation was initiated by Michael rather than Sony, in a

¹⁵² *Supra.* n.83 at 1308. The contract was renewable at Schroeder's discretion. Macaulay had no choice in the matter.

¹⁵³ *Supra.* n. 125 at 152. The maximum length of the entire contract was based on an indeterminate event, which was the release of the album in the US. Zomba was not contractually obliged to release the recordings in the US at all. Therefore, the recordings may have never been released there at all. The contract lacked certainty; and the Stone Roses may have been tied to Zomba indefinitely.

¹⁵⁴ The mini-max formula was discussed in Chapter 2.

¹⁵⁵ According to a major independent record company renegotiation is currently a standard practice when the 'new comer' artist achieves significant commercial success.

¹⁵⁶ See further Carter JW, 'The Renegotiation of Contracts' (1998) 13 *JCL* 185, for a general and interesting discussion regarding the circumstances which may encourage the renegotiation of the contract. For instance, Carter cites circumstances such as 'inadequate cash flow' and the fact that the original contract was 'a "bad deal" to begin with' as relevant issues. In the context of long term contractual relationships he suggests that 'preservation of the relationship is something which should be encouraged'. The simple fact is that a party cannot engage in a long-term loss making venture.

bid to obtain greater remuneration¹⁵⁷. Moreover, Michael's timing was ill judged because the negotiations were initiated before the popular success of 'Faith'. Indeed it was only immediately after the signing of the 1988 agreement and the commercial release of 'Faith' that Michael realised the mercurial rise in his bargaining power. Furthermore, he was not bargaining against the background of a strong bidding war because his 1984 agreement was far from being completed and consequently, he was not seen by Sony executives at the time as bargaining from the more favourable position he was very soon to achieve.¹⁵⁸ Therefore, Michael had very little scope to insist on particular terms during the negotiation of the 1988 agreement. However, the fact that Michael was still under contract to CBS/Sony was not considered a procedural issue in his renegotiations and his claim that he was procedurally disabled as he was not negotiating on the 'open market' was, quite correctly, not accepted as a valid argument.¹⁵⁹

In practice, it would appear that the issue of bargaining on the 'open market' is not particularly significant because a disgruntled artist who feels that he would be able to achieve far greater rewards on the 'open market' is unlikely to prove either productive or profitable. Furthermore, an artist who is approaching the end of his/her agreement is quite likely to be able to command so called 'open market' terms and in such circumstances it is more likely that the artist will be offered extremely favourable terms on renegotiation, well before the onset of a bidding war. For instance, an industry major record company claims to offer renegotiation terms which are almost as favourable as those obtained on the 'open market'.

¹⁵⁷ *Supra*. n.133 at 229. In other industries this practice is quite common. For instance, when a construction contract is tendered at an undervalued amount and costs subsequently rise, the performance of the obligations as required under the tender is then transformed into the (new) consideration for the extra costs in order to complete the tender. Accepting undervalued tenders places the onus on the tender to accept and insure against the risk of non-performance due to such costs. A good example of this position may be found in *Williams v. Roffey Bros. & Nicholls (Contractors) Ltd* [1991] 1 QB 1.

¹⁵⁸ The importance of negotiating from the strongest possible position is emphasised by the Musicians Union in its recommendation to singer-songwriters. The latter are advised to delay signing a music publishing agreement until the conclusion of a recording contract. A singer-songwriter is able to command more favourable terms in a music publishing agreement when he/she also holds a recording agreement.

¹⁵⁹ Michael's claim with regard to negotiating on the 'open market' was rather complicated. He claimed that if the 1984 agreement could be considered an unreasonable restraint of trade then he would have negotiated his 1988 agreement as a 'free' artist bargaining on the 'open market'; and that his agreement

Consequently, the actual or anticipated level of the artist's commercial success will, more or less determine his/her negotiating ability and the fact that he/she is under a contract would not seriously undermine his/her negotiating powers.

As I suggested in chapter 2, if the record company or music publisher is keen to nurture a long term collaborative relationship with the artist it is more likely that a co-operative approach will be taken when negotiating, drafting and executing contracts.¹⁶⁰ For instance, where young unestablished artists are concerned a 'development deal' is a clear indication of the co-operative nature of the negotiating process and the long term interests of the parties.¹⁶¹ Therefore long periods of exclusivity will have to be considered against a background of co-operation and flexibility between the parties, both at the negotiation stage as well as in the execution of the contractual obligations. This reasoning suggests that where long periods of exclusivity are concerned, there appears to be very little room for 'take it or leave it' type agreements as this 'competitive' approach to contracting seems to foster short term aims and priorities between both parties.¹⁶² For instance, the desire to secure profits and reduce the losses of market failure appear to override the need to develop a fruitful long term relationship between the artist and the record company or music publisher. Some commentators have considered the negotiating stance of Sony in the *George Michael* case as competitive and have suggested that George Michael's 1988 agreement was negotiated without regard to establishing a fruitful relationship with the artist.¹⁶³ This is perhaps a valid observation and the fairness of a long term agreement may be indeed jeopardised if the record company or music publisher negotiated the contract from a purely competitive position.

would have reflected this bargaining status. See *supra* n. 133.

¹⁶⁰ In Boon et al, 'Complete Control? Judicial and Practical Approaches to the Negotiation of Commercial Music Contracts' 24 *International Journal of the Sociology of Law* (1996) 89, the authors suggest that parties who negotiate with a view to procuring long term exclusive agreements ought to consider a co-operative approach to the process. This is in contrast to the competitive bargaining policies which may be acceptable in the context of short term periods of exclusivity.

¹⁶¹ For instance a development deal for 'Rhythm and Blues' (R&B) acts may take a number of years to bear fruit and so these relationships are often considered as long term ventures. Development deals such as these are becoming increasingly rare in the music publishing industry.

¹⁶² *Supra*.n. 160, Boon et al, make this point.

¹⁶³ *Ibid.* at 112. The authors suggest that a reason for this may have been Sony's inexperience in dealing with 'popular artists'. This seems rather an extraordinary assertion since Sony's relationship with Michael was executed by highly experienced ex-CBS employees.

Ultimately, it is in the interest of each party to recognise its own expectations as well as those of the other party and negotiate accordingly.

(a) Access to independent legal advice

Procedural unfairness due to a lack of access to independent legal advice has played an important role in a number of decisions and one of the reasons for this outcome may be the fact that most agreements in the industry operate on 'take it or leave it' type standard form contracts. Moreover, the circumstances in which such agreements are sometimes signed suggest that the artist may be agreeing to terms without the benefit of appropriate legal advice regarding the gravity of his/her liabilities under the contract and the contractual rights to which he/she would be entitled. The *O'Sullivan* decision appears to suggest that if the agreement is concluded in circumstances where the artist is financially or psychologically dependent on the dominant party but without access to independent legal advice, there may be a strong presumption of procedural unfairness.¹⁶⁴

The analysis of chapter three suggests that an artist's access to expert legal advice is increasingly viewed as a significant if not the determinant procedural requirement for fairness in exclusive recording and music publishing agreements, and this attitude appears to be the case where companies at the middle and upper echelons of the music industry are concerned.

¹⁶⁵ Indeed, in the *George Michael* case Parker J measured the fairness of the overall contract

¹⁶⁴ *Supra.* n.94 at 352.

¹⁶⁵ The recent Court of Appeal decision, *Nicholl and Another v. Ryder* [2000] EMLR 632 is an interesting example of the role of legal advice in the contractual process. In this case the combination of a drug addict musician, one sided contract terms and the lack of access to legal advice during the crucial periods of the negotiation process was sufficient evidence of procedural unfairness for the court to declare the contract a restraint of trade and one obtained by undue influence. The case concerned a management agreement between the plaintiffs who were experienced managers in the music industry and the defendant who was a well known musician, drug addict and dyslexic. The defendant was also 'unable or unwilling to concentrate on paper work'. His legal affairs were scrutinised by a solicitor who acted on his behalf, and was to become his 'mentor and spokesman'. The plaintiffs had drafted an agreement which failed to receive the approval of the defendant's solicitor. The plaintiffs were aware of the fact that the artist used cannabis during the recording sessions. Accordingly, they visited the artist during one of his recording sessions, during which he did not have access to his legal advisor nor did he bother to scrutinise the agreement due in part to his drugged state. The court held that the agreement was an unreasonable restraint of trade which was obtained by undue influence. However, the lawyer had been aware of the circumstances in which the contract was obtained; and during the nine months in which the agreement operated he failed to inform the artist that the agreement could be

on the basis of the artist's access to legal expertise. He appears to suggest that if the artist has had access to specialist independent legal advice at the crucial stages of the contract negotiations, then he/she cannot subsequently claim that the agreement was concluded in circumstances of procedural unfairness. In clearly marking the particular significance of this element of the negotiation process as its most important requirement, all other issues of procedure, previously raised by the courts, appear to have been diminished in the process of determining the fairness of the agreement. However, this position fails to take into account situations in which the artist is advised by his/her expert legal advisor that one contract alternative may be better than the other, although that 'better' alternative, in itself, may also prove particularly severe and unfair. When an artist can only choose between a 'rock and a hard place' the effect of expert legal advice may not be particularly significant in the choice that he/she is able to make. Indeed this was the point which Lord Diplock made in *Schroeder* because the widespread application of common industry standards can still be unfair, and no amount of independent legal advice would change that. Consequently, it is arguable that the mere fact that the artist has received legal advice may not always prove to be a reliable indicator of overall contractual fairness, especially at the more humble end of the market.

The lure of a career as a music performer is great whilst the opportunities are relatively limited. Moreover, circumstances in which young, and unestablished artists are sufficiently desperate to sign almost any type of agreement are not uncommon in the 'pop' music industry. Such vulnerable artists may feel compelled to sign contracts in this manner despite legal advice to the contrary and these artists may agree to terms which they may, in time, come to bitterly regret. Therefore the availability of legal expertise may not always produce a substantively fair agreement.¹⁶⁶ Conversely, agreements which have been

unenforceable. Moreover, the lawyer had recognised the immediate value of the plaintiff's management of the artist's career. Consequently, the court held that since the lawyer was acting for the defendant in all his legal affairs, his knowledge of the procedural irregularity was more or less imputed to the defendant. Therefore, it was held that the defendant had acquiesced with the terms of the agreement.

¹⁶⁶ The courts have been prepared to strike down contracts on the basis of substantive unfairness despite the availability of legal advice for the weaker party. For instance, in *Boustany v. Piggott* (1995) 69 P&CR 298 PC, the weaker party had accepted a severely unfavourable contract against strong legal advice to the contrary. There was no evidence of fraud on the part of the dominant party. However, the Privy Council held that access to legal advice was not sufficient to 'cure' the weaker party's *a priori*

negotiated in conditions where the artist did not receive expert legal advice may fail this particular procedural ‘fairness’ test set by the *George Michael* case. Indeed such agreements may actually prove to be substantively fair and reasonable. Consequently agreements which may not appear substantively disproportionate may yet fail, in theory, as procedurally unfair if independent legal expertise was not available for the artist.

It is submitted, that to a large extent, the courts have determined the fairness of a contract on the presence or absence of independent expert legal advice and therefore, it is in the interests of the dominant party to ensure that this requirement is met. In practice, the ‘industry majors’ and large independent companies do pay for independent legal advice for unestablished artists when the latter is not otherwise legally represented.¹⁶⁷

The record companies and music publishers at the upper end of the market are more able to sustain the cost of ensuring that the artist has had access to independent legal advice from a specialist lawyer; however smaller independent record companies and music publishers may not be able to afford such financial burdens. In those circumstances their contracts may include no more than a clause to draw the attention of the artist to the need to obtain independent legal advice before signing the contract. For instance the following type of clause is not uncommon:

‘The artist hereby confirms that he fully understands and approves all the terms and conditions of this Agreement and that prior to the signing hereof he has taken a copy of this Agreement to an independent legal advisor versed in relevant matters.’¹⁶⁸

However the extent to which such a clause can validly address the procedural concern for

negotiating disability. Moreover, the dominant party was not aware of the weaker party’s negotiating disability and had acted ‘unconscionably’ in the light of these circumstances. The contract was set aside as a matter of ‘common fairness’. There is an interesting Australian example, *Louth v. Diprose* (1992) 175 CLR 621 in which the ‘weaker’ party was himself a qualified lawyer who had formed an unrequited emotional attachment to the dominant party. The weaker party’s character was such that this emotional attachment was considered the negotiating disability. The High Court of Australia held that the dominant party had exploited this *a priori* negotiating disability and had thus acted unconscionably. The transaction was struck down as unfair. Both cases are discussed in Burrows A, and E McKendrick *Cases and Materials on the Law of Restitution*, Oxford University Press, 1997.

¹⁶⁷ The costs for which are recouped from profits.

¹⁶⁸ This clause is from the contract between Richard Walmsley and Acid Jazz Records, and may be considered standard. See further *Walmsley v. Acid Jazz Records Ltd.* [2001] E.C.D.R.4. I am grateful to

independent legal advice is doubtful and is yet to be tested in the courts.

It would appear that the artist's ability to access independent and expert legal advice at crucial periods of the contractual relationship, such as the negotiations and renegotiations, only becomes an issue, for judicial scrutiny, when the artist is unestablished and dependent on the stronger party in some manner. It is unlikely that an established artist, who has also secured a substantial measure of contractual exchange from the basis of a strong bargaining position, may claim his/her contract is unfair merely on the basis of not having had access to independent and expert legal advice.¹⁶⁹ Therefore, a judicial inquiry into the availability of legal advice is not likely to determine the fairness of an agreement where established artists are concerned; and in any case not unless there is evidence of substantive exploitation.

The lack of independent legal advice has been an important feature in the determination of procedural fairness. Cases such as *Holly Johnson*¹⁷⁰ and the *Stone Roses*,¹⁷¹ which were decided on the basis of the doctrine of restraint of trade, suggest that this interpretation of procedural fairness is independent of any evidence of the exertion of undue influence by the dominant party, on the weaker party. Therefore, procedural unfairness due to the lack of independent legal advice may arise in common commercial relationships where undue influence does not exist. However, the circumstances in which negotiations are sometimes undertaken suggest that a party's access to independent legal advice need not, in itself, always guarantee substantive fairness.

(b) Package Deals

The packaging of recording and music publishing agreements became increasingly common with the rise of the singer/songwriter from the nineteen sixties and onwards.

These multiple restraint contracts and multiple contracts have not generally found particular favour in the courts. In fact, the *O'Sullivan* case suggests that the practice of tying the artist to a number of exclusive contracts will most probably fail as a restraint of trade and

Professor Jeremy Phillips for drawing my attention to this case.

¹⁶⁹ If the artist has been able to secure substantial contractual benefits it is more likely that he was assisted in his negotiations with advice from experts in the industry.

¹⁷⁰ *Supra*. n. 112 at 61.

as an unfair agreement.¹⁷² My research affirms the view that industry ‘majors’ and well established independent labels do not insist on the signing of multiple agreements and indeed, many of these parties are not in the business of acting as agents and managers as well. However, there is some anecdotal evidence that this practice was, until quite recently, still prevalent, albeit at the more humble end of the industry. Moreover, it would appear that such ‘package deals’ tend to be limited to fairly short periods of exclusivity.

It is not surprising that the dominant party would attempt to secure and control the copyright in both the sound record and the written musical score. The position of the courts suggests that such ‘package deals’ may only fail when the terms in one or both of the agreements proves an unreasonable restraint of trade. In the *Stone Roses* case, for instance, it was held that the unfairness of one contract would taint the other. Both the agreements were offered as a ‘package deal’ so if one were to fall so would the other. Moreover, these ‘package deals’ may also create the circumstances in which ‘undue influence’ may arise; and unless the dominant party is able to provide evidence of having conferred a substantial contractual benefit, on the weaker party, it is more likely that a ‘package deal’ will fail as unfair. For example, the *O’Sullivan* case suggests that the multiple agreements were considered unfair and unconscionable despite the considerable contractual and professional benefits conferred on the young O’Sullivan by Gordon Mills. In practice, empirical evidence suggests that ‘industry majors’ and large independent labels are unlikely to insist on contracting its artists on the basis of ‘package deal’ agreements.¹⁷³

The appearance of ‘package deals’ within the contracting process have supported claims of procedural and substantive unfairness. However, whilst the courts generally appear to disapprove of ‘package deals’, such contractual arrangements have yet to be condemned outright. Moreover, in some circumstances the inclusion of package deals or multiple

¹⁷¹ *Supra.* n. 125.

¹⁷² I am using the term multiple agreements in the sense that more than the recording contract and the music publishing agreement are at issue. In these circumstances, other contracts, i.e. for the artist’s management and agency will be offered as well.

¹⁷³ For instance, EMI (UK), Warner Chappell (UK) and Zomba Music claimed that their artists were never pressured to sign ‘package deals’.

agreements may be justifiable. For instance in the context of the doctrine of restraint of trade a package deal may be considered reasonable in order to protect the legitimate interests of the record company or music publisher. However, there is a strong suggestion in caselaw that pressurising the artist to sign both recording and music publishing agreements as a 'package deal', may be considered procedurally unfair.¹⁷⁴ Procedural unfairness is yet again a pertinent issue when the pre-existing 'package deal' relationships is seen to influence all future contractual agreements between the parties. Therefore, pre-existing 'package deal' relationships, and perhaps the manner in which they were originally attained, may in fact jeopardise the validity of future agreements.

IV (iii) Freedom, property and remuneration: substantive fairness

The courts have considered substantive fairness on the dual basis of the 'quality' of the contractual exchange and the severity of the restraint. My analysis of substantive fairness will attempt to pinpoint general issues of principle and policy, raised by the courts, with regard to music industry agreements. Moreover, contract terms will be considered with regard to their status as negotiable or non-negotiable terms and whether the courts have considered their inclusion mandatory or prohibitory.

The discussion will be divided into three principal sections: (a) issues of contractual and professional freedom; (b) copyright and related rights; and (c) fairness in the contractual remuneration.

(a) Issues of Contractual and Professional Freedom

Duration

The duration of agreements has been a matter of great controversy in caselaw. The

¹⁷⁴ In this context I refer to legitimate commercial pressure in the form of 'take it or leave' competitive negotiating tactics on the part of the record company or music publisher.

potential seven year tie in the Stone Roses/Zomba recording agreement was considered excessive and unfair; whereas the potential fifteen year restraint in the George Michael/Sony recording agreement was not considered as unfair nor unconscionable. However, a pattern of interpretation may be discerned from the judgements. First and foremost, the courts appear to strongly disapprove indefinite terms and this point is well illustrated in the *Stone Roses* case where the lack of a clearly defined length to the recording agreement was deemed as not only uncertain but also capable of tying the artist indefinitely. The professional sterilisation of the artist is the major conceptual challenge to any tie which is capable of operating beyond a few years.

Caselaw appears to suggest that recording agreements at the more humble end of the market which exceed a seven year tie run the risk of being struck down as an unreasonable restraint of trade. Moreover, the Musician's Union advises its members to secure 'as short a deal as possible' when negotiating with small independent labels.¹⁷⁵ Both record companies and unestablished artists are thus being advised to minimise the number of options in their recording and music publishing agreements. However, there is little evidence that this advice is being readily followed by the recording industry or artists alike. For example, a fairly large and successful independent company in the UK is likely to offer an unestablished artist an exclusive a 4-5 option contract with a potential duration of seven to eight years in all,¹⁷⁶ whilst the six option period standard recording agreement offered to unestablished artists by industry majors usually require eight to nine years to complete and the Musician's Union considers this as quite a common practice within the industry. It would appear that despite the judicial concern expressed in the *Holly Johnson* and *Stone Roses* cases for lengthy ties in the recording contracts of unestablished artists the industry has continued to offer such terms.

My research suggests that in the context of the duration of standard contracts, the record companies often seem reluctant to accommodate the highly critical views of the courts. Indeed, it would appear they have doggedly standardised industry practices in their favour,

¹⁷⁵ <http://www.musciansunion.org.uk>

¹⁷⁶ This period would consist of : one minimum commitment period followed by four option periods at

and this has been accepted by the artists with little resistance, despite the views of the courts. Equally it is interesting to note that despite the court's justification for the validity of the duration of the restraint in the *George Michael* case, a number of the industry 'major' record companies began to review their own contracting patterns, and the industry standard 'eight option deal' agreement, which Michael had signed in 1988, was subsequently reduced to no more than 'six option deals'. However, record companies still appear to ignore the value of 'capping' agreements and this was a factor in the justification of Michael's 'eight' option restraint.¹⁷⁷

Where music publishing agreements are concerned an industry major claims to offer unestablished songwriters the standard 'exclusive songwriters agreement', which consists of an initial one year term followed by three option periods and on average these contracts do not generally exceed a maximum period of four years.¹⁷⁸ The maximum contract period under this standard music publishing agreement does not reflect the potential ten-year term found in the contract between Macaulay and Schroeder.

It is significant that whilst post *Schroeder* caselaw confirms the view that an indefinite tie can never be bought, the courts have been prepared to justify lengthy periods of exclusivity on the basis of a substantial benefit conferred on the artist. For example, in the *George Michael* case, the substantive contractual rewards of the 1988 agreement was a significant factor in the court's justification of the potential tie of fifteen years, as a reasonable restraint of trade.

Lord Reid in *Schroeder* and Dillon LJ in *Holly Johnson* suggest that there may be an inherent unfairness within a contractual relationship where only one party may exercise the discretion to control the duration of the contractual arrangement, and consequently the lack of reciprocal termination rights for the artist was considered one-sided and a particular concern

Zomba's discretion and the time spent in marketing of the work.

¹⁷⁷ An interesting point to bear in mind is that the album "Faith" (which was produced under the 1984 contract) was counted as the first option period under the 1988 contract. In effect, Michael was chained to seven option periods.

¹⁷⁸ There is a three month period between the delivery of the material and the decision to exercise the option.

for the courts in these cases. The current 'option' structure of contracts used in the 'pop' music industry does not offer a similar right for artists to accept or reject the 'next' option within the agreement, however some of the other underlying concerns regarding the professional sterilisation of the artist which were expressed by the courts are gradually being addressed by the music industry. For instance guaranteed release rights which allow the artist to terminate the contract if an album is not released in a designated territory are gradually becoming more common in recording contracts. However, a termination of the agreement on this ground would not secure a reversion of the mastertape to the artist.

Release Rights

The artist's ability to control the release of his/her material is an important power within a recording or music publishing agreement. Both the *Holly Johnson* and *Stone Roses* cases suggest that the lack of any reciprocal release rights could be interpreted as a significant factor in finding the agreement one sided and a restraint of trade. In *Schroeder*, Lord Reid was particularly concerned as to the artist's lack of reciprocal release rights during long periods of exclusivity. A default or reciprocal release right on the part of the artist would free him/her from potential professional sterilisation. Conversely, the ability to control the release of the material in the market place, without interference from the artist, is an important commercial power and one which is used, more often than not, in the interests of creating market profits. Therefore, the ability to control the commercial production, distribution and exploitation of the particular musical work enables the respective record company or music publisher to dictate the time of release, and indeed to decide whether the record would be released at all. Consequently, exclusive agreements usually require the artist to deliver material of 'commercial or technical' suitability.¹⁷⁹ This is an important instance in which the creative freedom of the artist and commercial freedom of the record company or music publisher compete to dominate the contract and to some extent the inclusion of guaranteed release rights can off-set any claims regarding the professional sterilisation of the artist. For

instance in the *George Michael* case the fact that Michael had secured a limited release right for singles in the 1988 agreement suggested that his creative and professional freedom was not necessarily sterilised. However Michael claimed that the right to release singles was economically futile because the royalties would not be paid on budget priced singles and that the pricing of singles was not within Michael's sphere of influence.¹⁸⁰

According to industry sources one industry 'major' record company almost always includes a 'release commitment' term for the home territory so that an artist may serve notice for release of an album if twelve months has passed by without its release and also makes provisions which enables the artist to re-purchase the intellectual property rights in the unreleased material after the twelve month period. If this release commitment is no more than distribution of the artist's work as budget singles which do not provide royalties for the artist then these release rights are not in themselves guarantees of a reasonable restraint of trade.

Releasing and exploiting the work is not only a commercial freedom for the record company or music publisher but also part of its contractual obligation because the contract may be seen as one for the artist's services as well as for the production of works which can be exploited for commercial profit. Most exclusive recording and music publishing contracts include clauses which require record companies or music publishers to use their 'best endeavours' to commercially exploit the material and to 'undertake the distribution for retail sale' of the material within a specified time limit.¹⁸¹ For instance, in most recording agreements there is maximum time limitation of twelve months, from the date of delivery, in which the record company should use its 'best efforts' to commercially exploit the material. To some extent it would appear that a certain co-operative or even collaborative relationship is thus built into the contract. However, Lord Reid in the *Schroeder* case suggests that 'best endeavour' and similar types of clauses carry very little weight in ensuring the release of the

¹⁷⁹ This standard is determined by the record company or music publisher, see chapter 2.

¹⁸⁰ *Supra*. n. 133.

work.¹⁸²

In the context of recording agreements, unestablished artists have very little influence on the release of their material. According to a major independent record company the decision to release material is ultimately a business decision not a matter of creative control as some artists claim and consequently the material which fails the commercial suitability test is never marketed because it is feared that the costs of production and distribution would not be recouped by its sale. However as I mentioned in chapter 2 most industry majors claim to release, as a matter of practice, almost all the material which its artists deliver purely for commercial reasons. Record companies continue to rely on release terms which appear quite similar to those in Michael's 1988 contract with Sony and consequently even though default release rights for albums are not included in standard agreements there are nevertheless always provisions for the inclusion of release commitments for singles for the home territory i.e. the UK. However, as I have already mentioned these rights are meaningless to the artist if the exploitation of the work does not also include royalty provisions.

The industry majors tend to claim that the extent of the investment made in the artist and the actual production of the material can only be recouped by distribution. In these circumstances it would appear that even a relatively unknown recording artist would have a far greater opportunity to have his/her material released by an industry major than an independent company.

Where established artists are concerned, the industry practice suggests that record companies would invariably release their works, even if this right had not been secured in the agreement itself.¹⁸³ This policy may reflect the fact that popular artists have already established a sufficiently loyal 'fan base' so that commercial sales of their sound recording

¹⁸¹ There is no general 'best faith' doctrine under UK contract law. There are however some very limited consumer protection provisions pertaining to the 'best faith' doctrine in the Unfair Terms in Consumer Contracts Regulations 1994 SI 1994/3159.

¹⁸² *Supra*. n. 83.

¹⁸³ Industry observers suggest that since popular artists have already established sufficiently loyal 'fan bases' commercial sales of their sound recordings are considered more or less guaranteed.

are more or less guaranteed.¹⁸⁴ Moreover, the *Bassey v. Icon* case suggests that an established artists may be able to negotiate the right to refuse the release of his/her work.¹⁸⁵ Therefore, the right to withhold the release of the work and thus control the commercial freedom of the record company or music publisher is an important indication of the artist's creative control and freedom and signifies his/her negotiating status and ability.

It is not surprising that the Musician's Union informs its members that the ability to control the release of the musical work is an important issue and worth pursuing during the negotiation process. However release rights are only worth pursuing, at the expense of other matters such as options, advances and royalties etc..., if there is a strong prospect that the work will not be released at all even in 'good faith'. The common practices and customs of the industry suggests that release is almost always inevitable particularly where industry majors are concerned and where 'A and R' personnel have been able to successfully advise the artist on the tastes of his/her prospective market. The combined effects of the realities of commercial practice and the frequently collaborative nature of the enterprise suggests that the concern for the artist's lack of reciprocal release rights need not be necessarily that serious on every occasion. Furthermore, the inclusion of effective release rights can provide a commercial incentive for the record company to release the work, but the artist will not benefit from these rights unless he/she actually receives royalties from the profits.

The practices discussed above with regard to the recording industry may be equally applied to the music publishing industry.¹⁸⁶

¹⁸⁴ This policy may explain the release of some material by pop artists.

¹⁸⁵ *Bassey v. Icon* [1995] EMLR 596. The case concerned the singer Shirley Bassey and her performances in some sound recordings of theme songs from the James Bond movies. Bassey was not the owner of the sound recording rights. She had consented to a recording agreement but had retained a right to veto the release of the material if she was not satisfied with the recordings. The court held that she was entitled to exercise her rights according to her contract. A performer's consent for the exploitation of the sound recording may be qualified so that final release rights are retained by the performer.

¹⁸⁶ It is interesting to note that in civil law jurisdictions, such as France, the composer's right to control the release, the divulgation right, is enshrined in legislation: the Intellectual Property Code of 1985, art.L.121-1. It is considered a moral right and it is therefore, inalienable, i.e. non-assignable from him/her. The publisher is at liberty to sue him/her for a breach of contract but will be unable to release the work. The author's moral right to control the release of the work was first recognised in the nineteenth century case concerning the artist James McNeill Whistler. The artist had been commissioned to produce a painting, but on having produced the work, Whistler refused to hand it over

Rights of Termination

Most standard contracts in the UK provide for quite limited rights for the termination of the contract. For instance, I have stated above that the guaranteed release clause allows for contract termination and there are standard termination clauses such as the following:

‘ In addition to any other rights and remedies at law either party specified below may, by giving written notice to the other party terminate the agreement on the following grounds:
(i) Where the record company has failed to account or make payments as required under this agreement.
(ii) Where either party has committed a serious breach of its obligations under this agreement unless such party rectifies the position, as far as reasonably possible, within 30 days
(iii) Where the record company goes into voluntary or involuntary liquidation or is declared insolvent either in bankruptcy proceedings or other legal proceedings or has reached an agreement with creditors due to its failure or inability to pay its debt as they fall due, or where a receiver is appointed over the whole or part of the record company’s business.’¹⁸⁷

These terms usually amount to no more than the general common law rights to terminate the contract for breach of essential terms, and they are equally enjoyed by the record company.

The artist’s right to terminate the agreement at any stage is limited to specific circumstances cited within the contract such as lack of pay etc... It cannot be seriously considered as a counter balance to the record company’s discretionary rights with regard to the exercise of options. Indeed the record company or music publisher’s right not to exercise an option in favour of the artist is perhaps the most important and broadest ‘termination’ right and one which is not enjoyed by the artist as well. Guaranteed release rights are another means of terminating the contract under specific circumstances which appear highly unlikely to occur.

to the commissioner. The court held that although he had acted in breach of contract he was, in fact, well within his moral rights to deny the release of the copyright in his work. Similarly, as the ‘creator’ of the work, the original copyright owner, holds the inalienable moral right to withdraw the work from commercial circulation.

The recent case *Durand v. Molina* [2000] E.C.D.R. 320, reiterates the view in the UK, that release and withdrawal rights are not statutory moral rights and must be negotiated for as specific terms within the agreement. For a general discussion on moral rights see *supra* n. 44.

It would appear that neither the courts nor the parties themselves adequately consider the practical problems when music publishers and record companies 'change hands'. Termination rights under these circumstances appear almost non-existent and one reason for this is may be that the artist could represent an important company asset.

Liability of band members

A restraint which ties a band member jointly and severally to the contract carries with it issues concerning future freedom of contract. The judgement in the *Holly Johnson* case strongly suggests that courts do not favour restraints which can tie a member of a band both jointly and severally whilst the *George Michael* case proposes that such clauses may not be necessarily offensive. Therefore, it would be fair to state that the law is somewhat undecided on this matter. The application of this term, in practice, is variable and much depends on the perceived 'talents' of the various band members.

An initial agreement with an unestablished band will almost always tie all the band members jointly and severally and this appears to be a standard contracting procedure within the industry. In practice the record company or music publisher will continue to keep the 'talented' band member(s) under contract if the band should disband.

Another important aspect of this type of clause is that in some circumstances 'the group may also be in breach of contract if it decides arbitrarily to change its membership against the wishes of the record company'.¹⁸⁷ This clause is particularly important where the band as a whole, rather than its individual members, are perceived as the 'talent'. The nature of such a clause may seriously affect the creative freedom exercised by the band.

The problems often arise when a band has realised commercial success during the course of the agreement and then decides to disband or change membership. If the success of the band is attributed to the status of the members as a band then a strict exercise of the record

¹⁸⁷ Fosbrook and Laing, *The Media Law Contracts Handbook Vol. 1* Longman, 1989, 116.

¹⁸⁸ According to Bagehot the investment in a group may be wasted in such circumstances. See further Bagehot, *Music Business Agreement* Waterlow, 1989, 117.

company's (or music publisher's) rights under such a clause may be particularly severe on the band members. However, if the band has achieved its success on the talents of a particular individual, then it is unlikely that the record company (or music publisher) would claim a breach of contract when, and if, the band membership alters or if it disbands. The record company or music publisher would simply continue to hold the talented members on contract. However, the existing band members would have to be particularly cautious when adding new members to the band because the latter could be already under contract to third parties. Moreover, certain clauses with regard to bands may specify that new band members are equally liable under the terms of the agreement. This was one aspect to the clause in the *Holly Johnson* case which bound the existing and future band members to the agreement, both jointly and severally.¹⁸⁹

The many interesting aspects of clauses concerning bands were not developed in the cases which followed *Holly Johnson*. Moreover, in the *George Michael* case, the position of the courts suggested that such clauses were not necessarily relevant factors when interpreting the doctrine of restraint of trade and consequently it would appear that the pre-*Holly Johnson* industry practices continue unchecked.

Product endorsement

The ability of an artist to commercially exploit his/her fame in a manner unrelated to his/her contractual duties, i.e. the obligations arising from the actual recording or publishing agreement, is an important form of control. Moreover such commercial ventures as product endorsements may prove very profitable. The power to control an artist's ability to endorse commercial products was not considered in caselaw as a legitimate interest of a record company or music publisher. For example, the product endorsement clause in the recording agreement, between the Stone Roses and Zomba, was severely criticised by Humphries J. He held that:

‘The artists may well not wish to sell soap powder or

¹⁸⁹ *Supra*. n. 112.

disinfectant or have some other reason for not wishing to endorse a product. Such a clause should never appear in a recording agreement'.¹⁹⁰

Therefore, it would appear that product endorsement clauses are, in themselves, considered unfair by the courts and the same reason can be used to reject product merchandising clauses as well.¹⁹¹ Product merchandising is equally lucrative, especially when the artist achieves a degree of fame and it is not surprising that the Musicians Union cautions its members to avoid such package deals within their recording or music publishing agreements. My research suggests that such clauses are more likely to appear in contracts offered by very small independent companies rather than those offered by the industry majors. It is interesting to note that since the *Stone Roses* case, Zomba enterprises no longer appears to include product endorsement clauses in its recording agreements.

(b) Copyright and related rights

The UK courts have yet to discuss, in detail, the role of copyright and related rights in the substantive fairness of recording and music publishing agreements and this lack of an adequate discussion is a regrettable state of affairs since the principal reason for entering music publishing and recording agreements is to produce and exploit the copyright in the musical work. Indeed the concept of copyright protection as an exclusive right to exploit the work may be interpreted as a form of restraint of trade. The advent of digital distribution of music has further emphasised the importance of acquiring control over the exploitation of copyright.¹⁹² Copyright is a statutory right which is a valuable economic asset to its holder.

The link between industry practices concerning copyright issues and the caselaw specifically regarding contractual fairness in the music industry, is difficult to establish adequately due to the scarcity of judicial direction on this matter. Therefore, my discussion

¹⁹⁰ *Supra.* n.125 at166

¹⁹¹ These clauses would include provisions for marketing celebrity T-shirts, coffee mugs, dolls etc.

¹⁹² The advent of online distribution has been discussed in chapter 1.

will be limited to observing industry practices, and the effect of statutory rights on these practices.

My discussion of this section will be divided into two categories: the control and exploitation of copyright and moral rights. The former has been mentioned in the decisions of the courts, whilst the latter is increasingly gaining interest in this country as a result of its membership of the European Union.¹⁹³

The control and exploitation of copyright

The copyright law of the UK confers copyright ownership of sound recordings on the party which produces the sound recording- the producer.¹⁹⁴ This provision has been interpreted to identify the producer as the party which not only makes the legal arrangements to produce the mastertape but ultimately the party which finances the enterprise.¹⁹⁵ Consequently in most circumstances the record company would ultimately own the copyright in the sound recording since it would be the party providing the finances in the form of advances to produce the mastertape.¹⁹⁶ However the consent of the performer is still required in order to produce and exploit the sound recordings and to a large extent this consent is implicit in the fact that the performer has signed an exclusive recording contract.¹⁹⁷ In circumstances where the artist acquires the *ab initio* statutory ownership of the copyright in the sound recording the record company includes assignment clauses in order to gain exclusive control over the exploitation of the work. For instance the following type of clause

¹⁹³ It is important to note that the major copyright legislation in the past two decades have arisen from this country's obligations under European Union law.

¹⁹⁴ Copyright Designs and Patents Act s 9(1)(a)(a).

¹⁹⁵ See further *A & M Records v. Video Collection* [1995] EMLR 25.

¹⁹⁶ Very few genres of 'popular' music can be produced on a limited budget without the financial assistance provided by a record company. Zomba Records suggest that even when it 'buys' a mastertape it usually contracts to retain the sound recording copyright for the entire statutory period. Sound recordings are considered an asset which may be exploited exclusively at any time during the copyright period.

¹⁹⁷ Copyright Designs and Patents Act 1988, s180 (1). Strictly speaking this right is neither a copyright nor a moral right but rather a performers right. In *Mad Hat v. Pulse 8 Records* [1993] EMLR 175, the court held that in entering the recording agreement the artist had given implicit consent to exploit the work. This implicit consent is subject to any express contract term to the contrary, see *Bassey v Icon supra*. n.185.

Copyright Designs and Patents Act 1988 ss182, 182A, and 182B deals with the performer's

is not uncommon in most recording agreements:

‘In consideration of The Assignment Fee and The Artiste’s Royalties The Artist assigns to the Record Company all present and future copyright and any other rights in all media whether in existence now or created in the future in The Sound Recordings made during the Term of the Agreement throughout The Territory for the full period of copyright and any extensions and renewals.’¹⁹⁸

This is an interesting clause for a number of reasons. Firstly it refers to future as yet unidentified copyrights which may be conferred onto the artist and thus attempts to cover many of the rights pertaining to online distribution of material which will be available when the Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society is brought into UK law.¹⁹⁹ The Musician’s Union suggests that since the consent of the performer is required for the exploitation of his/her performance and the consent of the composer is required for the exploitation of the musical score, the consent thus received should actually specify the format and medium for exploitation. They also advise that terms which suggest that unspecified references to other media and new rights conferred to the artists in the future should be treated with caution and be avoided altogether.²⁰⁰

However, according to the Musician’s Union, in most cases unestablished artists are compelled to ‘sign away’ their consents for all formats and media with such standard terms and this raises the interesting question whether the inclusion of such non-negotiable clauses which routinely require artists to relinquish or assign their future rights can be deemed fair or unfair. The courts have recognised the existence of these non-negotiable clauses but have not as yet attempted to provide a thorough conceptual analysis of their role within the recording or music publishing contract.

The above standard assignment clause raises another matter of interest because it is

respective rights with regard to the reproduction, copying and issuing of the work to the public.

¹⁹⁸ *Supra*. n. 187 at 26. This additional protection ensures that the copyright in all the sound recordings produced by the artist during the duration of the contract would be assigned to the record company, even if the production costs were not provided for by the record company. In such circumstances the law would require the record company to hold the ownership of the sound recording rights on trust for the party which provided the finances, see *supra* n. 195.

¹⁹⁹ *Supra*. n. 18 at arts 2 and 3. The directive should be implemented by the end of 2002.

attempting to make a clear conceptual link between the assignment of copyright and the royalties which are paid as consideration for this transfer of copyright. The particular nature of this relationship between copyright and royalties and its effect on the determination of substantive fairness has yet to be seriously analysed in the courts, and it is perhaps due to this lack of judicial direction that artists should pay particular attention to the standard clauses providing for the assignment of copyright and negotiate their royalty terms to reflect this currency of exchange. These conceptual matters are equally applicable to music publishing agreements, however it would appear that composers and songwriters in the UK have been far more successful, particularly in the past ten to fifteen years in securing comfortable rates of exchange between the assignment of copyright and royalty terms in their contracts.

Under UK law the copyright in the musical score will vest *ab initio* in the composer²⁰¹ and music publishers will insist that unestablished artists assign the copyright in all their works for the duration of the exclusivity agreement. In almost all cases, the duration of the assignment would continue long after the expiry of the contract period. For example, a large successful independent music publisher suggests that an assignment of ten to fifteen years duration, is more or less standard in its song writing agreements whilst an industry major considers an assignment period of between ten and twenty years as the standard in its exclusive song writing agreements, and consequently song writing agreements which attempt to secure the composer's copyright for the duration of the full statutory term must be considered with some caution as such terms appear to fall short of the common industry standard. Nevertheless, it must be recognised that such terms are not unknown in the industry; however, that is not to say that this practice is endorsed by industry bodies such as the Musician's Union.

I have already noted in an earlier section of this chapter that there is also a necessary

²⁰⁰ www.musiciansunion.co.uk

²⁰¹ Copyright Design Patents Act 1988 s11(1). This provision only affects exclusive service contractors and those employees who compose outside the terms of their employment, see Copyright Designs and Patents Act 1988 s11(2).

connection between release rights and the exploitation of copyright and some of the concerns which have been raised with regard to the assignment of copyright have been addressed to some extent by a number of the industry major record companies and music publishers. For instance, the standard recording agreement would include terms which allow the artist to purchase the copyright in the material which has not been released within a particular period specified in the agreement. An industry major music publisher may provide for the reversion, on notice, of non-exploited works to the songwriter. This right would arise two years after the expiry of the contract term. Repurchase and reversion rights are unlikely to be included in standard contracts offered by independent companies.

Earlier I mentioned that in practice, the copyright in released material usually reverts to the songwriter after a limited post contractual ‘rights period’ and often the rights in unpublished material can be usually re-acquired by the songwriter even before the expiry of the ‘rights period’.²⁰² However the re-acquisition of the control of copyrights in the context of recording contracts is not so straightforward. In general record companies prefer to retain unreleased material for two important reasons: (a) the works remain unreleased until actual release and this may only occur at an appropriate time in the marketing of the particular artist and the particular genre of music. Another factor in the release of material may be the release of material by ‘rival’ artists within the particular record company and within the record industry. In general the failure to release material or the retention of unreleased material may depend on the quality of the material, the favourable timing when releasing the artist and his/her genre of music, and on the record company’s ability to manipulate and control the market. Some large independent record companies claim that they often make provisions for the reversion of interest in copyright in material which has remained unreleased for lack of ‘marketable’ quality, to the performing artist and so it would appear that not all recording artists would be penalised if their material is not released.

²⁰² Most publishing contracts provide for terms which designate the procedure for a songwriter to reacquire the rights in unpublished material, even during the duration of the contract.

The foregoing discussion of copyright in the context of royalties as well as the repurchase and reversion of rights serves an important purpose because it emphasises the role of copyright as a valuable commercial asset which is produced by the contract, and this is perhaps a point which many artists are only lately beginning to understand. The exclusive right to exploit the copyright is not merely a matter of contractual control or freedom, rather it signifies the access to a profit producing commercial asset and any account of contractual fairness ought to take this into account and evaluate royalties in this manner.

In the *Schroeder* case Lord Reid considered the potential substantive unfairness which could arise from the ‘unreasonable’ behaviour of future third party assignees of the copyright in the material, and he thought that a specific ‘best faith’ clause would not be effective in such circumstances. For instance, third party assignees may refuse to adequately exploit the works. However, in the *George Michael* case it was held that the potential for unreasonable behaviour by third party assignees in not exploiting the works could not be determined merely from the fact that the works may be thus assigned. According to Parker J much depended on the commercial likelihood of assignment to such third parties in the first place and he considered the commercial possibility that Sony would assign the copyright in the sound recordings to third parties as remote. Indeed Parker J thought that the only instance in which Sony would have to assign its copyright in the sound recording would be if it were to become insolvent and this, he thought, was well nigh impossible.²⁰³ It seems extraordinary that Parker J did not envisage a ‘solvent’ Sony selling the material to another record company which is a common business practice in the industry.²⁰⁴ Furthermore, he thought that a failure to exploit the work even on such an assignment was, in itself, remote and commercially too fantastic an event to ever occur in practice.²⁰⁵

Therefore, the ‘fairness’ of including an ‘assignment’ term is arguable either way, and one may say that much depends on each individual case. The view of Parker J suggests that where ‘industry majors’ are concerned this issue is not relevant to the determination of

²⁰³ *Supra*. n. 133.

²⁰⁴ For instance EMI Records sold the Spice Girls back catalogue in 1999 for a reputed £2 million.

fairness in the agreement. Moreover, it must be remembered that unlike *Schroeder*, the *George Michael* case concerned a recording contract, where the sound recording copyright usually vests in the record company *ab initio*, and so as the original owners of the copyright it would not be unusual for Sony to deal with its property right as it saw fit.²⁰⁶ On this particular point Parker J did not address nor evaluate the fact that Michael was receiving a huge fee in advances, nor did he discuss the potential effect on his decision of the conceptual distinction between a composer and a performer which is sometimes made in the context of UK copyright law.²⁰⁷

Composers are perhaps better placed to directly benefit from their copyright interests in the work. Additionally cases such as *Schroeder* have also emphasised the connection between the earning capacity of composers and the exploitation of copyright in the work. Almost all composers earn the far greater part of their income from royalty payments and so the link between earnings and copyright control appears even more crucial in music publishing agreements.

The following observations may be made with regard to the assignment of copyright to third parties. In the context of recording agreements, particularly those with 'industry majors', it would seem highly unlikely that such terms would be considered as unfair. However, music publishing agreements especially those signed with small independent companies and for minimal levels of benefits, will have to be carefully scrutinised so that assignment terms are not exploitative. Careful consideration in this matter ought to be given particularly if the potential for artistic sterilisation appears sufficiently real, as it appeared to Lord Reid in *Schroeder*. For instance, a small independent company may be backed by non-musical financial backers to whom the copyright may be assigned on insolvency. Such a third

²⁰⁵ *Supra*. n. 133.

²⁰⁶ Indeed, Sony claimed the acquisition of copyright as a legitimate property interest and one which required protection under the law governing the restraint of trade.

²⁰⁷ See further *Hadley v. Kemp* [1999] EMLR 589, where the court held that the creative input from a performance must be sufficiently significant before the performer could be considered an author within the terms of the Copyright Designs and Patents Act 1988.

party may fail to commercially exploit the work for one reason or another.²⁰⁸ Indeed any third party could fail to exploit the copyright in the work, even for sound commercial reasons however the copyright remains a valuable commercial asset rather than a symbol of creative freedom. Despite, *Schroeder*, it would appear that such clauses are, more or less, standard and non negotiable within most music publishing and recording agreements and artists appear to accept this practice in their negotiations without question. The concern here is that they appear to be signing away valuable property assets without due regard to the nature of the consideration which they should be receiving in exchange for their significant contractual concession particularly in light of the ease with which these rights may be assigned to third parties.

Moral rights

Moral rights are conferred by statute to the original creator of the musical score: the composer. These rights cannot be assigned to the music publisher. In the UK, the creator of the work currently enjoys two moral rights; the right of paternity and the right of integrity.²⁰⁹ In almost all standard publishing agreements in the 'pop' music industry, composers are required to waive their moral right of integrity in the work during the period of the assignment of the copyright and publishers claim that such terms are included in order to ensure an unhindered exploitation of the material. The substantive fairness or unfairness of this standard waiver of a statutory right for composers is yet to be discussed by the UK courts.

The moral right in the score is a statutory right which is conferred on the author. The status of moral rights is not dissimilar to that of copyright because both rights are essentially rights pertaining to the economic control of the work. Therefore, authors should be able to bargain away their moral rights as well as their copyright in the work for profit. This choice should be available notwithstanding established industry practices and customs and consequently a strict waiver clause with regard to the author's moral rights could be seen as

²⁰⁸ Moreover, such third parties may actually insist that assignment clauses be included in the agreement.

unfair. There is some evidence that most unestablished songwriters in the 'pop' industry are 'encouraged' (if not compelled) to waive their moral rights during contractual negotiations.²¹⁰ If the waiver of moral rights were negotiable, at the least, then the issue may be less controversial. Moreover, this standard contractual waiver becomes particularly questionable when considering the assignment of rights to third parties. The relationship between the original contracting parties may be sufficiently co-operative to prevent an infringement of the otherwise assertable moral rights of the composer but an unknown third party may be less amenable to the wishes of the composer. However, the standard waiver of moral rights can be perhaps best seen as a commercial necessity rather than a curb on the artist's creative freedom because in practice the publisher's general desire to avoid bad publicity from disgruntled composers suggests that it is highly unlikely that the work would be exploited in a manner which is contrary to the wishes of the composer.

(c) Identifying and measuring fair remuneration

It is debatable whether contemporary courts in the UK would want to inquire into matters of royalty allocation. For example, in the *George Michael* case Parker J declined to investigate the royalty figures in Michael's 1988 recording contract on the grounds that the royalty structure was far too complex for legal evaluation. His position appears to underplay the significance of royalties as an integral feature of contractual remuneration particularly with regard to recording agreements. This view would not necessarily result in the exclusion of royalties in standard form recording agreements but it may well affect the status of royalties within the negotiating process. Downgrading the conceptual significance of royalties may particularly concern the more seasoned artist during the process of contractual renegotiations. For instance, during a 'routine' renegotiation a record company may be prepared to increase the level of advances per album, in order to gain more option periods,

²⁰⁹ Copyright Designs and Patents Act 1988 ss77 and 80.

²¹⁰ See Smith. M 'The George Michael case: a moral victory' [1992] *Ent.LR* 26.

rather than to increase the royalty rate.²¹¹ However, it would be in the interests of the renegotiating artist to maximise the fruits of his/her long term commercial success by negotiating for higher royalty figures rather than for greater but recoupable advances. In practice it would appear that only the industry 'superstar' is able to influence the distribution of remuneration between royalties and advances to any significant extent, and then only on rare occasions.

In many of the recent decisions the courts have appeared to determine fair remuneration only on the basis of advances. An underlying reason for this may have been because most of these cases primarily concerned recording agreements in which the copyright in the work(s) was owned *ab initio* by the record company. The artists concerned did not hold a copyright interest in the work. In these circumstances, George Michael's claim, for instance, for a 50% share of the profits from the exploitation of these rights was considered rather unsubstantial if not ridiculous. The lack of an *ab initio* copyright interest in the work(s) and the ensuing limitations which arise is probably the major issue which differentiates performers from composers. However, the fact remains that royalties still form a part of the remuneration which the performer may reasonably expect from the agreement. Moreover, it would appear that in some instances advances are being used to off set low non-negotiable royalty figures, and this practice is yet to be scrutinised by the courts as a measure of fairness. Consider for example, the distribution of advances and royalties in George Michael's 1988 recording agreement with CBS/Sony.²¹²

- The first album, 'Faith' was delivered on 1/2/88. The advances were paid under the conditions of the 1984 agreement. The royalty rate was set under the 1988 agreement at: 14% (UK): 13% (Major territories)²¹³: and 12% (rest of the world). All royalty figures

²¹¹ A 'routine' renegotiation refers to circumstances where the artist is nearing the end of his/her contract with the record company or music publisher.

²¹² These details were derived from a copy of George Michael's contract which was filed at the Supreme Court of Judicature (Chancery Chambers). *Supra*. n. 149.

²¹³ The 'major territories' included Germany, Austria, Switzerland, France, Italy, Japan, Australia, Canada and USA (including its territories and possessions)

were fixed at the royalty base rate.²¹⁴

- The second album ('Listen without prejudice) and the third album reportedly attracted up to an estimated £11 million²¹⁵ in advances in all, but the royalty rate was increased to 15%: 14%: and 13%. This royalty rate would be maintained in respect of the master recordings of the third, fourth and fifth albums. The advance levels for the fifth album was to range between £350,000 and £550,000.
- The three remaining albums would each enjoy advances levels ranging between £400,000 and £600,000. The royalty figures for the sixth, seventh and eighth albums would be 16%:15%: and 14%.

It is interesting to consider the extent to which this allocation of advances and the proportion of profits constitute a fair agreement. Michael's royalty figures continued to improve during the course of the agreement.²¹⁶ However, when we consider these figures (from his 1988 contract) to those currently offered in the standard agreements (at 16% -18% UK sales) for unestablished artists by industry majors and large independent record companies, the quality of Michael's remuneration may be seen in a clearer light. For instance, the contract appears to match the rise in royalty percentages throughout the increasing years of the contract, however it would appear that the royalty rate Michael would have received for the sixth, seventh and eighth albums (if the agreement had continued) would have been no better than the minimum standard royalty figures offered by large independent companies in the mid to late 1990s. Moreover, these royalty figures would have failed to meet today's standards even for unestablished artists.

The typical royalty rate, on the basis of the 'dealer' price', for a new artist in the UK is between 16% and 18%.²¹⁷ For example an internationally successful independent record

²¹⁴ The initial contract period consisted of the first three albums after which each successive option would consist of one album each: exercisable at Sony's discretion. The royalty rate was determined at the base price. I have discussed the two methods of determining royalties in chapter 2.

²¹⁵ The details are unclear whether the majority of these sums were the advances agreed to in the 1988 contract or whether it was subsequently advanced to Michael during the period in between the second and third albums.

²¹⁶ Although the royalty structure, it self, had not changed significantly from the 1984 agreement.

²¹⁷ *Supra.* n.42

company considered 16% as the standard figure in its contracts with new artists. In 1999 a standard contract with this rate eventually yielded approximately £1.20 per album after all the necessary deductions had been made. Publishers of 'popular' music accept royalty rates, ranging from 10% to 15% of the sales of sheet music and ranging from 70% to 80% from the income derived from the economic exploitation of the mechanical reproduction rights, public performance rights and synchronisation rights²¹⁸ in the work, as a contractual standard for new 'songwriters'.²¹⁹

Industry observers suggest that the industry standard rate is often considered as a good starting point from which negotiations could begin (if the parties are amenable to effective negotiations). However, negotiating tactics are bound to vary according to the status of the artist, the status of the record company or music publisher, the genre of 'pop' music etc..., but despite the many variables in these situations there are some issues which are more or less common to most negotiations. For instance, the following negotiating approach with regard to negotiations with established songwriters is not uncommon: the music publisher considers the artist's earnings over the previous five years; and from that position, his/her earning potential will be projected forwards five years into the future. On the basis of this assessment he/she would be offered terms of remuneration at 75% of this figure where mechanical reproduction rights are concerned. This would usually signify the opening position for the negotiation. The calculation of the royalty rates would then depend very much on the risk of market failure and the songwriter's ability to negotiate a favourable rate. For instance, it is not uncommon for songwriters to negotiate the mechanical reproduction rights royalty rates at 80% of the licensing fees, whereas 85% may sometimes be negotiated by an artist with strong prospects, however 90% is considered to be extremely rare.

Both in the context of copyright control and the allocation of royalties it would appear that the music industry treats songwriters differently to recording artists in terms of their

²¹⁸ Synchronisation rights pertain to the exploitation of the music in advertisements, television broadcasts etc...

²¹⁹ The Musicians Union (UK) considers this percentage as a recommendable minimum standard for their members. See *supra*. n.175.

contracts. Songwriters seem able to negotiate royalty and copyright acquisition terms with far more ease and freedom than do recording artists.

Recording companies consider advance payments as investments particularly where young unestablished artists are concerned. For instance development deals can be quite generous and highly beneficial in developing the talents of industry newcomers; they are also good examples of the level of investment made by record companies. In the year 2000 industry 'majors' were often spending up to £1,000,000 in advances for the recording costs of a few new bands, whilst large independent companies were expending no more than half this figure on similar artist.

The more 'artist friendly' recording and music publishing companies appear to favour a long term view of the career potential of their artists. For instance, an industry major recording company funds the singing lessons for one its recently signed artists, although she has yet to produce an album. Rhythm and Blues (R&B) 'acts' need time and substantial resources to test and develop their skills and require funding from long term development deals. Often new artists are encouraged to work with producers who are associated with the record company and sometimes, such relationships can prove particularly fruitful such as the association between Pete Waterman and Steps/Zomba Records (UK). Consequently, the record company is far more lenient in measuring the market success of these artists when deciding on the exercise of an option than with other types of popular musicians. Judging long term potential and investing accordingly is, of course, a matter of judgement; and no doubt artists do benefit from this investment.

Parker J, in the *George Michael* case suggested that remuneration in long term contracts could be justified by very large advance payments. This view considered the following facts: Michael was not contracting as a humble artist; his contract included 'guaranteed release' rights; and his advance payments, per album, were not particularly humble. His recording costs were not likely to exceed the handsome level of advance payments. However, the unestablished artist, who receives no more than sufficient advances for the production of the mastertape, would have to rely on decent royalty figures in order to

reap the professional rewards of a long term contract. Therefore, long term contracts may be justified by reference to 'professionally rewarding' levels of remuneration.

The *George Michael* case made a second significant point with regard to remuneration by marking a clear distinction between the humble unestablished artist and the successful artist. The position of the court suggests that where commercially successful artists are concerned, remuneration is not necessarily measured by the potential length of the contract. The commercially successful artist's bargaining power would enable him/her to negotiate favourable remuneration. The ability to choose between advances (current income) and royalties (future income) is yet an aspect of this bargaining power. On the other hand the *Holly Johnson* case suggests that the more humble unestablished artist does not enjoy any negotiating power and consequently, his/her remuneration is primarily determined against the potential length and severity of the contract. Therefore, caselaw suggests two independent means by which the courts will balance the issue of remuneration: (a) the length of severity of the periods of exclusivity and ; (b) the bargaining status of the artist. In either case, the courts are willing to offer no more than minimum protection to the artist.

Although the adequacy of the exchange is not formally questioned by the courts, there is no doubt that minimum standards of substantive fairness have been maintained by the courts, particularly when the artist is negotiating the contract without any significant measure of bargaining power and for a potentially lengthy period. Therefore, and to this extent, there is some inquiry into the fairness of the contractual exchange. In this sense, the courts have endorsed a 'minimum wage' policy where the contract is concluded by an unestablished artist. Judicial policy has thus interpreted long term contracts in terms of *quasi* employment obligations. Therefore, merely offering a recording contract in itself, with nothing substantially more, cannot amount to fair remuneration. Once a minimum threshold of remuneration has been met, either as future or present income or both, then the courts are unlikely to inquire into the adequacy of the remuneration.

The decision of the courts suggest that where more humble artists, such as Tony Macaulay and Holly Johnson are concerned, the contractual remuneration would have to

reflect the actual investment made in the artist for the duration of the restraint. It would appear that young artists and their advisors are becoming increasingly aware that these factors will be relevant when considering the fairness of their agreements with record companies or music publishers. For instance, quite recently an industry major record company offered an increasingly popular young band a recording agreement with the standard six option periods of one album each. The initial advance of £2500 was to be followed by advances of £500 for each subsequent album. According to industry experts, the royalty figures were also extremely poor and well below the basic levels recommended by the Musician's Union. The band sought advice from industry insiders and were duly advised to reject this offer.²²⁰ This type of contract contained all the standard terms pertaining to options, release rights and non-negotiable copyright which are generally extended to almost all categories of artists. It was however the level of advances which were offered in this particular contract that appears to distinguish the superstar from the industry novice. This conclusion suggests that in practice, the level of advances offered to the artist is not merely being measured against the duration of the contract, but rather determined on his/her market status.

IV (iv) Conclusion

Current industry practices suggest that the role of professional negotiators such as managers and lawyers is considered important in determining the fairness of the agreement. The industry has clearly recognised this aspect of procedural fairness, and the clauses relating to the artist's access to independent legal advice are more or less standard in current recording and music publishing agreements and this requirement presents a semblance of procedural fairness in the negotiating process. It would also appear that this aspect of procedural fairness has helped to raise general contracting standards within the industry at least to some extent.

Most contracts at the more modest end of the industry continue to remain standard

²²⁰ The band had apparently recently achieved a strong London 'fan' base and was steadily increasing its national (UK) profile.

and non-negotiable, whilst even more successful record companies and music publishers tend to appear inflexible with regard to particular terms such as copyright and royalties. Advance levels remain negotiable but much depends on the bargaining abilities and market status of the particular artist. However, a major concern with regard to the negotiation of advances is the fact that artists, particularly industry newcomers are lulled into treating advances in terms of income rather than part of the production costs. Consequently a fairly generous advance of £200,000 may be swallowed up in recording and production costs. This sort of problem would affect new as well as middle level artists. Therefore the income representation of advances may not always prove useful despite the inclusion of mini-max terms and minimum standards in remuneration.

Seemingly attractive rates of advances may very well be substantially absorbed in recording costs and may ultimately fail to provide a 'current' income for the artist. The non-negotiability of customarily poor royalty rates, and the fact that the royalties will not be paid until all the advances have been recouped may compound this problem. It is debateable whether the negotiating practices with regard to the payment of remuneration of recording artists, hinders or assists the artist's ability to maximise his/her trading capital.

This representation of advances diminishes their importance in a number of ways and suggests that artist ought to focus their negotiating priorities on fair royalty structures and copyright control. Where recording artists are concerned this negotiating posture would not be easy to achieve in practice. Music publishing agreements, by contrast, generally leave sufficient scope for negotiating both royalty and advance levels.

Chapter V

Exclusive multi-option recording and music publishing agreements in New York and California

V (i) Introduction

This chapter will attempt to survey the laws, with regard to fairness in exclusive recording and music publishing contracts, in New York and California. The decisions of the courts in New York and California, on contract law, influence each other as persuasive authority, however in my discussion below, I shall consider the respective laws of New York and California in two discrete sections. This is because the laws which directly concern some of the substantive terms in exclusive multi-option recording and music publishing contracts in California are primarily governed by statute. Consequently, particular socio-economic policies have strongly influenced the contracting process and the determination of contractual fairness in California. Nevertheless, there are aspects to my discussion which are common to both jurisdictions.

The courts in New York and California have often referred to related decisions concerning specialised professions and trades in other branches of the entertainment industry. Therefore, I shall refer, at least in passing, to some of the relevant caselaw from non-recording/music publishing contracts and from non-music industry sources as well. The importance of these cases illustrate not only the common references to substantive terms but also the common problems within the entertainment industry with regard to procedural fairness.

The issues of contractual freedom, inequality of negotiating power and

unconscionability underpin the contract laws of both jurisdictions.²²¹ The courts in both New York and California deal with the concept of fairness in a very technical sense. Procedural fairness and substantive fairness are defined within the general doctrine of unconscionability, as a contract in which the economically 'weaker' party has been compelled to accept contractual terms that are, in themselves, substantively disproportionate in terms of the contractual remuneration.²²²

The case which more or less defined the meaning of unconscionability in US contract law and which has been followed explicitly by the courts in both New York and California is *Williams v. Walker-Thomas Co.*²²³ In this case Skelly Wright J defined procedural fairness as the presence of meaningful choice; and substantive fairness as the absence of oppressive terms which unreasonably favour one party thus creating a gross substantive imbalance of contractual benefits and corresponding burdens. Therefore, the doctrine of unconscionability considers issues of both procedure and substance; and moreover, there appears to exist an intrinsic link between these two aspects of fairness.

I shall conclude my survey of the laws in New York and California by attempting to identify and distinguish specific principles, policies and terms which underpin the concept of fairness in exclusive multi-option recording and music publishing agreements in both jurisdictions.

V (ii) The law in New York

²²¹ The doctrine of unconscionability holds a special place in American jurisprudence. The 'doctrine of unconscionability' under the Uniform Commercial Code (UCC) art.2-302, has been enacted in the laws of both New York and California. Indeed, the latter has expressly enacted art.2-302 as a general contract law principle which would be applicable to all types of contracts. The Code was first created as a means to regulate interstate commerce in the sale of goods. However, one of its principal architects, Karl Llewellyn expressed a hope that art.2-302 would be generally applied to all areas of contract law, and the courts in New York and California have done so. See Slawson, W.D. *Binding Promises: the late twentieth century reformation of contract law* Princeton University Press (1996), at 135-144.

²²² In keeping with the previous chapters, I have assumed that the principles of fairness and unconscionability refer to one and the same concept.

²²³ 350 F 2d 445 (D.C. Cir. 1965). W. David Slawson notes this decision as the first 'to explicitly declare unconscionability to be part of the common law of contract, and virtually every jurisdiction [in

(a) *M. Witmark v. Peters* and its progeny²²⁴

The first reported decision concerning the fairness of an exclusive music publishing contract arose long before *Williams v. Walker-Thomas Co.*, and indeed before the drafting of the Uniform Commercial Code. The case of *M. Witmark v. Peters et al.* arose during the early years of the twentieth century in the aftermath of the *Lochner* decision and for this fact alone its outcome is noteworthy.²²⁵ However, the importance of *Witmark* in the context of exclusive agreements in the music industry should not be underestimated. Because it has enunciated, albeit mildly, some of the principal judicial concerns with regard to such contracts.

In December 1911, William F Peters, a composer, signed a music publishing agreement with M. Witmark & Sons, a New York music publishing company. The five year exclusive agreement required Peters to assign the copyright in all his compositions for the entire period conferred by statute.²²⁶ Therefore, the copyrights were to be transferred to Witmark as absolute property. The assignment clause in the contract pertained to Peters' solo compositions, joint-compositions; and 'the titles, words and music'. Moreover, this assignment clause would be also applied to the copyright in any music which may have been acquired by Peters during the five year duration of the contract. The contract specifically included the assignment of the mechanical copyright in the works as well.²²⁷ The contract

the US] has followed it in this respect', see *supra* n.221 at 140-141.

²²⁴ *M. Witmark & Sons v. Peters* 149 N.Y.S.642 (N.Y. Sup Ct 1914). The judgement of the Supreme Court of New York, Appellate Division, First Department, was delivered on November 6th 1914.

²²⁵ *Lochner v. New York* 198 U.S. 45 (1905). The US Supreme Court declared as unconstitutional, a New York state statute which restricted the working hours of bakery employees to a maximum of ten hours per day, and a maximum of sixty hours per week. This statute was held as unconstitutional because it 'interfered' with the freedom of contract between employer and employee. The US Supreme Court based this influential judgement on classical contract law theory.

²²⁶ During this time US copyright law entitled the copyright holder to a twenty eight year period of exclusive use which could have been renewed for a further twenty eight year period.

²²⁷ This was an era in which the mechanical reproduction rights were yet to gain sufficient significance as recording technology was still in its infancy. Consequently, the customary industry usage of the term 'copyright' may not have covered mechanical reproduction rights as well. Nevertheless, the specific inclusion of the rights suggests a recognition of the new media and its potential importance.

required Peters to deliver no less than six compositions a year.²²⁸ Under the terms of the contract, Witmark was required to publish no less than three compositions a year, however it was 'not bound to publish them in the year in which they were submitted'.²²⁹ The contract also included a negative covenant which prohibited Peters from entering into a similar contract with third parties during the duration of the agreement with Witmark.

The facts do not mention the payment of any advances to Peters under the contract. Therefore, it would appear that his only contractual benefits were in fact derived from the payment of royalties from the exploitation of his works. If Witmark failed to exploit his works he would be denied his contractual benefits.

During the first year of the contract Peters presented three compositions for publication. However, none of these works were published. The five compositions which were submitted in the subsequent year were in fact all published in that second year, between the 9th December 1912 and 9th June 1913. Nevertheless, on the 5th June 1913 Peters signed a music publishing agreement with another company Harms & Francis, Day & Hunter, and thereafter delivered to them the musical score for a musical comedy entitled 'Iole'. Three 'numbers' from 'Iole' were subsequently published by Harms & Francis, Day & Hunter.

Witmark brought an action, against Peters, for breach of contract and it also attempted to enforce the negative covenant clause in the contract by seeking an injunction which would have forced Peters to remain with Witmark for the duration of the contract.²³⁰ The New York County Court decided in favour of Witmark and granted the injunction sought. The defendants (Peters, and Harms & Francis, Day & Hunter) appealed to the United States District Court of New York on the basis that the 1911 contract was inequitable.

Dowling J, with whom the other judges of the appellate court concurred, determined

²²⁸ *Supra*. n.224, 643. 'Complete works such as comic operas, musical comedies, or groups of numbers or cycles were to be considered as single compositions'.

²²⁹ *Ibid.* at 642.

²³⁰ Witmark was seeking both injunctive and mandatory relief. In seeking an equitable relief rather than damages Witmark would have retained the services of Peters for the remaining years of the contract and would have thus required Harms & Francis, Day & Hunter to reassign the copyright in the music from 'Iole'. If Peters' music had begun to attract commercial success this remedy would have appeared preferable to an action for damages.

the enforceability of the contract on a strict application of equitable principles and this was the underlying basis on which he then proceeded to analyse the particular terms of the contract.

The contract did not include any express obligations on Witmark's part for the commercial exploitation of the compositions. Dowling J considered this fact as an important contractual omission. Having determined this primary failure, he held that the agreement failed to state specific details regarding the commercial exploitation of the work. Such specific terms would include the setting of a minimum or fixed number of copies for commercial distribution. Dowling J considered this failure to set specific obligations for exploitation of works as inequitable in itself. This view is linked to his position with regard to exclusivity.

Dowling J considered the potential consequences which could arise when the five year period of exclusivity was coupled with the assignment to Witmark of the exclusive copyright in the works. Under the terms of the contract, Witmark gained absolute control of all compositions composed during the duration of the contract whilst its limited obligation to publish the compositions controlled Peters' earning capacity for five years. Moreover, Dowling J considered the contractual benefits received by Peters as 'palpably disproportionate' to those gained by Witmark:

'It [Witmark] could literally comply with the terms of the agreement by publishing five or ten copies of each of the three compositions which it finally selected in each year, and thus make it master of the entire productive capacity of Peters for five years, preventing him from finding a market for his efforts elsewhere, and at the same time paying a royalty rate ridiculously small and entirely inadequate for the services which he was required for them.'²³¹

A potential for abuse could arise from the detrimental exercise of this level of economic control by Witmark, for which Peters was not sufficiently compensated. This combination of a disproportionate exchange of benefits coupled with complete economic control of Peter's professional capacity over a lengthy period produced an inequitable contract. Dowling J held

²³¹ *Ibid.* at 644

that equity would not ‘interfere to enforce such an inequitable and improvident agreement’.²³² The judgement of the County Court was reversed and Witmark was left to a remedy in law rather than in equity.²³³

The limited scope of equity in *Witmark v. Peters* must now be considered in the light of *Williams v. Walker-Thomas Co* and the recognition of the doctrine of unconscionability within the common law of contract.²³⁴ An expansive interpretation of the *Witmark* case suggests that substantive contractual fairness would be determined according to the ‘mutuality’ of benefits and burdens within the contract. A more specific reading of the case presents the following inter-related judicial concerns with regard to exclusive music industry agreements: the nature of control and obligations with regard to the exploitation of the work (the property value of copyright); the length of the contract particularly with regard to the artist’s capacity to earn in such circumstances; and the economic impact of the terms on the weaker party.

These three specific factors were particularly important when considering the fact that the artist’s only source of contractual benefits, over a lengthy period of time, could have been severely curtailed by the stronger party without adequate compensation. This was not merely a matter of professional freedom but also of adequate compensation in exchange for obtaining control over that professional freedom: a ‘mutuality’ of benefits and burdens. Acquiring control over copyright and personal service for any period of time required commensurate remuneration (compensation and payment). Therefore, it is this concept of fairness which appears to have been the principal concern of the court in *Witmark*.²³⁵

In *Witmark*, the court considered the combination of a lack of an obligation to exploit

²³² *Ibid.* at 644

²³³ By not granting an injunction and thus enforcing specific performance, the court was, in theory, upholding the long term professional freedom of the artist. A remedy in law, i.e. damages, would allow Peters to ‘buy’ his freedom. In this sense *Witmark* can be reconciled with the classical contract theory expounded in *Lochner*.

²³⁴ *Supra* n.223.

²³⁵ There is a more recent case from Illinois, *Bonner v. Westbound Records Inc.* 76 Ill.App.3d 736, 394 N.E. 2d 1303, which considered the issues involved in determining the fair exchange of contractual benefits between the parties. The court suggested that the lack of reciprocal release rights could be offset by a lavish sum in advances, as compensation. In this case the record company paid advances to the band as a ‘sign-up’ fee, for the payment of income tax, to settle litigation with their former record

the works as well as the artist's sole economic dependency on the payment of royalties over a long period as circumstances of contractual inequity. This case is significant because it sets out to identify the relevant terms, underlying legal principles and conceptual arguments which the courts would have to examine in order to determine fairness in exclusive music industry contracts. The following discussion will consider the development and expansion of these judicial concerns with regard to determining fair terms and practices in exclusive music industry agreements since *Witmark*.

(b) Obligations to exploit the work

In *Witmark*, the court accepted the industry practice in which copyright in the work(s) is assigned to the music publisher or record company as an undeniable fact of commerce. By assigning his/her copyright the artist would, in effect, thus delegate his/her future ability to commercially exploit the work. Moreover, this situation could place the artist at the economic mercy of the music publisher or record company if he/she did not receive fair remuneration as well. In such circumstances, it would be fair and equitable to imply a positive obligation to exploit the work. The court in *Witmark* did not consider further, the more specific and implicit obligations for the exploitation of the work, however, subsequent caselaw has attempted to elucidate this point.

In 1917, the landmark case of *Wood v. Lucy Duff-Gordon* made implicit a common law standard of 'reasonable efforts' in the performance of any contract in New York law.²³⁶ Moreover, Cardozo J held that in certain circumstances a 'best efforts' obligation would also be implicit within the contract and that its application would depend very much on whether the remuneration due to the party restrained by the exclusive tie was to be derived from the performance of the obligation to exploit the work. The judgement of Cardozo J suggests that a 'best efforts' obligation will only exist when the benefit of the contract arises from the exploitation of the work, and in fact this duty would then carry with it a positive obligation to

company and also for the recording costs.

²³⁶ 222 N.Y.88 (N.Y.1917).

exploit the work.

The nature of the obligation to exploit the work has been developed into categories of positive (best efforts) and discretionary (reasonable efforts) duties. The two following cases have attempted to identify and develop the differences between the obligations for best efforts and reasonable efforts in the exploitation of copyright.

*Contemporary Mission, Inc. v. Famous Music Corporation*²³⁷ concerned the two contracts which were signed between Contemporary Mission, Inc. and Famous Music Corporation in 1972 and 1973.²³⁸ The first contract, the 'VIRGIN' recording agreement of 1972, required Contemporary Mission, Inc. to deliver a mastertape of 'VIRGIN', a rock opera.²³⁹ Famous Music gained the exclusive copyright to distribute and market the records produced from this mastertape; and therefore, the discretion to control the exploitation of the work. However the contract expressly included specific obligations, on the part of Famous Music with regard to the marketing and exploitation of the work. These obligations included: (1) the appointment of a promoter, within the period of a year of the agreement, to personally supervise the national sales promotion;²⁴⁰ (2) the expenditure of a minimum of \$50,000 on the promotion of the records; (3) the 'release, within the first two years of the agreement, of at least four separate single records from 'VIRGIN'.²⁴¹ The contract also included a 'non-assignability' term which severely restricted Famous Music's ability to assign its rights and obligations under the contract to third parties. The only contractual remuneration obtained by Contemporary Mission under the terms of this contract was the payment of royalties.

The second exclusive contract, the so-called 'Crunch' agreement of 1973, 'dealt with musical compositions other than VIRGIN'. The contract provided for a specified number of

²³⁷ 557 F.2d 918 (1977)

²³⁸ Contemporary Mission, Inc. was a non-profit making charitable corporation which was 'composed of a small group of Roman Catholic priests who write, produce and publish musical compositions and recordings'. The Famous Music Corporation is an established music business which produces music for nation-wide (USA) distribution. At the time of the contracts the president of Famous Music was Tony Martell who was credited by the industry for the highly successful marketing of the Andrew Lloyd Webber/Tim Rice rock opera 'Jesus Christ Superstar'.

²³⁹ The work was written by a member of Contemporary Mission, Father John O'Reilly.

²⁴⁰ Under the terms of the contract, the promoter was 'to maintain contact with Contemporary Mission and to submit weekly reports to contemporary'[Mission].

²⁴¹ *Supra* n. 237 at 921

delivery obligations for Contemporary Mission. The contract did not express any particular promotional obligations on the part of Famous Music. However, 'Famous undertook to use its reasonable efforts to promote and distribute the records.'²⁴² The case report suggests that the contract did not provide for the payment of advances. Therefore, the only contractual benefits for Contemporary Mission was to be derived from the royalties earned from the exploitation of the work.²⁴³

The high expectations for commercial success failed to materialise. A series of events, which included the assignment of the contracts to a third party (ABC Inc.), culminated in the lawsuit which Contemporary Mission brought against Famous Music. It claimed, *inter alia*, that Famous Music had breached the terms of the contracts by failing to promote; (i) the 'VIRGIN' rock opera, prior to the assignment to ABC Inc and (ii) the 'Crunch' recordings at all times. Famous Music denied these claims.

These claims were considered at a first instance jury trial and the decision of the court was upheld on appeal, by the Circuit Court. With regard to claim (i) the courts held that the explicit 'reasonable efforts' obligation extended a party's duty beyond the 'technical compliance' with an express contractual duty. Famous Music had followed its express promotional duties under the 'VIRGIN' contract, prior to the assignment to ABC Inc., but had nevertheless, 'prematurely terminated the promotion of the first single' under the contract 'shortly after its release'. Famous Music had also reduced its promotional staff for budgetary reasons and this was also considered a relevant factor in the determination of the adequacy of its promotional efforts. These factors were considered by Meskell J in the Circuit Court

'in light of Martell's [the president of Famous Music Inc.] obvious commitment to the success of VIRGIN and in the light of the efforts that were in fact exerted and the lack of any serious dispute between the parties prior to the sale to ABC'.

Nevertheless, there were specific duties which Famous Music Inc. failed to perform as

²⁴² *Ibid.* at 921. You will recall that *Wood v. Lucy Duff-Gordon* stated a specific common law duty of 'reasonable' efforts. See *supra* n.236.

expressed in the contract. Therefore, despite the evidence of ‘good faith’ in the relationship between the parties, ‘reasonable efforts’ had not been used to exploit the rock opera ‘VIRGIN’.²⁴⁴

With regard to claim (ii), the courts held that Famous Music had used ‘its reasonable efforts consistent with the exercise of sound business judgement’ to promote the recordings which were delivered under the terms of the ‘Crunch’ agreement. Therefore, ‘sound business judgement’ determined the ‘reasonable efforts’ duty which was implicit in the contract. However, it was held that the assignment of the contract involved a delegation of duties.²⁴⁵ Consequently, Famous Music remained under an obligation to ensure that ABC Inc. performed the ‘reasonable efforts’ duties under the terms of the ‘Crunch’ contract. Therefore, the duty to use ‘reasonable efforts’ to promote the recordings remained with Famous Music after the assignment to ABC Inc. The breach of contractual duty occurred because there had been a complete failure to promote the music and therefore a breach of this duty.²⁴⁶

The case proposes two important points with regard to the interpretation of the obligations to exploit copyright. The implicit common law duty of ‘reasonable efforts’ will be judged on the basis of ‘sound business judgement’. This suggests that a lack of bad faith in the performance of the contract would be sufficient to satisfy this fundamental contractual duty. On this point *Contemporary* narrows the wide interpretation of exploitation obligations suggested in *Witmark*. However, when specific duties have been expressed in the contract then such obligations will extend beyond mere ‘technical compliance’ with the contractual terms. Therefore, expressly specified contractual obligations for expending reasonable efforts in the exploitation of the work(s) will attract a positive, rather than a discretionary, duty of performance. It would appear that such a duty is akin to the ‘best efforts’ duty which was

²⁴³ In this contract the ‘non-assignability’ clause was directed at Contemporary Music.

²⁴⁴ *Supra*. n. 237 at 24.

²⁴⁵ The assignment term in the ‘Crunch’ contract was considered bilateral. Consequently the party which assigned the duties remained liable for the performance of those duties. This was a general rule of contract law. *Ibid.* at 918.

²⁴⁶ Indeed Contemporary Mission was informed by ABC Inc. that ‘ABC was not going to have any relationship with Contemporary’.

expressed in *Wood v. Lucy Duff-Gordon*.²⁴⁷

Contemporary suggests a shift in judicial priorities with regard to determining fair obligations for exploiting the work. The emphasis appears to have shifted towards the determination of contractual obligations in terms of express contractual duties and implicit duties in accordance with 'sound business judgement'. This interpretation of contractual duties departs somewhat from that in *Witmark* which was more concerned with the effect of the obligation on the party providing the copyright work for exploitation. The following case attempts to reconcile both positions.

Mellencamp v. Riva Music concerned the popular singer/songwriter John Cougar Mellencamp and the various music publishing contracts which he had signed with a group of affiliated companies.²⁴⁸ These companies were represented by Riva Music Ltd.²⁴⁹ In all, four contracts were concluded between 1977 and 1985. Under the terms of the contracts, Mellencamp assigned the exclusive copyright in his music to 'Riva' and in exchange, he received a fee for the transfer of copyright as well as a share of the royalties from the exploitation of his works. Although the parties described the relationship as a personal service contract the court deemed the agreement as a 'sale' of copyrights in the music. Therefore it would appear that Mellencamp's contractual benefit was to be derived from the payment for the acquisition of the copyrights as well as the profits generated from the exploitation of his music.

Soon after the conclusion of the final contract, a dispute arose between the parties. Consequently, Mellencamp brought an action against the 'Riva' companies. Amongst the many claims made by Mellencamp, the most pertinent were the following: 1) that the 'Riva' companies had failed 'to actively promote' Mellencamp's songs. Mellencamp claimed this duty was implicit in a composer/music publisher relationship; and 2) that the composer/publisher relationship was a fiduciary relationship. Moreover, he claimed that the terms of the various publishing agreements had placed the 'Riva' companies in a fiduciary

²⁴⁷ *Supra.* n.236

²⁴⁸ 698 FSupp. 1154 (S.D.N.Y.. 1988)

position with regard to Mellencamp's interests, and those fiduciary duties had been breached.

The defendant companies argued that the implicit duties of the contract were not in fact breached, and as a matter of law, a publisher did not owe an author any fiduciary duties under a publishing agreement.

In the US District Court, Conboy J held that there was an implied covenant of good faith and fair dealing in all contracts under New York law. This obligation 'precluded a party from engaging in conduct that will deprive the other contracting party of his benefits under their agreement.'²⁵⁰ Moreover, he continued that

'When the essence of a contract is the assignment or the grant of an exclusive license in exchange for a share of the assignee's profits in exploiting the license, these principles imply an obligation on the part of the assignee to make reasonable efforts to exploit the license.'²⁵¹

Therefore, with regard to the first claim, Conboy J held that the implicit duties of good faith, fair dealing and to use reasonable efforts to exploit the work could not be extended to simply requiring Riva to actively promote Mellencamp's music. The practical application of the implicit reasonable efforts duty was discerned from the essence of the contract. Mellencamp had been paid for 'selling' his copyright to Riva and the latter was not under a fundamental duty to exploit the works in these circumstances because Mellencamp had already received his contractual benefit which was the payment of the sale price. Mellencamp's contractual benefit was not dependent on the receipt of royalties. In these circumstances reasonable efforts did not require Riva to exploit the copyright in the works.

This part of the judgement suggests two important points: (a) that the principle of good faith and fair dealing will prevent those who rely on their share of the royalties, as the only form of contractual reward, from being deprived of this benefit. In such circumstances, a positive obligation to exploit the work could be thus implied; and yet (b) that there is not an implicit contractual duty on music publishers to actively exploit the works of composers.²⁵²

²⁴⁹ In the interests of clarity and brevity I shall refer to the defendants as 'Riva'.

²⁵⁰ *Supra*. n. 248 at 1157.

²⁵¹ *Ibid.* at 1157.

²⁵² In *Dell Publishing Co. v. Whedon* 577 F.Supp.1459 (S.D.N.Y. 1984), a case concerning an author-publisher contract the court held that 'good faith' would be implied into the publisher's duty 'to

Therefore, obligations to actively exploit the works must be expressly stated in the contract. In common circumstances where standard form contracts are used, such obligations may not be easily negotiated by the artist, however if the obligation to exploit the work lies at the heart of the contract as a source of the only viable contractual benefit for the artist, then as point (a) suggests a positive duty to exploit the copyright would be implicit within the contract. Therefore a positive duty to exploit the copyright would depend very much on the identification and measurement of benefits under the terms of the contract. In this sense it is perhaps apt to consider benefits in terms of contractual remuneration.

Conboy J held that Mellencamp's claim was based on the 'professional relationship between the parties', rather than on the existence of 'any specific conduct or circumstances' in which a fiduciary relationship was present.²⁵³ He supported this position by reiterating the view in *Land v. Mercury Records* that 'a royalty or a percentage arrangement would not in itself establish a fiduciary relationship' between the parties.²⁵⁴ Therefore, the songwriter/music publisher relationship between the parties did not, in itself, give rise, under the covenant of good faith and fair dealing, to an implicit duty (imposed upon Riva) to actively promote Mellencamp's music as a fiduciary.²⁵⁵

Conboy J limited the implicit duty to exploit the works to the identification and measurement of contractual remuneration (benefit) and this duty was a purely contractual

prepare the work for exploitation', i.e. by providing editorial assistance for revision. This duty arose, not only as a result of the circumstances surrounding the case but also in accordance with standard industry customs. Furthermore, in *Doubleday & Co Inc. v. Tony Curtis*, 763 F.2d 495 (2nd Cir. 1985) it was held that this 'good faith' duty extended to all stages of the creative process. Nevertheless, this duty did not bind the publisher to exploit the work after the author had rejected the publisher's editorial assistance.

In *Bonner v. Westbound*, the judgement of the court suggests that whilst a contract need not include an express obligation for the exploitation of the copyright, an implicit 'good faith' duty would, in most cases, achieve the same result. *Supra*.n.235.

²⁵³ Furthermore, Conboy J was quite clear that 'a publisher's obligation to promote an author's work is one founded on contract rather than on trust principles'. He thought that in general 'the express and implied obligations assumed by a publisher in an exclusive licensing contract are not, as a matter of law fiduciary.' The court did not accept Mellencamp's claim that the fairly long and involved contractual relationship with Riva gave rise to a positive duty to actively promote his works.

²⁵⁴ 252 N.Y.S.2d 1011 (1st Dep't 1964).

²⁵⁵ The judge also rejected the earlier decision of *Cortner v. Israel*, 732 F.2d 267, 271 (2d. Cir.1984) in which the court suggested that 'when a composer assigns a copyright title to a publisher for the payment of royalties, an equitable trust relationship is established between the two parties which gives the composer the standing to sue for infringement of the copyright.'

duty. In this case Mellencamp had received remuneration for the 'sale' of the copyright. He had not been deprived of his contractual benefit and consequently there was no obligation to exploit the works. His claims were dismissed.

The lineage of caselaw from *Witmark* to *Mellencamp* represents the gradual shift in judicial concern with regard to the exploitation of the work in the interpretation of contractual fairness. This change of emphasis has occurred both generally and specifically. The earlier caselaw is concerned with the exploitation of the work as the only source of contractual benefits for the artist. In such circumstances the courts have found an implied duty to exploit the work. However, the *Contemporary* case clearly states that there is not an implied positive duty to exploit the work, if sound business judgement suggests otherwise; and this would be so despite the potential economic effect on the artist of non-exploitation of copyright.

Mellencamp modifies this position by suggesting that in circumstances where the contractual benefit would be otherwise denied, there would be a positive implicit duty to exploit the work.

Therefore, the current legal position appears to be that positive obligations to exploit the work must be expressly stated in the contract as mandatory or must accord with sound business judgement or must lie at the heart of the contractual benefit, and these are ultimately matters of substantive fairness. The concern for the artist's professional freedom to earn from his/her works finally rests with the substantive fairness of contractual remuneration. The substantive fairness of a contract is principally measured in terms of remuneration. The following case, *Croce v. Kurnit*, considers issues of remuneration (substance) as well as the procedural rationale which underpins any substantive inquiry into the fairness of contractual terms.²⁵⁶

(c) Procedure and substance

Jim Croce was a singer-songwriter and guitarist who briefly enjoyed 'pop' music stardom in the US from 1971 until his early death in an air crash in September 1973. He had

begun his musical career in the early 1960s and by 1968 had attracted the interest of his 'college' friend Tommy West, who had already begun to build a career in the 'pop' music industry. During this time, West and his associates Phillip Kurnit, Terry Cashman and Eugene Pistilli were in the process of establishing a music business in New York. Both West and Kurnit were officers of the companies within the enterprise, which included a music publishing/management company Blendingwell Music Inc., and CP &W, a record company.

In the summer of 1968, Jim Croce and his wife Ingrid travelled to New York from Pennsylvania and stayed with West. The Croces and West discussed the possibility of CP &W producing a record by Jim Croce. During this visit Kurnit was introduced to the Croces by West as 'the lawyer'. A 'contract' was discussed in outline before the Croces returned to Pennsylvania.

The Croces revisited New York on the 17th September 1968 and stayed with West once again. During a two to three hour meeting, Kurnit outlined the contract terms to them.²⁵⁷ Jim Croce was not represented by a lawyer during these negotiations and neither was he advised by Kurnit to seek independent legal advice. Moreover, Kurnit admitted that there had not been any real negotiation of the three contracts which Jim Croce duly signed on 17th September 1968.²⁵⁸ The three exclusive contracts consisted of a recording agreement with CP &W, a publishing contract with Blendingwell and a personal management contract with Blendingwell. Kurnit signed the contract on behalf of the two corporations.

Under the terms of the contracts Jim Croce received an annual retainer fee of approximately \$600 and he was also entitled to certain royalty payments. The maximum duration of the respective contracts was seven years each. The discretion to exercise the option periods was left solely to CP &W and Blendingwell. The terms required Croce to grant all copyrights in his musical performances and compositions to CP &W and

²⁵⁶ *Croce v. Kurnit* 565 F. Supp.884 (1982).

²⁵⁷ West claimed that the parties had already considered the contract in depth during the first meeting in the summer. However, this claim was vehemently denied by Mrs Croce during the trial. In any event, the court concluded that the only 'meaningful review of contracts' occurred on the 17th of September 1968.

²⁵⁸ There was apparently only a minor amendment to the proposed contract.

Blendingwell respectively. The latter also held the right to assign the management agreement, which it duly exercised two years later.²⁵⁹

The contracts were duly performed and after some initial difficulties in the first few years, Croce's career began to progress quite rapidly until his untimely death in September 1973.²⁶⁰ Mrs Croce filed the action on 21st July 1978 against Kurnit, Cashman and West on the general grounds of breach of a fiduciary duty and the unconscionability of the contracts. After some delay the case reached the District Court of New York in 1982.

Mrs Croce claimed that: (1) the duration term and the royalty percentage figures in the contract as well as the lack of provisions for the reassignment of the copyrights were substantially unfair; (2) the assignment clause in the management contract could lead to potential abuse by future assignees; (3) the interrelationship between the three contracts and the various, often conflicting interests involved within the agreements were also a cause for concern; and moreover, (4) the unfavourable substantive terms, i.e. arguments (1) and (2) above, may have been avoided during the negotiations of September 1968 if Jim Croce had had access to appropriate legal representation.

In the US District Court, Sweet J described an unconscionable contract as one which

‘affronts the sense of decency and usually involves gross one-sidedness, lack of meaningful choice and susceptible clientele. A claim of unconscionability requires some showing of an absence of meaningful choice on the part of the parties together with contract terms which are unreasonably favorable to the other party’.²⁶¹

Sweet J then set the following policy background against which to determine the potential unconscionability of Croce's contracts: "Whether a contract or any clause of the contract is unconscionable is a matter for the court to decide against the contract's

²⁵⁹ In 1970 the management contract was assigned to Showcase Management. CP &W had an interest in this company. The recording agreement had already been assigned in 1969 to Interrobang Productions Inc. subsequently, Cashwest Productions Inc. became the successor in interest to Interrobang productions Inc. Kurnit and West were officers in Cashwest Production Inc.

²⁶⁰ There is much discussion in the case concerning the relationship between the parties, during the contracts but I shall not consider it here.

²⁶¹ *Supra*.n.256 at 892.

commercial setting, purpose and effect.”²⁶² The commercial background to which he referred was an industry where ‘the returns on a successful record are unbelievably high, the risk of initial failure is also high’.²⁶³ However, he thought that Croce’s career was ‘not atypical, representing as it does, initially a famine, and ultimately a feast,’²⁶⁴ indeed he held that ‘judgement, taste, skill and luck far outweigh the time spent or the capital spent or capital expended on any particular recording.’²⁶⁵ Nevertheless he accepted the music industry claim regarding market losses and therefore the fairness of all agreements had to be judged against it. Consequently the contracts were not considered unfair or unconscionable though they did favour the defendants.²⁶⁶ This was because the terms did not ‘shock the conscience or differed so grossly from industry norms as to be unconscionable by their terms’. Industry norms were accepted as the standard for fairness.

With regard to claim (1), Sweet J held that the specific terms concerning the royalty rates, duration etc. were similar to those commonly found in standard form contracts produced by ‘various organizations involved in the entertainment industry’,²⁶⁷ and he then suggested that such agreements included many industry specific terms which were ‘customarily the subject of hard bargaining in the event that the artist and the producer have both established economic power’.²⁶⁸

Although there had not been any significant bargaining on the contracts, the circumstances in which the contracts were negotiated lacked ‘the elements of haste and high pressure tactics’²⁶⁹ and consequently Croce did not suffer from any form of bargaining disability during the negotiations of the contract. Moreover, despite the lack of any

²⁶² *Ibid.* at 893. The court quoted from *Wilson Trading v. David Ferguson* 297 N.Y.S.2d 108, 112 (1968).

²⁶³ *Ibid.* at 889. I have already explained that my research suggests that the risk of market failure is far lower than is commonly believed. This is because business practices in the music industry are usually far more conservative than is generally assumed.

²⁶⁴ *Ibid.* 889

²⁶⁵ *Ibid.* 889. The facts suggest that Jim Croce has already developed his own unique musical style before approaching the defendants, see *ibid.* at 887.

²⁶⁶ *Ibid.* at 893. The facts state that, between 1968 and 30th September 1982, the defendants received a profit of approximately \$6.9 million as a result of the three contracts with Croce.

²⁶⁷ *Ibid.* at 888.

²⁶⁸ *Ibid.* at 888.

²⁶⁹ *Ibid.* at 893.

meaningful negotiation the contracts were not considered unconscionable, and although the court recognised the complex nature of the terms it was deemed that they were not constructed in order to confuse Jim Croce.²⁷⁰

These were hard bargains which were negotiated with a party which lacked negotiating power however that fact in itself could not amount to an unconscionable contract. A hard bargain required evidence of substantive unfairness: Croce in fact benefited from the substantial monetary rewards of his contract. Furthermore, the contracts were not offered with 'haste and high pressure tactics' and therefore were not procedural unfair.

With regard to claims (2) and (3) the court acknowledged the inherent conflict of interests which could arise when one party assumes control of more than one contract. However, Sweet J held that each contract had to be considered according to individual circumstances. For instance with regard to Croce's management contract he thought that whilst Jim Croce's career advanced, so did his dependency on his manager. However, this particular situation did not infringe upon the 'mutuality of their interests'.²⁷¹ Consequently, the fact that Jim Croce had signed multiple contracts was not, 'in and of itself, determinative of the issues of unfairness and unconscionability.'²⁷² Therefore, according to Sweet J multiple agreements in themselves, did not raise issues of procedural fairness, i.e. 'haste and high pressure tactics'.

Argument (4) was a specific claim, against West, Cashman and Kurnit, for the breach of a fiduciary duty. Sweet J defined a fiduciary duty thus:

'A fiduciary relationship is bound by a standard of fairness, good faith and loyalty.'²⁷³ '... Broadly stated, a fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It is said that the relationship exists in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The rule embraces both technical fiduciary relations

²⁷⁰ There was no evidence of fraud.

²⁷¹ *Supra.* n.256 at 893

²⁷² *Ibid.* at 893.

²⁷³ *Ibid.* at 892. The court was referring to *Newburger, Loeb & Co v. Gross*, 563 F.2d 1057, 1078 (2d Cir.1977).

and those informal relations which exist whenever one man trusts in, and relies upon another.²⁷⁴

Moreover, he held that the breach of a fiduciary duty would be reflected in the substantive terms of the contract.

Sweet J applied this interpretation of a fiduciary duty to those with whom Jim Croce had placed his trust: West, Cashman and Kurnit. He held that the substantive terms of the contract would not be considered unfair in the context of the duties owed to Croce by Cashman and West. However, Kurnit was a lawyer and as such he owed a professional duty towards Jim Croce. ‘In particular, a fiduciary duty arises when a lawyer deals with persons who, although not strictly his clients, he has or should have reason to believe rely on him’²⁷⁵ Kurnit’s failure to advise the Croces’ to obtain independent counsel before proceeding with the contract negotiations in 1968 was considered a breach of his professional duty. Moreover, according to Sweet J, Kurnit’s introduction as the “lawyer”, his explanation to the Croces of the “legal ramifications” of the contracts, which contained a number of legal terms and concepts; his interest as the principal in the transaction; his failure to advise the Croces to obtain legal counsel; and their lack of independent legal representation taken together established both a fiduciary duty on the part of Kurnit and a breach of that duty. Nevertheless this duty was independent of the issue of procedural fairness in contract.

The effect of Kurnit’s breach of a fiduciary duty was not sufficiently severe as to give rise to any measure of substantive unfairness within the contracts. Kurnit’s breach of his professional duty was not considered sufficiently fundamental to defeat the validity of the contracts. The breach did not result in significant substantive consequences. Therefore, Mrs Croce was only able to obtain damages for this fiduciary breach by Kurnit.

It is noteworthy that, the failure to obtain independent legal advice was not considered as an issue of procedural fairness or the lack of it. However, the need to inform Jim Croce to obtain independent legal advice was considered a sufficiently significant

²⁷⁴ *Ibid.* at 891.

²⁷⁵ *Ibid.* at 890.

‘fiduciary’ duty to place on the lawyer Kurnit. Perhaps, the court was beginning to acknowledge the growing influence of lawyers within the negotiating process itself, both in their legal and corporate capacities. Placing this extra duty on the ‘lawyer’ would reduce the disparity his/her presence would produce in the bargaining strengths between the parties. However, this was not a contractual duty but rather a fiduciary obligation of a professional nature.

The *Croce* case restates the view that fairness is a matter of substance and procedure. Substantive fairness could be illustrated by terms which grossly diverged from standard industry practices that had been negotiated between parties of similar bargaining power. However, the very narrow interpretation of procedural fairness is restricted to negotiating tactics such as high pressure tactics. Moreover, the case suggests the obtaining of independent legal advice is not relevant to the issue of procedural fairness.

V (iii) The law in California

(a) Notions of fairness and unfairness: the doctrine of unconscionability

The fairness of exclusive recording and music publishing agreements in California is regulated by statute law and the state has specifically adopted the doctrine of unconscionability in statute form in its Civil Code section 1670.5. The wording of this section is almost identical to that contained in UCC art.2-302, and it is applicable to all categories of contracts within the jurisdiction of the California courts. Section 1670.5 (a) states that

‘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 as to avoid any unconscionable result.’

The interpretation of unconscionability in caselaw has specifically considered aspects

of both procedural and substantive fairness. In the context of the music industry, procedural fairness has been discussed in the light of inequality of bargaining power and in particular the use of standard form contracts has provided the basis for some very interesting discussions on this point. However, there has not been a reported decision which has dealt specifically with the issue of unconscionability in the context of standard form exclusive recording or music publishing contracts. Nevertheless, there are relevant cases from other branches of the music industry which can serve to illustrate common circumstances of procedural fairness.

In *Graham v. Scissor-Tail Inc.*, the court held that a standard form contract which was drafted by the American Federation of Musicians (AFM) was procedurally unfair because the weaker party had no alternative to the ‘take it or leave it’ contract.²⁷⁶ Despite the prominence of the weaker party (in the music industry), he was still a ‘humble adherent’ who had signed a more or less standard form contract.²⁷⁷ There was no accommodation between the parties and the ‘weaker’ party was only able to negotiate on insignificant points. Therefore, the bargaining on these minor terms could not ‘remove the taint of adhesion’.²⁷⁸ The terms regarding remuneration remained non-negotiable and were found to be substantively unconscionable as well. The arbitration clause which designated AFM as the forum for the resolution of any disputes, which may have arisen between the parties was also non-negotiable, and was found to be substantively unconscionable because the AFM procedure suggested a potential for bias, i.e. the contract offered an oral hearing for one party (the AFM member) but not the other.²⁷⁹

The matter of standard contracts issued by an artists representative body may very well arise in the context of exclusive music publishing and recording contracts.²⁸⁰ The principles

²⁷⁶ 28 Cal.3d 807. In this case the dominant party was the musician who was using the standard contract form which had been drafted by his union. The weaker party was a concert promoter.

²⁷⁷ The court stated that all prominent musicians were AFM members and thereby subject to the by-laws of the union. Therefore, in effect the ‘weaker party’ had no opportunity to contract with a non-AFM musician.

²⁷⁸ *Supra*. n. 276 at 819.

²⁷⁹ Interestingly in *Waggoner v. Dallaire* 649 F.2d 1362 (9th Cir. 1981), the judgement of the court suggests that collective bargaining power does not always carry with it a presumption of superior or even equal bargaining power.

²⁸⁰ There are standard form contracts such as the standard music publishing contracts which are produced by the Songwriters Guild of America (SGA). The SGA encourages its members to use the

discussed by the courts with regard to fairness in other types of entertainment contract are equally applicable to contractual relationships between musicians and record companies/music publishers.

The controversial case of *Buchwald v. Paramount* provides an example of the application of the doctrine of unconscionability to the standard contract terms offered by the Paramount movie enterprise.²⁸¹ The weaker party (the author of the 'storyline' for the 'hit' movie 'Coming to America') claimed that the contract terms which dealt with 'net profit participation' was substantively unconscionable and resulted from circumstances which were procedurally unconscionable.²⁸² Buchwald, the author, was considered a novice in the industry and the contract terms had been presented by Paramount on a 'take it or leave it' basis. This negotiating tactic was a not uncommon within the movie industry. Nevertheless, *Schneider J* held that the inequality of bargaining power between the parties resulted in 'no real negotiation'. Consequently, Buchwald had lacked a 'meaningful choice' during negotiations and that was a matter of procedural fairness. Furthermore, he held that the terms were indeed substantively unfair despite the prevalence of their usage in industry. *Schneider J* explained that the 'market' price or 'going rate' in the movie industry was set by an 'oligopoly' and consequently, 'the going rate' could not always provide a clear indication of fairness. Moreover, the one-sidedness and harshness of the terms were not justified by the nature of the business; and the risk and extent of the potential loss.²⁸³

This general link between procedural and substantive fairness was followed by a detailed discussion of the fairness of the structure for net profit participation. The judge's

'standard songwriter contract form' which it publishes. The AFM also produces its 'standard' recording contract which members are encouraged to use. The ability of a member of a particular union to insist on a union standard contract depends very much on his or her bargaining power. Therefore, it is highly unlikely that an artist at the more humble end of the market could wield this power. See *supra*. n. 6 at 188.

²⁸¹ 90 Daily Journal, D.A.R. 14482 (Los Angeles) 21 December 1990. This case ushered much comment from the entertainment industry. It is also significant for the fact that the court held that s1670.5 could be invoked as a cause of action: 'shield' rather than merely as a 'sword', in order to protect the weaker party against a stronger party which may otherwise rely on the written terms of the contract.

²⁸² 'Profit participation' is used in this case as another term for royalties. The court clearly distinguished this type of payment from that involving 'up front' compensation.

²⁸³ The harshness of the terms and the 'take it or leave it' manner in which they were offered was

observations on this point would be relevant to any discussion on artists' royalties in recording and music publishing contracts as well.²⁸⁴ For instance, Schneider J held that Buchwald's 'royalty' discounts from the net profits should not include charges which were: disproportionately higher than the actual costs; double counted; or calculated by 'unfair' accounting means. Profit participation terms which were determined on this basis were considered unconscionable. Schneider J found in favour of Buchwald and the 'net profit participation' terms were declared unconscionable and invalid. Although, subsequent caselaw declined to endorse this assessment of substantive fairness, the validity of the procedural concerns raised by Schneider J were not questioned.²⁸⁵

(b) Duration and remuneration

Until quite recently artists in California did not consider bringing their actions against record companies and music publishers with regard to the validity of contract terms on the basis of section 1670.5 of the Civil Code.²⁸⁶ There are a number of reasons for this development. Firstly, artists in California who have signed exclusive multi-option recording and music publishing agreements enjoy two particular statutory provisions which specifically consider the contractual terms of duration and compensation: the Labor Code s2855 and the Civil Code s3423. These statutes act independently of the general application of the doctrine of unconscionability in s1670.5 of the Civil Code. Not unlike their counterparts elsewhere artists in California and their legal advisors have almost always concentrated their actions on the fairness of terms of duration and advances and since the Labor Code s2855 and the Civil Code s3423 address these issues directly it would appear that artists in California tended to ignore the potential protections offered in the Civil code

deemed as 'boiler plate' language

²⁸⁴ According to Arthur Campbell, the method of payment in the US music industry relies almost exclusively on 'profit participation' or royalty payments. See *supra*, n.41 at 503-4.

²⁸⁵ The case was not followed in *Batfilm Productions v. Warner Bros.* Nos. BC 051653 and 051654 (LA County, 1994). In *Batfilm* the court upheld the validity of the 'net-profit participation' terms which were not unlike those in the Buchwald/Paramount contract. This case is discussed in Weiler Paul C. *Entertainment, Media and the Law*, West Publishing Co. (1997).

²⁸⁶ The Dixie Chicks' recent attempt to unravel the mysteries of the fairness of royalty accounting was unusual in this sense.

s1670.5. Therefore almost all conflicts between artists and record companies or music publishers have been litigated on this basis and the combined effect of both of the Labor Code s2855 and the Civil Code s3423 has shaped the judicial interpretations of fairness in exclusive music industry contracts in California to date. However prevalent use of these provisions does not diminish, in any way, the potential effectiveness, of the doctrine of unconscionability under s1670.5 of the Civil Code determining fairness in exclusive multi-option recording and music publishing agreements.²⁸⁷

The Labor Code s2855 became clearly established in the law of California during the golden years of the Hollywood film industry and consequently, some of the decisions of the courts relating to exclusive long term contracts between movie actors and the various Hollywood studios are applicable to the music industry.²⁸⁸

The Labor Code s2855 concerns the maximum duration of any personal service contract under California law.

‘(a) A contract to render a personal service, other than a contract of apprenticeship as provided in Chapter 4 of this division, may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.’

The last sentence of the provision is intriguing because it suggests that if the parties choose to continue the contract beyond the seven year limit, the law would consider the

²⁸⁷ For instance only an ‘otherwise valid’ contract may be enforced for a maximum of seven years under s2855. Therefore, a contract would then have to be valid in accordance with the doctrine of unconscionability as well.

²⁸⁸ The original enactment of 1872 was modified in 1931 and then again in 1937. The wording of the modified versions suggests a clear concern for the protection of Hollywood’s investment in the various ‘talents’ contracted within the industry. A brief history of the statutory provision may be found in *De Havilland v. Warner Bros. Pictures*, see *infra* n.291.

In 1987 s2855 of the Labor code was amended yet again. According to one commentator, Gary Greenberg, this amendment was enacted as a result of the strong lobbying of from the Recording

contractual relationship fair on the presumption that the procedural requirements for consideration for a 'new contract' had been met. Therefore, the seven year term may be effectively extended, as a new contract, by voluntarily continuing the contractual obligations.²⁸⁹ The issue of compensation is thus presumptive.

The 1987 amendment to s2855 of the Labor Code added the following:

'(b) (3) In the event a party to such a contract is, or could contractually be, required to render **personal service** in the production of a specified quantity of the phonorecords and fails to render all of the required **service** prior to the date specified ..., the party damaged by the failure shall have the right to recover damages for each phonorecord as to which the party has failed to render **service**...'

The second legislative provision of significance requires a minimum level of compensation in all personal service contracts in California. The Civil Code s3423 does not directly refer to a minimum standard from which an artist's contractual benefits ought to be determined, but rather it concerns the minimum monetary compensation which the artist should be guaranteed before the court could enforce the term of exclusivity in the form of a restrictive covenant, by means of an injunction. A failure to provide this fixed statutory minimum requirement would prevent the record company or music publisher from restraining the artist from providing the service for a third party. However, the failure to comply with this minimum payment would not prevent the record company or music publisher from seeking damages for breaches under the contract. Under the Civil Code s3423:

'An injunction may not be granted: (e) to prevent the breach of a contract the performance of which would not be specifically enforced, other than a contract in writing for the rendition of personal services....where the promised service is of special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably compensated in damages in an action in law, and where compensation is...(1) as to contracts entered into on or before December 31, 1993, the minimum compensation provided in the contract ... shall be at the rate of six thousand dollars (\$6000) per annum...(2) as to contracts entered into on or after January 1, 1994...the minimum compensation provided in the

Industry Association of America (RIAA), see *infra* n.295.

²⁸⁹ The lack of clarity by which the last part of this section has been interpreted has produced much confusion. I shall discuss this in due course.

contract shall be at the rate of nine thousand dollars (\$9000) per annum for the first year of the contract, Twelve thousand dollars (\$12,000) per annum for the second year of the contract, and fifteen thousand dollars (\$15,000) per annum for the third to seventh years inclusive of the contract'.²⁹⁰

De Havilland v. Warner Bros. Pictures provides one of the earliest examples of the application of these statutory provisions to the entertainment industry.²⁹¹ The California Court of Appeal refused to extend Hollywood star Olivia de Havilland's contract, for personal service as a 'motion picture actress', beyond the seven year maximum stated in her contract.²⁹² Her 'employer' Warner Bros. Pictures had argued that Olivia de Havilland had refused to perform the contract at certain periods of its duration and consequently, Warner Bros. deemed her 'suspended' during these periods of non-performance.²⁹³ Olivia de Havilland claimed that these periods of non-performance were due to illness and moreover that her contract with Warner was hindering her career development because she was being offered roles which were 'unsuitable to her matured ability'. However, the contract had expressly provided that the exercise of artistic discretion would rest solely with the producer, and furthermore Warner had the right to extend the duration if she had been suspended for any period during her contract. The statutory and contractual minimum of seven years was considered fair. However, the court held that an extension of the contract beyond the statutory limit of seven years would be unfair; and that the 'limitation of the life of the personal service contracts and the employee's rights thereunder could not be waived'.²⁹⁴ The decision suggests that a party's right to protection under the seven year limit cannot be denied by the mere fact that he/she refused to perform the contract (or because he/she was suspended). This appears to be a fundamental right of contract.

The court was less generous with the movie actor Gene Autry in the first instance

²⁹⁰ These are the current compensation levels.

²⁹¹ 67 Cal.App2d 225 [1944]. Many of the practices of the movie industry were repeated decades later in the music industry. Therefore these cases are instructive and relevant to the music industry.

²⁹² The initial fifty two week contract could be extended on an annual basis, for six option periods. Each option could only be exercised at the discretion of Warner Bros. Pictures.

²⁹³ A suspension would hold the performance of the contract in abeyance until the contract was resumed. The length of the period of suspension would then be added onto the overall duration of the contract.

²⁹⁴ *Supra*.n.291 at 237.

judgement of *Autry v. Republic Productions Inc.*²⁹⁵ Autry signed an exclusive service contract with Republic Productions in September 1938. The agreement provided for an initial one year period and four successive option periods of one year each and Republic held the sole discretion to exercise the option periods. In May 1942, a separate agreement was entered into by the parties. This one year contract was to come into operation on the expiry of the 1938 contract, however, shortly after the second contract was signed Autry entered the armed forces, in which he served until the end of World War Two. When Autry returned from military service in 1945 Republic sought to enforce the 1942 contract. Autry claimed that performing this contract would effectively extend his contractual obligations beyond the seven year limitation in section 2855 of the Labor Code. The court held that Autry's failure to perform his contractual obligations was not due to the actions of Republic and consequently the 1942 contract was declared enforceable. Moreover, the court held that parties involved in an employer/employee relationship ought to be free to negotiate to extend an exclusive contract and yet remain within the protection of section 2855.²⁹⁶ This interpretation of the seven year limit bears a direct relationship to the statutory presumption stated in the second part of s2855(a) with regard to contract extensions. Therefore, the legal position on the matter of contract 'extensions' beyond seven years appears to be that a voluntary continuation of a contract is presumptive of fresh consideration and thus a 'new' contract; otherwise the continuation of a contractual relationship requires evidence of fresh consideration for the creation of a 'new' contract. The following case concerning exclusive recording agreements has endorsed this position.

Manchester v. Arista Records Inc concerned the exclusive recording contract which the popular singer Melissa Manchester signed with Arista Records Inc. in 1973.²⁹⁷ The contract provided for an initial eighteen month period and four option periods of one year

²⁹⁵ No. 503481 (Los Angeles County Super. Ct. Jan. 14, 1946). This case is discussed in Greenberg Gary A., 'Seven Years to Life', 12(3) *Entertainment and Sports Lawyer* (1994) 1.

²⁹⁶ *Ibid.* at 2. Greenberg suggests that if this decision had been appealed it may very well have been overturned.

²⁹⁷ No. CV81-2134 (C.D. Cal. Set. 17, 1981). The case report is not generally available. I shall rely on Greenberg's account. He notes that the Judge Robert J. Kelleher 'chose not to publish the case.' See

each. Therefore, the maximum contract period was set at five and a half years. The option periods could only be exercised at the discretion of Arista Records Inc. and Manchester had no contractual right on this matter. She was also required to deliver two albums for each of the subsequent option periods. A 'standard extension/suspension clause' was included in the contract, which effectively gave Arista Records the right to extend the contract if the albums were not delivered on schedule. An extension of the contract also gave Arista Records the right to 'suspend its obligations during any such extension periods until all required albums were delivered.' Therefore, the extension/suspension clause could effectively lengthen the five and a half year maximum period which had been specified with regard to the duration of the initial term and the four option periods. In 1976, Manchester signed an 'amendment' to her contract which provided for an additional one year option period, which could be exercised at Arista Record's discretion. In return, Arista Records Inc. agreed to pay \$145,000 to Manchester's former manager. This additional option period was to commence on the expiry of the 1973 contract.

Two albums were to be delivered by Manchester during the initial eighteen month period, but it appears that she failed, quite frequently thereafter, to deliver the albums on the scheduled delivery dates and consequently Arista decided to extend her contract under the terms of the extension/suspension clause in the 1973 contract. Furthermore, Arista also exercised the option periods in accordance with its 1973 contractual right. As a result of both these events, Manchester had only fulfilled her obligations for the fifth year of her contract by 1981.

In 1980 Arista records gave notice to Manchester that it would exercise the '1976' option. In 1981, Manchester brought an action to have the option declared contrary to section 2855 of the Labor Code and thereby unenforceable. The action was apparently dismissed on jurisdictional grounds however, the court stated 'that midterm extensions could be upheld on a case-by-case basis.'²⁹⁸ In the context of the Manchester/Arista contractual relationship it

ibid. at 2.

²⁹⁸ *Ibid.* at 23.

was held that the 'modifications made in 1976 were material' and independent of the 1973 contractual obligations. The 1976 'event' amounted to a new contract and the court accepted Manchester's request for \$145,000 as consideration- the contractual benefit. Despite the seven year statutory limit on exclusive personal service contracts, it would appear that the determination of duration must eventually dissolve into a measurement of remuneration.

Greenberg suggests that the *Manchester* decision made a strong impact on the recording industry because it encouraged record companies to use 'mid-term modifications' to effectively extend the duration of the contract beyond the statutory minimum of seven years.²⁹⁹ Indeed in a subsequent case concerning Don Henley *Geffen Records v. Henley*, the record company successfully argued that the 'extended' period which was negotiated during the course of an agreement, was in fact an independent contract rather than a contract modification.³⁰⁰ Don Henley, the recording artist in question argued that the series of 'extended' periods had drawn out his relationship with the record company well beyond the seven year statutory maximum duration for single contracts to over a period of twenty years. The case was eventually settled out of court.

Greenberg suggests that 'mid-term' negotiating tactics, which the *Manchester* and *Autry* cases appear to encourage, ought to be scrutinised with greater care. His argument stems from the artist's circumstances of being already contracted to the record company or music publisher during the negotiations for the 'independent' contract and this procedural concern is not unlike that raised unsuccessfully by George Michael in the UK courts.³⁰¹ The court in the *Manchester* court based its decision on the existence of 'new' consideration for the new contract and similarly the UK courts decided that the amount of advances which Michael received in his 'new' contract was fair and reasonable evidence of 'new' consideration. Both cases illustrate the measurement of duration in terms of guaranteed payment. The following two cases have considered the combined effects of duration and remuneration far more explicitly.

²⁹⁹ *Ibid.* at 25.

³⁰⁰ No. BC073696 (Los Angeles County Super.Ct) 1992, see *ibid.* at 28.

MCA Records Inc. v. Newton-John concerned the recording agreement which Olivia Newton-John, the 'pop' singer and entertainer, signed with MCA Records Inc. on the 1st April 1975.³⁰² The terms of the contract required Newton-John to record and deliver to MCA Records annually, the master recordings for two albums for an initial two year period. In addition, the contract included three option periods of one year each which could only be exercised at the discretion of MCA Records. Therefore, the maximum duration of the agreement was five years: from 1st April 1975 until 1st April 1980. However, the contract also provided that if Newton-John failed to deliver a recording by the due date, MCA could extend the maximum five year duration which was initially set in the contract.

The three option periods required Newton-John to deliver two albums per year. The contract provided for the payment of \$250,000 as a non-refundable advance for the initial two year period and the exercise of the subsequent options, by MCA, would attract further payments of \$100,000 for each recording received during this period. The contracts stated that the costs of producing the sound recordings were to be financed by Newton-John and consequently the advance payments were inclusive of all recording and production costs. The judgement did not disclose the actual royalty percentage figures which were due to Newton-John under the agreement.

The first three recordings were delivered to MCA Records in accordance with the specified delivery dates but there was a delay in the delivery of the fourth album. Nevertheless, MCA Records decided to renew the first option under the terms of the contract but Newton-John ceased to deliver any further mastertapes to MCA Records. By this time, Newton-John had received approximately \$2, 500,000 in royalties and inclusive advances under the terms of the contract.

In May 1978 both parties filed breach of contract actions against each other and MCA Records obtained a preliminary injunction against Newton-John to restrain her from recording for anyone other than MCA Records whilst the action was pending or until 1st of

³⁰¹ See chapter 3.

³⁰² 90 Cal.App.3d 18 [1979].

April 1982 – whichever date was earlier. Furthermore, MCA Records claimed that they were well within their rights to extend the maximum five year term of the contract for an additional two years because she had failed to deliver the mastertapes for the requisite number of albums.

Newton-John appealed the preliminary injunction on a number of points and the most pertinent claim centred on her assertion that the agreement failed to guarantee the payment of the minimum statutory compensation under the provisions of the Civil Code s3423 of \$6,000 per year.³⁰³ She claimed that the annual expenditure involved in producing the mastertapes for two albums exceeded \$194,000 and therefore, the deduction of this sum from the guaranteed annual inclusive advance payment of \$200,000 would produce a yearly net compensation of less than the statutory minimum requirement of \$6,000. Moreover, Newton-John claimed that the restraint was unfairly being enforced since she had already been suspended by MCA Records.

The trial court found against Newton-John on the issue of statutory compensation and this decision was upheld on appeal. It was thought that suitable recordings could have been produced at a sum less than \$194,000 and consequently Newton-John would have been able to enjoy an annual minimum compensation of \$6,000, if she had spent less on the actual production of the mastertape:

‘It is decisive here that under the terms of the agreement exclusive production costs remained under the control of the defendant’s hands at all times. The defendant was free to record as tight -fisted or as open-handed a manner, costwise, as she chose’.³⁰⁴

Moreover the court suggested that the statutory minimum compensation provision under the Civil Code s 3423 referred to nothing more than the gross guaranteed sums paid under the contract. The court held that under the terms of the contract Newton-John was guaranteed an annual non-returnable albeit inclusive advance of \$200,000, which was independent of the royalties she would eventually receive and this large payment gave her the ability to control

³⁰³ During the time of the contract the statutory minimum was set at \$6000.

the amount of compensation she would receive for her services: she could not increase the production costs in order to nullify her contract at any time. The court held that Newton-John could not then claim that MCA failed to provide minimum payment for her services contrary to Civil Code s3423 and therefore the restraint preventing her from recording for anyone else was in fact enforceable.

Newton-John's second claim pertained to the length of the restraint which she argued should be limited to the maximum period of five years that was specified in her contract. However, MCA Records argued that the duration of the agreement could be extended until the expiry of the seven year limit, under s 2855 of the Labor Code, if Newton-John continued to neglect her contractual obligations.³⁰⁵

The court did not approve of this extension and on this point agreed with Newton-John. There was a real concern that suspension periods could be used to extend the contract well past the agreed expiry date:

‘We have grave doubts that the defendant’s failure to perform her contractual obligations under the contract can extend the term of the contract beyond its specified five-year maximum.’³⁰⁶

The court held that under the terms of the contract MCA Records would not be entitled to prevent Newton-John from recording for any of their competitors after the expiry of the five year period to which the parties had agreed and this accepted ‘cap’ on the duration was crucial to the enforcement of the contract. Consequently any other term which entitled MCA Records to extend the contract was considered unfair.

The *Olivia Newton-John* case raises many important issues with regard to fairness, for instance a very well paid artist cannot simply use the minimum guaranteed compensation requirements of the Civil Code s3423 in order to be released from his/her contractual obligations because this statutory provision is designed to protect the more modestly paid artist and therefore it serves as no more than a minimum standard for contractual payment for

³⁰⁴ *Supra*.n.302 at 22.

³⁰⁵ *Ibid.* at 23.

³⁰⁶ *Ibid.* at 24.

personal services. Furthermore, the case suggests that an exclusive recording or music publishing agreement cannot be simply extended beyond the date stated in the contract (due to the non-performance of the artist) by the simple inclusion of extension or suspension terms in the agreement. Any new expiry date must be renegotiated as a new contract and then the requirements for a new contract, such as consideration, would have to be met. If this were not so the artist would not be obliged to perform the contract beyond its duration date or seven years whichever term came sooner.

Performing an existing contractual duty to pay remuneration is not sufficient evidence of a new contract. There must be clear indication of fresh consideration in order to establish a renegotiated new contract.

Motown Record Corp v. Brockert concerned the then 'unknown' singer/songwriter, Teena Marie Brockert and the recording and music publishing contracts which she signed with Motown Records and Jobete Music Publishing in 1976.³⁰⁷ The two companies belonged to the one musical enterprise, Motown.

Both contracts were similar: after an initial period of one year the companies were granted six options of one year each, which could be exercised solely at the discretion of the respective companies and if all the options were to be exercised both contracts would expire in April 1983. Each contract contained a restrictive covenant which prohibited Brockert from performing for any other 'employer', during the potential maximum duration of the contract, i.e. seven years.

Each contract also provided that a compensation fee of not less than \$6000 per year could be provided for Brockert but this was only a discretionary obligation for Motown and Jobete. Furthermore, according to the 'set off' provision in both contracts, the exercise of this discretion in favour of Brockert, under one contract, was said to benefit her under the terms of the other agreement as well, so for instance, the 'set off' provision in the Motown

³⁰⁷ 160 Cal.App.3d 123 [1984]. At the time of the contract Brockert's musical career was limited to 'singing with local bands at weddings, parties, and shopping centres and roles in school musicals. She had also written some songs but none had been recorded or released commercially.' Therefore, she was presumably a rather young and inexperienced artist during the time in which the contracts were signed.

recording agreement stated that:

‘Any amounts paid under [the \$6000 compensation clause] may be credited against monies thereafter payable to you pursuant to this or any other agreement between [Motown] and you, or between [Motown’s] associate, affiliate, or subsidiary corporations and you’.³⁰⁸

This proposed yearly payment of \$6000 was not guaranteed under the terms of either contract. Nevertheless, under the terms of the recording contract Brockert was to receive an annual payment of \$600 to \$900 but the music publishing agreement with Jobete did not provide for the payment of advances. However both contracts conferred on Brockert the right to royalties from the sale of her music.³⁰⁹

Brockert wrote songs which were published by Jobete Music Publishing and recorded four very successful albums for Motown Records between the years 1979 and 1980. “It Must Be Magic”, her fourth album, produced sale figures of more than 400,000 copies; and subsequently achieved gold record status.³¹⁰

However, in May 1982, six years after the contracts were signed, Brockert gave written notice(s) of rescission to both Motown Records and Jobete Music Publishing and informed them that she was no longer prepared to carry out her obligations under both contracts. In August 1982, Motown and Jobete sued Brockert for a breach of contract and also claimed injunctive and declaratory relief. In September 1982, Motown and Jobete both decided to finally exercise their discretion, under the terms of the contracts, to pay Brockert an annual compensation of \$6,000.

In November 1982, Motown and Jobete were informed by Brockert that she had already signed a recording contract with another company that she would be commencing the performance of that contract later in that month. Motown Records and Jobete Music Publishing immediately sought a preliminary injunction in order to restrain her from performing her contractual obligations with the third party until the expiry of her exclusive

³⁰⁸ *Ibid.* at 134. Therefore, this clause would have included Jobete in these calculations.

³⁰⁹ The judgement does not quote the royalty figures for either of the contracts.

³¹⁰ Motown apparently earned an estimated net profit of \$1.7 million from this last album. See *Supra*.n.307 at 160.

Motown/Jobete contracts i.e. on 1st April 1983.³¹¹ The trial judge granted an injunction to restrain Brockert and she then appealed to the Court of Appeals of California.

The Court of Appeals held that according to the Civil Code 3423, the person sought to be restrained should have been guaranteed an annual compensation sum of \$6000 from the express terms of the contract. Therefore with regard to the Brockert contracts this guaranteed minimum level of payment should have been paid to her from the outset of the contracts and moreover, this statutory requirement could not be satisfied by merely including the sum as a discretionary payment in any of the option periods under the terms of the original contract. The court would only enforce restrictive covenants, in the form of an injunction, if this mandatory payment had been annually paid to Brockert throughout the contract. Furthermore it was decided that the option period in a contract or the exercise of any rights under it would not in itself be considered a new contract or a modified contract, and consequently the belated attempt by Motown/Jobete in 1982 to finally exercise its discretion to pay Brockert the annual minimum statutory compensation did not signify a new enforceable agreement with her.

The court described the 'set off' provisions in the respective contracts as 'cagily drafted' clauses because they were completely discretionary and independent of any discrete decision making standard. The respective contracts failed to provide Brockert with any guarantee of payment let alone a minimum compensation in accordance with Civil Code s 3423.

Furthermore, the court emphasised the point that the strict enforcement of both exclusivity clauses and restrictive covenants under s 3423 would also require the performer to be 'a person of distinction in her field at the time of entering the contract.'³¹² Therefore, restrictive terms of exclusivity are more likely to be enforced, as fair, against the 'prima donnas' of the entertainment industry rather than the 'spear carriers'. The rationale for this view is perhaps because the former is more likely to wield sufficient negotiating power to

³¹¹ *Ibid.* at 127.

³¹² *Supra.*n.307 at 136

strike a favourable and 'fair' bargain and thereby earn well over the statutory minimum. In the light of the circumstances which surrounded the signing of the contracts in 1976 it was held that Brockert was not in the 'prima donna' category of 'pop' artists and consequently not a candidate to be thus restrained under s3423. Brockert's novice status in the industry during the time of signing her contracts marks one of the significant differences between this case and that of Olivia Newton-John.³¹³ The court appeared to imply that merely paying her an advance which covered the bare statutory minimum sum was not sufficient to enforce the restraint. This was because she was not paid sufficiently adequate amounts to control the recording costs and consequently the payment of the statutory minimum sum would have to be considered independently to the advances required to produce the work. In this sense her bargaining circumstances were unlike Olivia Newton-John who not only wielded substantial bargaining power but also received enormous sums in advance payments.

In its interpretation of s3423 the court noted that any agreement which restricts a person's professional capacity would be strictly construed *contra proferentum*. Moreover, the judgement suggests that even if Motown/Jobete had duly and annually paid the statutory minimum that in itself may not have been sufficient to justify the enforcement of the respective contracts particularly when Brockert's output was generating large profits in royalties. The court observed, with reference to previous cases, that:

"As one grows more experienced and skilful there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest possible compensation";³¹⁴

Therefore, the judgement in the *Brockert* case attempts to identify the conceptual basis for the operation of s3423 of the Civil Code in exclusive multi-option recording and music publishing agreements. The paramount concern to protect the industry newcomer artist is illustrated by: (a) the requirement for annual statutory guaranteed payments; and (b) the provision that s3423 cannot be applied to enforce a restraint against the low-paid artist (the humble 'spear carrier'). The underlying principle to the application of s3423 appears to be the

³¹³ *Supra*.n.302.

need to preserve the contractual freedom for modestly paid artists to capitalise on their commercial successes and improve their professional earnings at the earliest opportunity. A fair contract should continue to present the young artist with opportunities to benefit financially from his/her continual success.

V (iv) Conclusion

The law in New York and California have many common aims. The concern for the artist to be free to earn fair profit from the exploitation of his/her work is an important issue because it requires a recognition and fair assessment of the artist's professional worth. In this context there is a concern that the industry novice and other artists who have weak bargaining power should not be undervalued and exploited. This concern justifies the judicial inquiry into the substance of the contract, particularly in circumstances where standard form contracts are used.

The underlying regard for the artist's contractual consideration is assessed in terms of benefit and in particular contractual remuneration. Fair remuneration may be determined by considering the essence of each party's contractual obligation. Ultimately the fairness of contractual obligations and remuneration raises issues pertaining to the parties' assent to the contractual terms.

³¹⁴ The court was quoting from *De Havilland v. Warner*, *Supra* n.291.

Chapter VI

The negotiation and formulation of exclusive recording and music publishing agreements in New York and California

VI (i) Introduction

In this chapter I shall be considering the interaction between the law and practice in the determination of fair terms in exclusive multi-option recording and music publishing agreements in the US. Particular emphasis will be placed on those aspects of contracts which have already been considered in the courts and due to the many similarities in the laws and practices between New York and California, I shall only distinguish between the two if there is a technical need to do so.

Much of the discussion regarding US caselaw and legislation in the previous chapter has focussed on the substance of the contract and the interpretation of its terms. Consequently, I shall begin my discussion on the practices of negotiating contracts in the US with regard to the fairness of the substantive terms of the contract. However this approach is not in anyway an attempt to diminish the importance of procedural issues in the determination of contractual fairness. Indeed the application of art.2-302 of the Uniform Commercial Code (UCC) in caselaw has been almost always founded in circumstances in which parties have been compelled to use standard form contracts and that is a matter of procedure.

The courts in both New York and California deal with the concept of fairness in a very technical sense. Procedural fairness and substantive fairness are defined within the general concept of unconscionability, in which the 'weaker' bargaining party has been compelled to accept standard contractual terms which are, in themselves, substantively

disproportionate with regard to the contractual benefit.

VI (ii) Determining Terms of Substantive Fairness

(a) Term

In New York there is no statutory restriction on the duration of any exclusive recording or music publishing contract, but caselaw recommends no more than a five year term as a fair period for an exclusive recording contract particularly where the rate of compensation is modest, and this maximum term for recording contracts is supported by the American Federation of Musicians.³¹⁵ Current practice in New York suggests that the standard terms for duration in recording agreements consists of the initial 12 month period followed by six options and these contracts are usually capped at a seven year maximum duration; though some are capped for a time beyond seven years. Music publishers usually begin the negotiations with a six-option offer but can generally be persuaded to settle for four or five options instead.

In California the direct and indirect effects of statutory provisions determine the duration of recording and music publishing contracts. The Labor Code s2855 caps all personal service contracts at a maximum duration of seven years. However, the rule has been heavily criticised for a number of diverse reasons, for instance Gary Greenberg considers this period too excessive and recommends a reduction to five years,³¹⁶ whilst record companies argue that the statutory limit ought to be increased to ten years.³¹⁷

In California the seven-year rule may be indirectly qualified. For instance, the 1987 amendment to the seven-year rule under the Labor Code may render the statutory limit

³¹⁵ See *supra*. n.6 at 15.

³¹⁶ Gary Greenberg thinks that artists should be given the chance to renegotiate every five years, and he argues that if this were not so there will be an increasing devaluation of the artist's worth. Nevertheless, he applauds the idea of statutory limit. See *supra*. n. 295 at 26.

³¹⁷ *Ibid.* at 27, fn 3. Greenberg recalls the strong lobbying by the Record Industry Association of Industry in 1987 to increase the statutory limit to ten years.

ineffective and in fact extend a recording contract beyond seven years.³¹⁸ Under the current terms of the statute a recording artist, who relies on the seven year maximum rule in order to terminate an agreement, the duration of which proceeds to exceed the statutory limit, may face an action brought by the record company for the unfulfilled obligations under his/her contract. This provision would also apply to 'future' options which have yet to be exercised by the record company. Such circumstances may well arise in the current climate of contracting within the recording industry, which no longer refers to the duration of a contract in terms of years but rather in terms of the more 'elastic' concept of options for albums. These options have flexible time schedules which are generally set to a twelve to eighteen month period for the performance of each option and the contracts themselves are rarely capped at a maximum duration in terms of years.³¹⁹

Therefore, an artist may sign a standard six to eight option recording contract which would probably extend beyond the seven-year statutory limit.³²⁰ If the artist is keen to exert his/her rights under s2855 he/she may, nevertheless, face the prospect of an action for damages for the unfulfilled obligations under the terms of the of the contract and these 'obligations' will inevitably refer to undelivered albums under as yet unexercised option periods.³²¹ According to Greenberg, the true effect of this statutory amendment could very well intimidate the artist to continue with his/her contract beyond the seven years and thus forgo his/her statutory rights under s2855 of the Labor Code.³²² Furthermore it is also arguable that continued performance of the contract could amount to a presumption that new consideration has been offered and that the parties have voluntarily agreed to a new contract in accordance with the Labor Code s2855 (a).

³¹⁸ Labor Code s2855 (2). This amendment is only applicable to recording contracts.

³¹⁹ Greenberg notes that the annual delivery option schedule is unlikely to operate effectively when one considers the time involved in actually producing an album See *supra*. n.295 at 27, fn16.

³²⁰ Los Angeles attorney Don Passman states that this is a significant improvement on the past practice of offering eight to ten options. See Passman, Donald. S *All You Need to Know About The Music Business*, 3rd edition (1998) Penguin at 119-121. In the context of exclusive songwriting agreements, Tomlinson suggests that three to four options of twelve minimum songs per option would not be uncommon, within the industry. However, he advocates no more than two options. See Tomlinson, D. 'Everything That Glitters Is Not Gold', 18 *Hastings Com/Ent L.J.* 85 at 105.

³²¹ California Labor Code section 2855(b)(3).

³²² *Supra*. n17, 24.

Despite the statutory protections offered under California state law it would appear that the fear of actions for damages under the 1987 amendment to s2855 of the Labor Code is likely to force all but the most wealthy artists to adhere with their contractual obligations beyond the seven year limit and the comments of a number of industry observers appear to confirm the view that in practice, recording artists under the jurisdiction of California law, more often than not, do carry out their contractual album delivery obligations beyond the seven year statutory limit.

Therefore, the 'elastic' measurement of the duration of the contract in terms of options and option periods rather than in years is important because it renders meaningless the determination of fair contractual duration on statutory limitations founded on a specific number of years. Conversely, the reference in terms of years to recording and music publishing contracts, appear altogether inappropriate when applied to current industry practices.³²³ Therefore, it is worth indulging in a brief discussion concerning the operation of options within the music industry. Let us consider recording contracts in particular, since the problems with options and duration tends to affect the circumstances of recording artists to a greater extent than those of songwriters.

On paper, option periods in the average New York and California recording contracts generally operate for a period of twelve to eighteen months. However, the entire length of the contract may ultimately extend beyond the aggregate length of all the possible option periods which are exercisable under the agreement.³²⁴ According to Passman, the contract option periods may be 'stretched' for the following reasons:³²⁵ (a) the tours and promotional work

³²³ This is so even with the exercise of suspension terms unless there is in fact a cap on the contract as in the *Olivia Newton-John* case, see *supra*. n.302. There is also the New York case *Vanguard Recording Society, Inc. v. Kweskin*, 276 F. Supp. 563 (S.D.N.Y. 1967), in which the New York District Court upheld the expiry date which had been agreed to in the contract despite the operation of suspension terms.

³²⁴ For instance, the time period between the delivery of the album to the exercise of the next option is usually specified in terms of anywhere between six to twelve months.

Passman recounts some colourful incidents which led to the adoption of the delivery schedules; one of them involved Frank Zappa, who arrived one day at his recording company, Warner Bros. Records, with the mastertapes of the four remaining albums required under his contract, and claimed that he was 'thus free to sign elsewhere'. See *supra*. n. 320 at 121.

³²⁵ *Ibid.* at 118 and 119. Passman also suggests that many artists are often somewhat apprehensive about launching the second album soon after the success of a debut album and this may be a factor in

which invariably follow the launch of a successful album may hold back the artist, for a time, from returning to the recording studio in order to record his/her next album;³²⁶ and (b) the artist may require further time to collect new material for a 'second' album as the success of the artist's 'first' album may have exhausted his/her existing repertoire of material.³²⁷ This situation is not only commonly tolerated throughout the industry but also considered as sensible for the purposes of market strategy. Therefore, in practice, the option periods in any typical recording contract are bound to exceed the seven-year limit. Moreover, when one considers the fact that record companies may well choose not to suspend the artist or terminate his/her contract for non-delivery of an album under the terms of a contract period; then the duration of the contract may be lengthened yet further, until his/her obligations are in fact fulfilled. In the current climate for drafting the length of contracts on the basis of options rather than on the basis of a pre-determined date or number of years even the pro-artist interpretation of the terms of suspension which the court declared in the *Olivia Newton John* case is unlikely to prove relevant for any artist. Consequently, the quantitative, let alone the qualitative obligations in recording agreements do create obstacles in completing the average contract within seven years.³²⁸

The discussion above suggests that, in practice, the seven year statutory limit under the California Labor Code does not limit the duration of most recording contracts; and the special benefit it implies is merely illusory, particularly in light of the 1987 amendment to the Labor code. However it should also be noted that the seven year rule which binds the recording artist will not be applied if the contract in it self is not 'otherwise valid' and consequently all recording contracts must also be justified in terms of the conscionable contracts provisions under section 1670.5 of the California Civil Code. The contract will have

the 'stretching' of the contract duration.

³²⁶ Moreover, Passman notes that the tour and promotion may be even longer if the album achieves particular commercial success. Consequently, the greater the success achieved during the contract: the lengthier the contract. Therefore, the artist who achieves success may be tied to the terms of his/her initial contract for a greater length of time than one who is less successful.

³²⁷ Reason (b) is perhaps particularly applicable to singer-songwriters.

³²⁸ The application of qualitative standards (which may lengthen a contract) were discussed in chapter 2.

to be fair with regard to the contractual benefits before the seven-year term would be enforced. Therefore record companies would have to offer sufficient remuneration to satisfy section 1670.5 before they attempt to enforce a seven-year term.

Don Passman advises his clients to negotiate in order to limit the number of options which a record company or music publisher may offer.³²⁹ He suggests that the record company or music publisher will always exercise the contract options if the artist proves successful. Whereas the artist will always be bound to the terms to which he/she agreed to before his/her success. If the artist fails then the options will never be exercised and consequently, restricting the number of options presents the artist with some leeway for renegotiating his/her terms in the event of his/her commercial success.

Furthermore, Passman states that record companies and music publishers will always attempt to offer a maximum number of options without any obligation to actually exercise them in favour of the artist. However, he suggests that the artist should negotiate to commit the record company or music publisher to as many options as he/she can possibly manage. When a record company or music publisher is committed to an option, the contract reflects a limited degree of 'mutuality' with regard to the control of its duration: both the artist and the record company or music publisher remain equally bound to continue with the contract, during the duration of the 'committed' options. Passman concludes that much depends on the respective bargaining powers of the artist and of the record company or music publisher.

The above discussion suggests that the duration of a recording or music publishing contract must be determined in the context of the 'elastic' concept of options. Setting the expiry date for a contract in terms of a specific date or number of years appears to be an obsolete practice, particularly within the recording industry.³³⁰ Therefore, the fair determination of the duration of a contract must take this industry custom and its consequences into account.

The 'elastic' notion of options is compounded by the seven-year limit under s2855 of

³²⁹ *Supra*. n. 320 at 117 and 118.

³³⁰ Setting an expiry date is only useful if it acts as a 'cap' to the duration of the contract. I have yet to

the Labor Code in California. As I have discussed above, the main problem with the application of s2855 is that the illusion of the seven year limit may very well mislead parties to accept the strict time scheduling for the exercise of the options under any contract, as the maximum duration of the contract. We have seen that, for one legitimate reason or another, recording contracts, in particular, do often exceed any set scheduling regarding the exercise of options. However, artists and record companies will continue to negotiate for levels of contractual consideration whilst relying on the protection of the seven year maximum rule. Furthermore, the practical effect of s2855 (2) will, in fact, extend most contracts beyond the seven years and therefore, such contracts would have been negotiated under an illusory appreciation of the protection offered by the seven-year rule. Moreover, these circumstances under which the average contract is thus negotiated may be considered (both procedurally and substantively) deceptive, and is arguably more likely to affect the more humble artist in particular. For instance, a six-option contract, the minimum period currently offered to young artists could not possibly expire within seven years; particularly in light of the contract performance scheduling involved.

However, the application of ‘otherwise valid’ requirement under section 2855 (in order to achieve a fair contract) offers some redress against the severity which the terms of duration may place on the contract. This argument is yet to be tested in court but there is no reason why the statute cannot be interpreted in accordance with the need to include fair benefits in the determination of the validity of the contract. This balance between the severity of the term and the requirement to provide an acceptable standard of remuneration may be similarly considered in the interpretation of exclusive music-industry agreements under the common law protections of New York law and practice as well. New York practitioners suggest that the principle of fairness in contractual consideration tends to be applied with reference to the transfer of control in the exclusive copyright more frequently than it does to the duration of the exclusive contract.

find evidence of the widescale use of ‘caps’ in the US music industry.

(b) *The control of copyright*

The duration of a contract may be determined to some extent on the quality control imposed on the work. Almost all contracts will include qualitative thresholds of commercial and technical suitability which the work must meet before it is commercially released. Don Passman notes that superstar artists are most likely to be able to exercise almost absolute freedom with standards of 'quality similar to your previous recordings' without any other approval from the record company.³³¹ However when an artist fails to meet the set standard then that option period could be deemed unfulfilled and he/she may be asked to rewrite the musical piece or re-record the mastertape at his/her expense.³³² This outcome could not only increase the artist's production expenses which in some circumstances may prove particularly costly but could also extend the duration of the contract. On the other hand, the record company or music publisher could elect to terminate the contract. However, this would be unlikely if they are keen to recoup the costs advanced for the rejected material and indeed whether there is a strong market opportunity to recoup these expenses.³³³

The need to adhere to the qualitative obligations in the contract may on occasion also ultimately restrict the artist's creative and perhaps creative freedom as well.³³⁴ It is only the well established artist who is able to secure guaranteed release rights in order to combat this potential problem.³³⁵ He/she has the opportunity to pursue his/her career elsewhere, yet it is this category of artist who is also more likely to have his/her works released because of the perceived lower market risks involved in the marketing of his/her works. In most other instances release commitments are generally rare and limited.

Under the terms of the US Copyright Act 1976 the creator of the work will be

³³¹ *Supra*.n. 320 at 125.

³³² See *ibid.* at 124.

³³³ Re-recording expenses for a sound recording mastertape will be costly. If additional advances are offered this would be recouped (along with that which had already been given for the production of the material that was subsequently rejected) before the artist receives any royalties. These circumstances suggest that the chances that the work will be released are high.

³³⁴ This claim was made by 'the artist formerly known as Prince' in his unsuccessful litigation against Warner Records. It is interesting to note that he was reputedly paid an advance fee of \$11 million per album for the six option period contract, see further *supra*.n.38.

deemed the statutory copyright holder unless the work can be categorised as a 'works made for hire'.³³⁶ The application of a 'work made for hire' clause would allow the record company or music publisher to claim first ownership of the work. 'Works made for hire' clauses are more frequently used by record companies rather than music publishers. In the US, copyright law permits the assignors of copyright to terminate their assignments after 35 years whereas those who relinquish their copyrights in the work under the terms of a 'works made for hire' provision do not enjoy this right. Therefore, artists are more likely to be offered contracts which provide for standard 'works made for hire' status for their works, as the market for back catalogues can then be secured beyond the 35 year period.³³⁷ *Ab initio* copyright ownership is in fact more valuable than an assignment, and all artists should be aware of this important 'bargaining chip' which they hold during the contract negotiations and one that should not be surrendered under the terms of a 'works made for hire' clause, without commensurate consideration.

Rights of release and reversion are subject to contractual negotiation and not generally available for unestablished artists on standard contracts. Therefore, a young unestablished songwriter's practical ability to control the exploitation of his/her unreleased works remains restricted. Nevertheless as I have already suggested, the courts have attempted to assure minimum contractual standards for the exploitation of the copyright in the artist's works, and indeed to identify circumstances when copyright exploitation of the work will be considered mandatory. The issue of release rights, and creative freedom is often raised by artists during negotiations and this should be considered against the background of commercial pressures and the artist's link to the copyright interests of the work. However, any obligation to exploit the work must arise from a contractual duty which has been explicitly stated in the agreement or can be implied on the grounds of specific best efforts and implicit reasonable efforts terms.

In *M. Witmark v. Peters*, the District Court of New York held that the lack of a

³³⁵ See Passman *supra* n. 320 at 129- 131.

³³⁶ See chapter 2 for a definition of 'works made for hire' terms in US copyright law.

specific and detailed obligation to exploit the work was an important contractual omission.³³⁸

The ability to control the earning capacity of the composer for a lengthy period placed the music publisher under an obligation to make considerable efforts to exploit his musical works. The court's concern was particularly acute since the royalty percentage was already 'ridiculously low' and the composer would have been unable to earn from his/her musical works without an implicit duty to sufficiently publish his works as well. The court did not declare any particular contractual obligation to use 'best efforts' on the part of the publisher. Nevertheless, the duty to exploit the works had to be determined according to the extent of the economic dependence of the weaker party on the profits of exploited copyright. Economic sterilisation was the underlying concern of the court.

Therefore, we can accept the *Witmark* decision as not stating a general rule that there is always a duty to exploit the work because much depends on the artist's reliance on the commercial exploitation of his/her music in order to earn or benefit from the contract. Indeed, in this case it was the lack of advances and the ridiculously low royalties that were the factors which gave rise to this duty: there was a lack of mutuality and consequently the contract was considered exploitative. This interpretation of the *Witmark* case is not necessarily inconsistent with the latter *Mellencamp* decision.³³⁹

In *Mellencamp* the District Court of New York held that the music publisher was not under any implicit professional obligation to exploit the musical work nevertheless a best efforts obligation would require exploitation of the work if the contractual benefits of the artists were dependent upon exploitation. Under these circumstances the mandatory effects of best efforts clauses on the potential exploitation of the work had to be decided on a case by case basis. For instance it would be arguable that the provision of low advances could be interpreted as a requirement to exploit the work under the terms of a specific best efforts clause and consequently, the contract required a specific 'best efforts' clause in order to create such an obligation. Furthermore, the court held that the professional relationship between the

³³⁷ I have discussed this subject elsewhere see *supra*. n.31.

³³⁸ *Supra*.n. 224.

songwriter and music publisher does not, in it self, give rise to a fiduciary relationship from which a 'best efforts' obligation could be implied into any contractual relationship.³⁴⁰

Mellencamp affirmed the implicit reasonable efforts duty which was declared in *Wood v. Lucy Duff-Gordon and Contemporary Music*. In the latter case, the court held that reasonable efforts would be determined in terms of 'sound business judgement' and reasonable and customary industry practices.³⁴¹ Similarly the implicit good faith requirement which is generally applicable under the UCC would imply an exploitation of the work in accordance with a standard which could be 'reasonably expected' and one which has traditionally been interpreted by the courts in order to prevent 'people from taking unfair advantage of literal readings of their contracts'.³⁴²

Usually almost all standard contracts omit express obligations to exploit the work and record companies and music publishers steer well clear of best efforts obligations as well.³⁴³ However, the implicit duties arising from caselaw suggests, that at least reasonable efforts will be undertaken to exploit the work and this would generally suggest that a lack of *mala fide* in the dealings between the parties. Alternatively, the exercise of sound (or standard) commercial practices should be sufficient to comply with this implicit duty. For instance an exclusive music publishing agreement would customarily require the production of a 'demo' as a matter of the publisher's implied reasonable efforts obligation³⁴⁴ and to this extent it may be deemed reasonable for any artist to expect the music publisher would at the least produce a 'demo', which could then be 'plugged' or promoted to record companies or solo recording artists.³⁴⁵ Indeed, the first step towards exploiting the songwriters work is the production of a demo of reasonable quality and if a contract includes an obligation on the part of the music publisher to produce a demo then it is arguable that further efforts should be undertaken to

³³⁹ *Supra*.n.248.

³⁴⁰ The earlier *Croce* case held that the existence of multiple contracts, in itself, did not give rise to a fiduciary relationship, see *supra*. n.256. Moreover, the court in *Mellencamp* emphasised the fact that circumstances which created fiduciary relationships were not matters of procedural fairness where contract law was concerned.

³⁴¹ *Supra*.n. 236 and *supra*.n.237.

³⁴² See *supra*. n.223 at 59.

³⁴³ According to Tomlinson, see *supra*.n. 320 at 97, fn 62.

³⁴⁴ A demonstration recording.

reasonably exploit the work in accordance with the implicit reasonable efforts duty.

Donald Tomlinson strongly advises his clients that even if an express exploitation term cannot be negotiated they should insist on an express duty to produce a demo at least for the 'minimum commitment' required under each option, because having produced the demo it would not be sound business judgement or in accordance with reasonable industry standards to leave it 'unplugged' or unpromoted. Alternatively, songwriters can argue that the production of a demo, in itself would be an implicit duty that reasonable efforts would be undertaken to perform the contract in the terms of industry practice and therefore in theory having thus produced the demo, the chances of non-exploitation are significantly reduced.

However, the potential for non-exploitation of the works remains and Tomlinson advises the songwriter to also include the right of first refusal so that his/her unexploited works may be reassigned to him/her, and preferably at a favourable price.³⁴⁶ He suggests that the right to 'repurchase' the unexploited work should be drafted so that if a cover recording is not secured, within a specified period subsequent to the expiry of the contractual term, the songwriter would be able to request a reassignment of the copyright in the thus unexploited work.³⁴⁷ However, Tomlinson notes that when a standard exclusive multi-option music publishing contract include this type of clause it also tends to include terms which place the songwriter under an obligation to return unrecouped advances and any applicable charges in a lump sum within a fifteen day period in which to act.³⁴⁸ He considers this fifteen day time period 'unconscionably short', and in combination with the other demands renders this right unworkable and unrealistic in the majority of cases.

In the long term songwriters who have assigned their control of the copyright are still entitled to terminate the assignments and regain the copyrights in all their works after 35

³⁴⁵ Ideally, the 'demo' should be funded by the music publisher.

³⁴⁶ Tomlinson also suggests that the songwriter should try to include a right of first refusal for the assignment of exploited works as well. See *supra*.n. 320 at 171.

³⁴⁷ A 'cover' recording is one in which the recording artist is not the composer of the song. Therefore a songwriter (as opposed to a singer-songwriter) would have to secure the services of a recording artist in order to have his/her work recorded, and the ensuing recording would amount to a cover recording of the work.

³⁴⁸ *Supra*. n.320 at 139.

years.³⁴⁹ This provision would be particularly useful for songwriters who signed modest songwriting contracts and have since gained enduring commercial success. After thirty five years all songwriters would be in a position to terminate their assignments and profit from the enduring success of their backcatalogues and I have already suggested in chapter 2 the internet offers even greater opportunities for copyright exploitation.

(c) Remuneration

The discussion thus far suggests that the fairness of the contract, as a whole, is determined by a somewhat uneasy balance between restraint, control and remuneration and the court in *Witmark* explicitly makes this point. According to the District Court of New York in the *Croce* case, the measure of this balance would be guided by the reasonableness of the contract. Therefore, a contract which lacked mutuality required evidence of ‘gross one-sidedness’ albeit within the effectiveness of its commercial purpose. The implicit and explicit benefits and remuneration which parties can expect from their contracts influence the specific nature of the obligations placed on the other party and represents the minimum standard of measure of substantive fairness which is applicable to exclusive multi-option recording and music publishing agreements under New York law. In California, s3423 of the Civil Code provides an indirect means of ensuring a minimum level of remuneration for recording artists and songwriters. The statutory provision prohibits the granting of an injunction against the artist who seeks to terminate his/her agreement in order to contract with a third party, unless he/she has been guaranteed annual advances of no less than a statutory minimum payment. Moreover, the *Brockert* case suggests that this payment must be independent to the sums paid as contractual advances necessary to produce the work and serves as a minimum ‘wage’ for the artist.³⁵⁰ The ability of an artist to ‘free’ him or her self from a period of an exclusive restraint with the minimum payment for enforcing the agreement is a balance between remuneration and exclusivity determined with reference to statutory measures, and

³⁴⁹ Under the US Copyright Act 1976 section 203, the songwriter has a statutory right to terminate his/her copyright assignment after thirty five years.

consequently a contract which fails to provide the statutory minimum remuneration under s3423, will, in effect, not be exclusive nor long-term. Furthermore, the provisions of the Labor Code s2855 suggests that the seven-year rule would not be enforced against a party where the substantive terms of the contract (including those pertaining to contractual consideration) prove unfair under section 1670.5 of the Civil Code.³⁵¹

To some extent I have attempted to draw out certain conceptual balances within the structure of the contract in order to illustrate the determination of contractual balance between the terms of exclusivity and remuneration. For instance, remuneration as guaranteed advance payments can be balanced against the length and severity of the restraint, whilst remuneration as royalty figures is correspondingly related to the transfer of control in the exclusive copyright in the work(s). The identification of these conceptual balances within the contract is essentially determined from the benefits which should be derived from the contract in the context of his/her contractual burdens. A party which has transferred exclusive control of the copyright in his or her work(s) or his/her ability to produce and commercially distribute his/her musical work(s), should not be denied the direct benefit of that burden.

The investigation into contractual balances which is quite evident within US law has also resulted in the clear demarcation between guaranteed advances and royalties as distinct concepts which serve particular purposes within exclusive multi-option recording and music publishing agreements. This division of the concept of compensation serves a useful purpose because it helps to provide some clarity when analysing very different issues within the nature of remuneration.

Some of the concerns with remuneration appear to be particularly acute in the recording industry. Advance payments are seen as a form of 'income' by unestablished recording artists whereas the record company would perhaps regard advances as no more than a loan or, at best, a form of investment in the artist. However the concept of royalties is rarely treated by the unestablished recording artist with the due consideration it deserves and

³⁵⁰ *Supra*.n. 307 at 135 fn.7.

³⁵¹ The California Civil Code section 1670.5 enacts art. 2-302 of the Uniform Commercial Code.

moreover it would appear that the royalty figures appear to be decided by reference to the market status of the artist. Advances are usually negotiable whereas royalties are non-negotiable even on contractual renegotiations and therefore the ability to negotiate a share of the profits is limited to the artist with substantial bargaining power. Campbell suggests that this may be due to the fact that royalties may also be seen as a measure of risk allocation.³⁵² The inability of most unestablished recording artists to negotiate royalty percentage figures or indeed to influence the manner in which fair remuneration may be distributed through various forms of contractual payments ultimately point to a procedural inquiry into fairness.

The inability to effect genuine negotiations with regard to royalties signifies the weakness of the bargaining status of the recording artist and in this sense the US artist is in no better position than his/her UK counterpart. Indeed it is only in very rare circumstances when the 'superstar' artist is able to negotiate royalty figures to any practical extent. This is an important point to bear in mind, particularly when commentators such as Campbell claim that in the US music industry the level of advances is generally very poor particularly since these payments tend to be inclusive and therefore absorb almost all the recording costs.³⁵³ Moreover, the record companies are not likely to offer more than the average costs for producing a mastertape to the unestablished artist and consequently most unestablished artists do in fact become quite heavily dependent on the royalties due to them. In California, for instance statute has provided some redress to the potential difficulties provided by this sort of bargain, however it would appear that unestablished artists still appear to 'focus heavily on the amount of the initial [recoupable] advance as a major negotiation point'³⁵⁴ and this negotiating strategy is executed by trading off this fee against both the number of contractual options as well as the royalty percentage. The latter should be first measured as a separate payment stream which corresponds to the transfer of exclusive copyright before it is traded off against the contractual advances. Moreover, the concept of advances does not play a role in the long term interests of the artist unless the payments are sufficiently generous in order to

³⁵² See *supra*. n. 41 at 506.

³⁵³ *Ibid.*

off-set inadequate royalty levels and such occurrences would be rare in most cases where unestablished artists are concerned.

Determining the fairness of royalty percentages and structures is not any easy task particularly where the artist has gained huge commercial success in his/her music and has consequently reaped large sums in royalty payments. The court in *Croce* held that the royalty percentages were fair merely as a result of the substantial profits which Croce's music made. In this sense, a financially successful artist would not enjoy the same level of judicial scrutiny into the payment of his/her royalties, as would an industry newcomer. The more recent but controversial *Buchwald* case provides some indication as to how a court may approach the problem of establishing fairness in the context of royalty percentages, particularly where more successful artists are concerned.³⁵⁵ The court held that the determination of fair terms of compensation, particularly royalties was not based on the 'going market rate' or their prevailing customs within the 'oligarchical' nature of the film industry.³⁵⁶ The fair division of royalty figures would have to be proportionate to the contribution made to the work as a whole, and according to the court, the royalty provisions may then reflect a proportionate allocation for the risk of potential loss.³⁵⁷ Furthermore, by directly connecting compensation (and in particular standard royalty terms) to the use of standard 'take-it-or-leave-it' contracts in an oligarchical industry, the court in *Buchwald* case neatly linked substantial fairness with procedural fairness.

Writing soon after the *Buchwald* case Campbell notes that the decision had, at best, no more than a temporary cosmetic effect on the movie industry.³⁵⁸ Moreover, the fact that *Buchwald* was not followed in the *Batfilm* case suggests that the determination of fairness in the division of profits in terms of proportionality remains controversial³⁵⁹ and consequently it

³⁵⁴ *Ibid.*

³⁵⁵ *Supra*.n.281. The Dixie Chicks raised the issue of profit participation too.

³⁵⁶ The oligarchical nature of the Hollywood movie industry may be likened to the position of the industry majors in the music industry.

³⁵⁷ The court appeared to have suggested this measure of fairness rather than one which merely avoided gross disproportionality between the contractual benefits and burdens.

³⁵⁸ *Supra*. n.41at 502.

³⁵⁹ The *Batfilm* case, BC 051653/051654 (Los Angeles County Ct, 1994).

is doubtful whether the music industry would adopt a proportionality based measure of fair royalty practices in standard exclusive multi-option recording agreements. In this light the successfully settled Dixie Chicks dispute with Sony perhaps offers a practical approach to addressing fairness in royalty payments because it does not question the relative abstractness of royalty percentage figures nor the actual sums paid to the artist but instead inquires as to fairness of royalty accounting procedures. The fairness of standard industry wide accounting practices cannot be determined by merely interpreting abstract royalty percentage points in the contract nor by the actual royalty payments received by the artist but rather by examining the recording or music publishing company's accounting practices.

To some extent composers and songwriters at least in recent times, have considered more fruitful negotiating techniques which have placed the due focus of long term contractual benefits in their share of the profits rather than merely on recoupable advance figures. Campbell suggests the following minimum standards for consideration when negotiating contractual remuneration in music publishing agreements:³⁶⁰ (1) the application of any minimum compensation requirements. Campbell suggests that the operation of collective bargaining agreements may be relevant at this point. This would be particularly so where song writing agreements are concerned, since there is some evidence that such 'union type' agreements are the only genuine protection, for the artist, from outright exploitation by the music publisher. In addition, the operation of a statutory provision such as s3423 of the California Civil Code would be equally, if not more important here; (2) the compensation terms which are currently used in standard form contracts. Campbell suggests that 'standard contracts often establish a point of departure for negotiations', albeit much depends on the relative bargaining strengths of the parties, and the genuine availability of alternative choices for the artist,³⁶¹ and (3) the particular practice of negotiations currently existing within the industry, which is evidenced by the 'deals' that have been recently negotiated. This last issue

³⁶⁰ *Supra*. n. 41 at 430. Campbell suggests that this is the base from which negotiations should proceed.

³⁶¹ *Ibid.* at 430. He notes that whilst record companies may claim that there is no standard recording contract, the underlying approaches of most of the industry 'majors' remain similar through out the

is difficult to determine with any practical certainty and consequently, Campbell admits that the payment and structure of contractual remuneration, as well as the 'going rates' and 'packages, 'tend to change more rapidly than other provisions in entertainment contracts.'³⁶² Campbell's advice with regard to remuneration suggests that the starting point in the negotiation process, for any status of artist, would be the minimum criteria set by the law and artist's representative bodies combined with the 'going rate' and customary practices of the industry. However as I have noted before, a measurement of fair remuneration must consider the different expectations of the individual parties with regard to advances and royalties as well. Moreover, this assessment must consider issues of duration and copyright control as well.³⁶³

The foregoing discussion of substantive fairness points to the underlying concern for procedural fairness and in particular the effectiveness of the artist's bargaining status particularly in the light of standard form contracts and substitutability.

VI (iii) Contractual assent: issues of procedural fairness

When the courts applied the doctrine of unconscionability to exclusive agreements in the music industry, procedural unconscionability was interpreted as circumstances in which no genuine negotiation between the parties took place. For instance in the New York case regarding Jim Croce the court held that any claim that the contract lacked genuine negotiation would have required evidence that 'haste and high pressure tactics' had been exerted on the weaker party, and in this particular case did not present such evidence.³⁶⁴ Whilst in the California cases of *Buchwald* and *Graham*, the respective courts interpreted procedural

business. See *ibid.* 506

³⁶² *Ibid.* at 431.

³⁶³ Much of this rationale is equally applicable for recording contracts too.

³⁶⁴ In *Croce* (*supra*. n.256) the court held that the circumstance of 'haste and high pressure' tactics did not exist in that particular instance. I assume that 'haste and high pressure tactics' would exceed acceptable commercial pressures. However, it must be noted that duress is available as an independent contractual remedy for any artist. Therefore, one assumes that the determination of 'haste and high pressure' may be somewhere in between the concept of duress and acceptable commercial pressure.

unfairness as the lack of a meaningful choice, which was considered in terms of the absence of a fair and reasonable alternative contract within the industry.³⁶⁵ Moreover, the lack of genuine negotiation with regard to significant contract terms, particularly as a consequence of standard industry negotiating practices, was a factor which was singled out for discussion in both *Graham* and *Buchwald*. The issue of meaningful choice lies at the heart of defining procedural fairness in both the New York and California caselaw.

(a) Standard form contracts

The use of ‘take it or leave’ standard form contracts is considered in the context of the doctrine of unconscionability. In these circumstances the problem is not merely the standard contract offered but rather that the contract has been offered on a ‘take or leave it’ basis which leaves the weaker party with no other meaningful alternative choice. Moreover, there are two distinctive issues which standard contracts do raise: the non-negotiability of the contract as a whole and the non-negotiability of specific contractual terms. In particular, the non-negotiability of important terms such as the royalty percentages or the number of options is common in recording and music publishing contracts; and such terms are often offered as the ‘standard’ throughout the industry. Therefore, the lack of a meaningful choice or alternative is difficult to determine because the available alternatives may be numerically adequate but may not provide a meaningful choice with regard to essential contractual terms. In such circumstances, the ‘industry standard’ in itself may prove substantively unfair as it did in the *Buchwald* case.

Common industry standards are primarily set by the practices and policies of both the industry majors and the large independent companies and are often referred to as the ‘going rate’ by courts and industry commentators.³⁶⁶ There is little evidence within the industry to

³⁶⁵ See respectively, *supra*. n. 281 and *supra*. n. 276. In the *Buchwald* case, the standard royalty terms were identical to those offered by the offeror’s rivals.

³⁶⁶ Independent companies are less likely to act in a ‘cartel’ type manner simply because they are too numerous and disparate to plan concerted contracting practices. Nevertheless, the music industry remains a ‘closed shop’, in which most businesses are highly likely to be aware of the terms offered by their rivals.

suggest that the 'going rate' is in fact considered as the substantively fair contractual standard.³⁶⁷ However the 'going rate' may be seen as the minimum industry standard from which record companies and music publishers negotiate their contracts.

Almost all exclusive recording contracts, which have been concluded with the record companies in the US require the approval of the American Federation of Musicians (AFM) but this process is seen as no more than a superficial and ineffective procedural safeguard and not as a general support of the fairness of non-negotiable industry standard terms by artists' representative bodies. This is because the thirty-day period within which a contract must be rejected is often too short a time for the AFM to oversee the terms of the contract without a thorough investigation.³⁶⁸

The use of standard terms and contracts set by artists' representative bodies appears to offer some solution to the problem. Nevertheless, and to a certain extent, the use of standard form contracts which have been drafted by the musician's union or labour association for instance may be able to ensure fair terms for artists (particularly for the industry newcomers). However commentators suggest that in practice, major artist representative organisations such as the American Federation of Musicians appear to wield little power, particularly when individual recording artists are concerned.³⁶⁹ Nevertheless, it would not be uncommon for a songwriter in a strong bargaining power to opt to use the standard form contract recommended by his/her union or association both for convenience and to be able to protect his/her interests at minimum costs.³⁷⁰

The determination of the fairness of all non-negotiable aspects of the contract would

³⁶⁷ In the *Buchwald* case the court deemed the 'going rate' which was offered by the industry as unfair, see *Supra*. n.281.

³⁶⁸ See *supra*. n.6 at 15. For example, the AFM recommendation that the duration of a contract ought not to exceed five years is not often enforced by them.

³⁶⁹ Almost every musician in the United States is a member of the AFM. The AFM has negotiated industry agreements in order to provide minimum standard conditions for its members, particularly with regard to session musicians. To this extent it has been successful. However, the influence of the AFM is generally limited to negotiating on matters of overall industry policy rather than those regarding individual contracts.

³⁷⁰ Songwriters with sufficient bargaining power are often able to utilise the standard form contract drafted by the Songwriter Guild of America (SGA). This contract provides a checklist of terms which ought to be considered during negotiations, rather than a wholesale attempt to standardise terms by means of collective bargaining. Therefore, the SGA advises its members that all terms in a songwriting

be ultimately judged on the overall fairness of its substantive terms. Therefore, standard form contracts would have to reflect substantive fairness; and determining the latter remains a controversial issue.

(b) Renegotiations

Another aspect of procedural fairness is the position of the artist during ‘mid-term’ renegotiations of the contract. It is arguable that the factors of ‘haste and high pressure tactics’ and the lack of ‘meaningful choice,’ which were specifically identified in caselaw with regard to procedural unfairness, could apply to circumstances in which mid-term renegotiations are concluded. The *Metallica* litigation suggests that artists claim to find the concept of renegotiations during the operation of a contract procedurally problematic.³⁷¹

In the *Metallica* dispute, the band, Metallica, claimed that it was facing covert ‘pressure’ to agree to the new terms which were being proposed by its record company, Elektra.³⁷² Metallica claimed that it depended on Elektra to amicably perform the existing contract, and it was in these circumstances that it (Metallica) was compelled to accept the terms of the new contract. Metallica argued that the circumstance of the pre-existing contract with Elektra placed the latter in a far superior bargaining position which it used during the renegotiations, in order to extract more favourable contractual terms³⁷³. This type of argument has found support amongst legal commentators. For instance, the Los Angeles attorney Gary Greenberg suggest that:

‘Most artists are so anxious to embark on or continue their recording career that they are willing to accept almost any terms, which often result in an agreement that favors the company.’³⁷⁴

The *Metallica* dispute was settled out of court and consequently the opportunity did not arise

agreement are negotiable. Strictly speaking, the SGA is not a union but rather an association.

³⁷¹ No. 964007 (San Francisco County Super. Ct.). The case was settled.

³⁷² Elektra is a leading record label belonging to Warner Records (USA).

³⁷³ This argument is not unlike that which George Michael used unsuccessfully against Sony. See Chapter 3.

³⁷⁴ *Supra*.n.295 at 23.

for the court to consider whether there had actually been an abuse of the ‘superior bargaining power’ by Elektra. The assessment of an abuse of a superior bargaining power would require an measurement of the quality of the contractual exchange, and it is unclear whether the court in *Metallica* would have determined substantive fairness on any standard other than a gross disparity in the contractual exchange. However, as I have already suggested the measurement of substantive fairness remains a controversial point.

In the *Melissa Manchester* case the court held that as long as independent consideration was offered, then a renegotiation or the ‘extension’ of the contract terms would not in itself be considered unfair.³⁷⁵ The position of the court suggests that it is unlikely that a mere disparity of bargaining power between the parties is sufficient to cast doubt on the fairness of the contract. Nevertheless, it is worth noting that record companies such as Elektra are willing to settle the dispute rather than take the case to trial as the negative publicity which is often produced by such disputes would prove commercially detrimental to them.³⁷⁶

Greenberg has argued for a reconsideration of the court’s position in the *Manchester* case. He observes, with some cynicism, that the contractual consideration which is offered in any renegotiation would eventually be funded from the artist’s share of the royalties, by a process of cross-collateralisation of remuneration between the contracts.³⁷⁷ Indeed, Greenberg claims that:

‘Typically, when an artist asks his record company for money above what is guaranteed in the contract, the company will review the artist’s account to ascertain what royalties are in the “pipeline” (royalties earned but not yet paid) and agree to accommodate the artist based on those projected royalties. In this way, what appears to the artist to be a generous concession is actually a prepayment of money that the artist has already earned.’³⁷⁸

³⁷⁵ *Ibid.*

³⁷⁶ An inquiry into the substantive exchange of the contract may have exposed an under-valuation, albeit not disproportionately so, of the band.

³⁷⁷ In the UK cross-collateralisation often referred to as cross-subsidisation. Don Passman, defines the concept thus: ‘advances under your current recording contract deal are cross-collateralised with royalties under past and future deals, and vice versa.’ Terms regarding cross-collateralisation with future agreements are ‘buried in the recoupment language’ of the initial contract. See *supra*.n.320 at 100.

³⁷⁸ *Supra* n.295 at 25. The problem of cross-collateralisation is not exclusive to renegotiated contracts. It may occur simultaneously within the advance and royalty terms of the one contract; as well as with royalty and advance terms in different types of contracts i.e. royalties from recordings which are used

Consequently, he suggests that an adequate inquiry into the substantive fairness of the renegotiated contract ought to recognise this point³⁷⁹ and he claims that this practice of ‘sequential’ cross-collateralisation is prevalent within the industry.³⁸⁰ He cautions against the ‘passing off’ of cross-collateralised remuneration as ‘new’ consideration.

The particular questions posed in any renegotiation are ultimately substantive in nature. The issue remains whether the renegotiated contract should reflect remuneration as merely adequate for an independent contract or a marked improvement from the old contract. The former type of contract may not always prove fair, particularly when one considers the obviously improved bargaining position of the successful artist and the non-negotiability of important terms, such as royalty provisions. Indeed a renegotiation is only likely to occur if the artist is in fact successful and therefore offering him/her a renegotiated contract, which is substantively similar to the first contract, without the opportunity to negotiate crucial terms may not be substantively fair either.

(c) Independent legal advice

The *Croce* case suggests that the lack of access to independent legal advice would not in itself imply negotiating circumstances of ‘haste and high pressure tactics’, nor a ‘lack of meaningful choice’. Moreover, an important feature of the case was that although an artist need not receive independent legal advice in order to enter a procedurally fair contract, he or she may still be entitled to a fiduciary duty from the lawyer acting for the record company or music publisher. The lawyer may then owe a duty as a member of the legal profession, towards the musician if the latter is not otherwise legally represented or advised during the

to cross-collateralise advances for songwriting. Passman declares that cross-collateralisation is never beneficial for the artist. See *Ibid.* at 99.

³⁷⁹ *Supra.* n. 320 at 25.

³⁸⁰ Passman agrees and states that sequential cross-collateralisation is common in all sectors of the music industry. Whereas, cross-collateralisation between music publishing and recording contracts is not generally practised by the industry ‘majors’. See *Supra.* n. 320 at 99 and 100.

negotiation stage. These circumstances create both a fiduciary and a professional duty for the lawyer. This professional duty adds an important additional obligation on the lawyer, and one which admittedly exceeds the procedural duties of fairness normally imposed on a record company or music publisher.³⁸¹

The presence of an independent legal advisor concerns two aspects of procedural fairness. First and foremost, when an artist acquires the services of an independent legal specialist in the music industry, he/she gains the ability to improve his/her inherently weaker bargaining position; and secondly, the record company or music publisher is also able to avoid a situation in which the potential for a conflict of interest may arise.

Surprisingly, California attorney Edwin McPherson appears not to notice the essential conflict of interest problems which could arise when there is essentially only the record company's or music publisher's lawyer present during the negotiation stage.³⁸² For instance, McPherson asserts that the actual negotiations and 'major deal points' for a recording agreement are conducted by the artist's manager and a high-ranking record company executive, whereas the record company lawyer merely deals with the routine 'paperwork'. Consequently McPherson argues that since the lawyer only draws up the contract he is not the key representative of the record company within the negotiation process. Moreover, he claims that with regard to the artist's position, '... often times, a better deal can be negotiated *because* of the attorney's [pre-existing] relationship with the [record] label...'³⁸³

McPherson's argument encourages the reliance on the one lawyer within the negotiation process and indeed, he praises the cost benefits of the concept of hiring only one lawyer. Nevertheless, he does accept the radical nature of his proposal and expressly limits its application to the entertainment industry because of its highly 'concentrated' and 'localised' nature.³⁸⁴

³⁸¹ This was the decision in *Croce*. See *Supra*. n.256.

³⁸² 'Conflicts in the Entertainment Industry? ... Not!' *Entertainment and Sports Lawyer* Vol. 10 Number 4 Winter 1993, 5.

³⁸³ *Ibid.* 7

³⁸⁴ Perhaps McPherson sees the role of the record company's lawyer, during the negotiation stage, as an arbitrator rather than a partisan actor in an quasi adversarial process. This view does place an additional

It is not surprising that McPherson's views have been heavily criticised. California entertainment attorneys Joseph Anderson and Darrell Miller have responded to his views by asserting that the potential for a conflict of interest and the breach of a professional duty are very important matters which McPherson's argument conveniently ignores.³⁸⁵ They contend that the limited opportunities for artists in the industry offer very little bargaining leverage and consequently, the majority of artists do in fact accept 'one-sided contracts offered on a "take it or leave it" basis'.³⁸⁶ They argue that without access to genuinely independent legal advice the artist would remain ignorant of his/her contractual obligations, statutory rights and business interests.³⁸⁷ Consequently these circumstances tend to produce a vicious circle of ignorance and exploitation from which major record labels, for instance, continue to 'dictate terms to all but the biggest artists and obtain far broader [copyright] ownership interests in the artists' product than imaginable in any other industry.'³⁸⁸

The underlying point to the argument posed by Anderson and Miller is the problem of adequate legal knowledge of the industry with which an artist or his/her manager is best able to negotiate a contract. This concern is also emphasised by Don Passman who explains that it is only a relatively small group of specialist lawyers who draft contracts within the industry. 'This means that [the specialist industry] lawyers end up seeing more deals than anyone else and, thus, have more knowledge of what's "going down" around town.' Consequently, a specialist lawyer is probably in the best position to offer useful 'industry information' to the artists.³⁸⁹

Artists are, more often than not, required by the record company or music publisher

burden for non-partiality on the lawyer, in accordance with *Croce* (*supra*.n.256). Arguably, in placing this additional obligation on the lawyer, he/she may not perform his/her duties adequately towards his/her client, the record company.

³⁸⁵ 'Professional Responsibility 101, A response to "Conflicts in the Entertainment Industry? ... Not!"' *Entertainment and Sports Lawyer* Vol. 11 Number 2 Summer 1993, 8. They consider McPherson's views as those 'destined for litigation'.

³⁸⁶ *Ibid.* at 8.

³⁸⁷ *Ibid.* 8

³⁸⁸ *Ibid.* 11. Indeed, the artist's manager may not always be well versed on the full legal implications of the contractual obligations imposed on the artist. Moreover, managers in the US sometimes negotiate for a 'portfolio' of clients. It is arguable that there may be a possible element of 'horse trading' when negotiating contracts for a range of artists. The music industry is rife with the circumstances for potential 'conflict of interests'.

to hire an attorney before signing contracts. Indeed, one of my questionees, a Los Angeles music industry attorney, stated that most record companies and music publishers currently make this demand as a company policy. He observed that the steady increase in the representation of artists by specialist music industry lawyers and the general improvement in the knowledge amongst most artists concerning their legal rights had occurred within the last 20-25 years.³⁹⁰ Therefore, it is interesting to note that despite the fairly narrow reading of procedural fairness in the *Croce* case; the interpretation of procedural fairness from both camps of the industry does increasingly take into account the artist's access to independent legal advice and on this aspect of procedural fairness the practices of the various actors within the industry have exceeded the minimum standards set by the courts.³⁹¹ Indeed, an independent study recently commissioned by the Recording Industry Association of America (RIAA) claims that almost 75% of the exclusive recording agreements offered by their member record companies were concluded in circumstances where the artist received independent legal advice.³⁹² Furthermore, RIAA claims that as a consequence of this procedural factor, these contracts are then inherently substantively fair as well. This position is not unlike that expressed by the court in the UK court in the *George Michael* case, but it is submitted that this conclusion does not necessarily follow from the fact that an artist did receive independent legal advice.

(d) Other issues of conflict of interests

The issue of conflict of interests may well extend beyond the need to acquire independent legal advice. For instance, when an artist enters multiple contracts with essentially the one entity then questions regarding a conflict of interests may be relevant. Indeed this argument was raised in the *Croce* case, however the court held that it would not

³⁸⁹ *Supra.* n. 320 at 54 and 58.

³⁹⁰ To some extent the improvement in the artists' knowledge of their legal rights may allay some of the fears expressed by Anderson and Miller. On the other hand, it may emphasise their point that there would be less 'knowledge' and more exploitation if McPherson's views were followed.

³⁹¹ I would venture to suggest that a record company lawyer would not be keen to accept additional 'fiduciary' obligations for him/herself as a result of *Croce* (*supra.* n.256).

declare multiple contracts invalid if they served a 'mutual advantage'.³⁹³ This is an important point to bear in mind when considering the increasingly popular trend amongst music publishers in the United States to offer a variety of services, besides music publishing for singer-songwriters.³⁹⁴

These companies perform a multiplicity of roles such as a publisher, 'A and R' personnel and quasi manager/agent, which stretch well beyond the contractual obligations which are found in typical music publishing agreements. However, the extent of this level of involvement in and control of very different aspects of the artist's career does not appear to concern many of these music publishing/production companies even though these relationships could very well produce circumstances which may impose fiduciary obligations on them. Consequently, the substantive terms of future agreements signed between the artist and the music publishing/production company may have to reflect this 'quasi' fiduciary relationship. In order to prevent any breach of duty, Donald Tomlinson suggests that it is always wise to include a clause within the contract which imposes a duty on the music publisher to deal with affiliated companies at an 'arms length'.³⁹⁵

The advent of this trend amongst music publishers has been welcomed as a positive development. For instance Patrick Finch, Vice President of Famous Music's Nashville Division explains that 'It's my responsibility to get them a record deal. How else better to guarantee me the copyright on a record than going out and getting the artist a record deal?'³⁹⁶ Moreover, many music production companies claim that there is a mutual advantage to such a relationship. According to Judy Stakee of Warner Chappell '...it's in everyone's best interest to maximise the act's potential as a tunesmith, recording artist and performer'.³⁹⁷

This prior interest in the artist also gives a record label which is affiliated with the music publisher, a bargaining advantage if and when a recording contract is eventually

³⁹² See *supra* n. 68.

³⁹³ *Supra* n. 256.

³⁹⁴ These entities are sometimes referred to as music production companies. I have discussed the advent of this trend in the music industry in Chapter 2.

³⁹⁵ See Tomlinson *supra* n.320 at 164.

³⁹⁶ *Supra* n.75 at 51.

concluded. Some companies such as Sony and Universal claim that artists are not under an obligation to sign with affiliated record labels and therefore the immediate problem regarding a conflict of interest appears to be avoided in this instance.³⁹⁸ Nevertheless a publisher may be tempted to promote the artist mainly with an affiliated record label. In fact such a record label may be the first 'port of call' for publishers who 'shop around for a label' on which to record the artist. Indeed, it would be in the interests of an enterprise which boasts both recording and music publishing outlets to control both the music publishing and sound recording contracts because then they would control the exploitation of copyrights in the respective agreements.³⁹⁹

Whilst, such 'internal' contacts may indeed secure a much desired recording contract for the singer-songwriter, it may also provide the record company with information regarding the artist's music publishing contract which would not be available to them under other circumstances.⁴⁰⁰ This information may give a recording company an additional bargaining leverage and consequently the potential for a conflict of interest remains strong. This issue is particularly significant when one considers the important negotiating points in music publishing agreements such as the assignment, retention and reversion of copyright which could affect the operation of the recording agreements. It is not surprising therefore, when Danny Strick, President of BMG Songs, suggests that '... a deal structure is preferable to the publisher at an early stage. This involves advances, as well as other important issues such as retention of copyright and royalty splits.'⁴⁰¹

³⁹⁷ *Ibid.* 51

³⁹⁸ *Ibid.* 51. This claim was made by David Renzer president of song music publishing at Polygram/Universal. Passman confirms this view, he notes that independent companies are more likely to 'encourage' songwriters to sign record 'deals' as well. see *supra.* 320 at 282.

³⁹⁹ In the US and Canada the mechanical licensing rates for a composition is not pre-set but rather held at a maximum price which is then subject to negotiation for a lower fee. By controlling both the songwriting and recording contracts of an artist the company would be able to negotiate for fairly low mechanical licensing rates. This is achieved by including a 'controlled composition' clause in the recording agreement, which limits the record company's payment to the artist for his/her own works. It is almost impossible to negotiate to remove such a clause from a standard recording agreement. In addition, an unfavourable apportionment of the mechanical royalties in the music publishing contract could prove particularly exploitative. See *supra.* n.320 at 235.

⁴⁰⁰ The singer-songwriter may have signed a standard form agreement, the terms of which may be well known to the affiliated record company, as a matter of common knowledge.

⁴⁰¹ *Supra.* n. 75 at 51.

There are some points concerning procedural fairness which are worth noting at this stage. First and foremost, aspiring singer-songwriters who are already under recording contracts will be in a better bargaining position when they negotiate a songwriting agreement. This improvement in the bargaining position would arise simply because they have already secured a popular market for their music. Then the artist would be able to present him/her self as a lesser commercial risk to the music publisher than he/she might have been able to do if this were not so. Indeed as New York attorney Ira Selsky suggests, if the artist is sufficiently patient to delay signing a song-writing contract until an entire album is recorded then a 'bidding war' could well ensue amongst music publishers.

The potential profits from the mechanical copyrights are enormous. However, with regard to the copyright ownership of the sound recordings, the artist will rarely, if ever, control the technical ownership interest in the sound recording, and this is the second point concerning procedural fairness.⁴⁰² The music publishing contract provides for the long term commercial and copyright interests of the singer-songwriter. Therefore, where the singer-songwriter is concerned, the music publishing contract is arguably far more important than the recording agreement.⁴⁰³ Consequently, it is always better to negotiate the music publishing contract from a position of even greater bargaining strength than when negotiating a recording contract.⁴⁰⁴ This is because the value of the artist's copyright ownership in his/her works is thus increased when it is finally negotiated at a more advantageous price to him/her; and therefore, it is not advisable to surrender these copyright interests cheaply and at haste, at the outset of a career as a singer-songwriter.⁴⁰⁵

Don Passman advises his clients to resist all manner of 'tie-in' deals and indeed, he considers the increased opportunities for cross-collateralisation in such arrangements

⁴⁰² The artist surrenders his/her future interests in controlling the copyright in the work by means of a standard 'works made for hire clause'. See further, *supra*.n.31.

⁴⁰³ Tomlinson suggests that songwriters only tend to demonstrate concern for proprietary control over their works when a song has achieved commercial success- this delayed concern is costly. See *supra*.n.320 at 91 fn 32.

⁴⁰⁴ Passman does suggest that actual sums in royalty payments from recording contracts would usually exceed those from music publishing agreements; however, the choice at hand is one between the long-term control over the copyrights in the work and the gaining of extra monetary rewards at an earlier date. See *supra*.n.320.

particularly unfair.⁴⁰⁶ Moreover, he cautions against ‘tie-in’ deals which also include lucrative merchandising rights.⁴⁰⁷ He states that three industry ‘majors’, Warner, Sony and BMG own their own independent merchandising companies and consequently, artists are strongly persuaded to sign merchandising agreements as well.⁴⁰⁸ Passman cautions that the artist who attempts to reject this type of offer will face much resistance from these companies.

VI (iv) Conclusion

The general contracting practices within the industry suggest that most record companies and music publishers appear to believe that procedural fairness could be achieved by merely insisting upon independent legal advice for the artist. It is for this reason that the artist’s access to independent legal advice is considered a requisite element of the contracting process. This is a reasonable assumption since the independent legal advice should cure any ‘ignorance’ on the part of the artist and thus prevent exploitation by record companies and music publishers. Furthermore, it is arguable that fiduciary obligations may not arise where an artist obtains independent legal advice. The record company or music publisher does not assume a fiduciary burden or act in the artist’s best interests when he/she obtains independent legal advice which should act in his/her best interests. It is perhaps this confidence in such aspects of procedure which encourages multiple contracting within the industry. However, the approach of the courts with regard to standard form contracts and the lack of a meaningful choice, as a measure of procedural fairness encourages a reappraisal of this overall view.

Procedural inquiries will ultimately refer to the substantive fairness of the contract. The measure of substantive fairness has proved controversial. Courts refer to terms such as mutuality, reasonableness, proportionality and the avoidance of gross disproportionality. Statutory limitations provide minimum standards in substantive terms. Lawyers, however,

⁴⁰⁵ Some of the general problems with multiple contracts were discussed in Chapter 4.

⁴⁰⁶ *Supra*.n 320 at 281-282. This advice is echoed by most music industry lawyers.

⁴⁰⁷ *Ibid.* 160

⁴⁰⁸ *Ibid.* 160. Ira Selsky disagrees and suggests that the industry independents are more likely to be

refer to the 'going rate' as a relevant factor when measuring the substantive terms of the contract. The 'going rate' is that which is set by the industry, and as such, ought to be negotiable in any fair contract. The inability to negotiate the 'going rate' demonstrates the lack of a genuine choice for the weaker party.⁴⁰⁹

The non-negotiability of an important term such as the royalty percentages exhibits the clear link between procedural and substantive fairness.⁴¹⁰ In almost all cases royalties remain non-negotiable, and often static on renegotiation.⁴¹¹ Royalties are seen as an apportionment of risk by the record company or music publisher. Therefore, it would be reasonable to assume, that on renegotiation, the artist would present a lesser risk which should be fairly reflected in improved royalty figures. Moreover, as a successful artist he/she should be able to fairly renegotiate for an important term, such as the royalty percentage. Therefore, the non-negotiability of essential terms may be procedurally unfair.

As I suggested earlier in this chapter, advances are conceptually less important to the artist than royalties. Nevertheless, advances are considered as an 'investment' in or 'loan' to the artist. Therefore, record companies and music publishers claim that the non-negotiable royalty figures off-set the level of investment/loan made in the artist. In addition, the number of options is also seen as a means of risk allocation. Therefore, another essential and generally non-negotiable 'going rate' term is used to offset the levels of advance offered to the artist. This 'double counting' of risk appears substantively unfair, particularly when industry practitioners observe the overall reduction in the investment of young artists within the industry.⁴¹²

The measure of substantive fairness in renegotiations is also an issue which warrants some discussion. The common practice of sequential cross-collateralisation may deny 'new' consideration for the renegotiated contract; and may amount to a mere modification of the

cautious on this matter.

⁴⁰⁹ This appears particularly so when considering *quasi* oligarchical nature of the 'majors'.

⁴¹⁰ The courts have always required a link between procedure and substance.

⁴¹¹ This seems to be particularly so with regard to recording contracts.

⁴¹² Los Angeles attorneys Richard Greenstone and Charles Robertson have voiced some concern about the level of investment in young artists in some, but not all, quarters of the music industry.

contract. Therefore, the fairness of the practice of sequential cross-collateralisation appears doubtful. Furthermore, the inability of the artist to bargain on essential terms on renegotiation could be seen, in certain circumstances, as a contract modification rather than a renegotiated contract.⁴¹³ The difference between a modified and a renegotiated contract is very important under the seven-year limit in California.

The uncertainty posed from the practice of defining duration in terms of options rather than years does not assist the substantive determination of the overall contract. Furthermore, s2855 of the Labor Code in California does not effectively monitor the actual duration of contracts.⁴¹⁴ Indeed, in the context of exclusive music industry contracts the measurement of the contractual duration in terms of 'years' appears obsolete. Therefore, the minimum statutory protection it appears to provide is illusory. Moreover, s2855 restrict the freedom of parties who are able to fairly negotiate contracts in excess of seven years.

The determination of fair terms is a matter of procedural and substantive fairness. The Courts have attempted to pinpoint issues of procedural fairness to some extent. However, issues of substantive fairness remain somewhat confused. Moreover, essential terms, which often signify risk allocation remain for the most part non-negotiable and static on renegotiation. These terms are governed by the 'going rate' within the industry. The courts have acknowledged that industry standard terms need not necessarily indicate fairness.⁴¹⁵ Moreover, industry practices have tended to undermine contractual conceptions of fairness to a large extent. Often abusive negotiating practices have been passed for 'standard' hard bargaining tactics, and particularly used in circumstances of great disparity of negotiating power. Therefore, the potential for unfair contracting practices within the industry is evident, particularly with regard to artists with minimal bargaining power.

The artistic and economic control in a contract is governed by the negotiating power

⁴¹³ After all, advances are inclusive and recoupable. If royalties represent the risks the artist should be able to present a better risk on renegotiation. Otherwise, the record company or music publisher would not bother to renegotiate with him/her.

⁴¹⁴ This failure particularly affects the more modest recording artists.

⁴¹⁵ Or so the courts would suggest. However, a fair or reasonably expected standard of performance would be in accordance with industry custom.

of both parties as well as the commercial demands and recoupment policies of the music industry and this is so with regard to both recording and music publishing agreements.⁴¹⁶ Contractual consideration must illustrate both adequate payment, with regard to the terms as well as to the transfer of copyright control of the work. The latter must satisfy the requirements of federal copyright law.

⁴¹⁶ These circumstances are not unlike those in the UK, see chapter 4.

Chapter VII

A commentary on theoretical matters

VII (i) Introduction

The UK, New York and California allude to different theoretical approaches to the interpretation of the terms in exclusive multi-option recording and music publishing agreements such as those pertaining to professional autonomy or proportionality in remuneration.

In the UK the following views have been suggested. Cases such as *George Michael*⁴¹⁷ (and to a certain extent) *O'Sullivan*⁴¹⁸ propose that fairness is procedural rather than substantive. In particular, specific negotiating imbalances such as the artist's lack of access to independent legal advice, and signing of related contracts with the same music enterprises, could amount to the absence of procedural fairness. The limited scope of 'undue influence' underpins this interpretation of fairness, suggesting further that the contractual consideration is not a concern for fairness. According to this view any substantive inquiry into the terms of the contract is taken not as a matter of fairness, but rather due to a concern for the law under the doctrine of restraint of trade, which is founded on the premise that a restraint of trade should not be encouraged and may only be enforced as reasonable if (and only if) it protects the legitimate interests of the covenantee. This is the 'rule of reason'.⁴¹⁹ Restraints which cannot be justified in terms of the 'rule of reason' would be considered invalid and struck down by the courts. The underlying claim here is the need to protect future contractual freedom. Lord Reid's concern in *Schroeder* regarding the strong potential for professional sterilisation as a result of the lengthy duration of the contract illustrates the basis of this

⁴¹⁷ *Supra.* n.133

⁴¹⁸ However, the *O'Sullivan* case is somewhat ambiguous on this point, see further *supra*.n.94.

argument well.

The second view from the UK courts is that suggested by Lord Diplock in *Schroeder*.⁴²⁰ He interprets the restraint of trade argument in terms of fairness: procedural and substantive fairness. The lack of procedural fairness could be seen in *inter alia* standard form 'take it or leave it' contracts which were not formed from accepted socio-economic bargaining practices and customs or were not developed over a long process of commercial trade dialogue. However, Lord Diplock suggests that ultimately fairness requires a substantive enquiry because the evidence to support these procedural requirements is not in itself, always sufficient to ensure a fair contract. Substance is measured in terms of the contractual exchange and the commensurate benefits between the parties. There must be a sense of proportion with regard to the benefits and burdens placed on the parties. A party's burdens which are (excessively) disproportionate to the benefits which he/she receives may be evidence of unfairness. In *ZTT* and *Zomba* the courts endorsed similar arguments albeit with less theoretical rigour than Lord Diplock: a substantively disproportionate contract was evidence of a procedurally unfair contract.⁴²¹ Lord Diplock's analysis equates the concept of fairness with the doctrine of restraint of trade. The contractual burden for the artist being the duration, whereas the burden for the record/company would be the investment in the artist (advances). Contractual benefits are directly measured against the duration of the agreement. This 'fairness' interpretation of the doctrine of restraint of trade is independent of specific contract doctrines regarding undue influence and duress. The latter does not require a substantive inquiry but rather a consideration of the 'psychological' circumstances affecting contractual assent. The doctrine of restraint of trade is essentially commercial in nature and has been primarily adapted to address the circumstances of trade and in this context it has evolved to consider the growing frequency of standard form contracts in 'quasi' employment relations as well.

The doctrine of unconscionability as a tool of procedural and substantive fairness, has

⁴¹⁹ Parker J applied this reasoning in the *George Michael* case, see *supra*.n.133.

⁴²⁰ See *supra*.n.83.

a hallowed place in US contract jurisprudence. Fairness is both procedural and substantive, and measured in terms of mutuality and proportionality in the contractual exchange.⁴²² New York and California caselaw regarding fairness does not generally distinguish the length of the contract as a particular burden in the interpretation of fairness. In the pre- UCC 1911 case of *Witmark*, for instance, the five year duration of the contract was mentioned as one of the many relevant factors in considering the unconscionability of the contract but other aspects of the contract such as poor royalty rates and the lack of control over the copyright were equally important to the determination of fairness.

In California a valid seven year maximum term for personal service contracts under the Labor Code section 2855 must also demonstrate adherence to the requirement for contractual fairness under the Civil Code section 1670.5 which, would include terms relating to contractual consideration. Furthermore the parallel provision under section 3423 of the Civil Code with regard to the minimum remuneration requirement for the enforcement of personal service contracts (Civil Code section 3423), has been applied to secure a minimum level of guaranteed advances for the artist. Minimum statutory levels of remuneration and the application of the doctrine of unconscionability have played a central role in determining the validity of exclusive multi-option recording and music publishing agreements. Moreover, cases such as *Buchwald* examine the percentages of royalty figures in great detail in order to determine substantive contractual fairness, and this type of evaluation is striking because it points to the important role of copyright ownership and future exploitation of copyright works.

Issues concerning both the duration of the exclusive contract as well as the exclusive control of the copyright must be considered alongside matters of remuneration in the determination of the artist's trading capital and his/her fair opportunities to maximise them. In this context the matter of fair remuneration in exchange for copyright control has not been adequately considered by the UK courts. In an age when artists are increasingly becoming

⁴²¹ See *supra*.n.112 and *supra*.n.125.

⁴²² See *Croce* (*supra*.n.256) and *Buchwald* (*supra*.n.281).

aware of the ease of digital exploitation of music and the profit potential of backcatalogues, the connection and contractual balance between royalties and copyright is an issue which must be addressed by those who negotiate, draft and interpret exclusive multi-option recording and music publishing agreements.

In the context of determining standard and negotiated terms in exclusive multi-option recording and music publishing agreements, the second contract model described above offers a clearer explanation of caselaw than the first model and it is also well supported by theoretical interpretations of fairness.

This chapter will provide a commentary on the significant theoretical issues which have arisen from the preceding discussion. In this regard I shall be considering three dominant theoretical approaches to the caselaw: (1) liberal perfectionism considers the reasonableness of a contract in the context of future freedom. Interestingly, the theory of future freedom rejects the principle of fairness in the consideration of freedom of trade. Future freedom consigns 'fairness' as a mere 'price', to the theory of Economic Efficiency; (2) the theory of Economic Efficiency determines contractual fairness, or the lack of it, in accordance with 'perfect market' conditions; and finally (3) the welfare based theory of fairness expounded by Karl Llewellyn and more contemporary theorists, which is founded on the presumption that contracts may be dictated by dominant parties rather than negotiated between both contracting parties. Aspects of both price and freedom are relevant to this view as well. I shall finally argue that the best interpretation of law and practice is founded in liberal egalitarianism.

The aim of this chapter is to consider the normative reasons for the law's concerns for fairness and to assess their usefulness and value to those who negotiate, draft and interpret these agreements.

VII (ii) Future Freedom of Trade: Liberal Perfectionism

The issue of future contractual freedom has played a significant role in the previous

discussions of the substantive laws and practices in the UK and the USA.⁴²³ The law's concern for particular contract terms such as duration, termination rights, contract suspension rights, commercial release rights, creative control and the exploitation of copyrights have centred on the issue of the artist's professional and economic future freedom and sterilisation. Moreover, as I have already discussed in Chapters 4 and 6, the industry practices with regard to the standard terms of duration and of the concept of contractual option periods have directly raised issues of future contractual freedom and sterilisation. These concerns are particularly well illustrated in the first model to which I referred in the introduction to this chapter.

The Doctrine of restraint of trade has been used by the UK courts in order to determine the validity of contract terms in exclusive multi-option recording and music publishing agreements. Stephen Smith applies a liberal perfectionist analysis to the interpretation of the doctrine of restraint of trade.⁴²⁴ He has based his argument on a positivist theoretical foundation and in particular one which draws on the theory of liberal perfectionism of promoting autonomous well being espoused by Joseph Raz. Moreover his account of the restraint of trade doctrine is dominated by the concept of future freedom which, I shall argue, does not in itself, supply an adequate interpretation of the law.

Raz's theory of liberal perfectionism is derived from the classical liberalism of J.S. Mill.⁴²⁵ Raz argues that an individual must be able to act with independence in order to control the important choices in his/her life and these choices may be short-term or long-term. A person must be given the opportunity to create a morally valuable life through the provision of a range of morally valuable alternatives. The ultimate value of autonomy is that it allows the individual to pursue morally good choices, in order to lead a morally valuable and socially acceptable life.⁴²⁶ The autonomy of a morally valuable life stems from a 'public culture'

⁴²³ See chapters 3-6.

⁴²⁴ Smith's analysis is principally founded on the caselaw in England and Wales, and the Commonwealth. His American references are rare.

⁴²⁵ See Joseph Raz's *Morality of Freedom* OUP (1986). Particularly Chapters 14 and 15.

⁴²⁶ *Ibid.* at 417.

which conforms to ‘a tasteful rather than a vulgar and offensive environment’.⁴²⁷ Consequently, a liberal society should create the necessary conditions to promote a valuable life, by ensuring an adequate range of valuable options, ‘eliminating repugnant ones’, and upholding valuable and independently chosen options.⁴²⁸ Therefore, not only must a person have valuable options but also the capacity to exercise his choices valuably and consequently society must actively promote autonomy and uphold the preconditions to the exercise of autonomy. A failure to do so would ‘harm’ society and its members. In this regard Raz defines ‘harm’ in the following terms: ‘Roughly speaking, one harms another when one’s action makes the other person worse off than he was, or is entitled to be, in a manner which affects his future well-being’.⁴²⁹ The concept of harm is determined by the restrictions it places on important long-term life choices.⁴³⁰ Therefore, liberal perfectionism supports the freedom to exercise life choices in the future. Indeed to place a restraint on this freedom would be considered harmful. Raz argues that a moral theory founded on principles of autonomy must have as its highest priority the right to restrict the exercise of present freedom in order to protect from harm an individual’s future freedom.⁴³¹ Consequently, a person’s present choices may be restricted if they pose harm to his or anybody else’s future freedom. The concept of autonomy thus provides an objective reference point for determining social and personal value.

Smith’s account of the caselaw dealing with exclusive recording and music publishing contracts in England and Wales is divided into two separate and mutually exclusive theories of ‘future freedom’ and ‘fairness’. He argues that the doctrine of restraint of trade, the legal basis for the justification of contract terms in the field of recording and music publishing agreements in English caselaw is founded on the theory of future freedom rather than fairness. Consequently, Smith’s fundamental criticism of the leading case,

⁴²⁷ *Ibid.* at 422.

⁴²⁸ *Ibid.* at 417.

⁴²⁹ *Ibid.* at 414.

⁴³⁰ *Ibid.* at 421.

⁴³¹ *Ibid.* at 419.

*Schroeder*⁴³², stems from this point, which he thinks the House of Lords failed to recognise. Although Smith suggests (somewhat ambiguously) that on occasion procedural and substantive fairness are valuable in the understanding of the restraint of trade doctrine, his sole interest, in the context of the application of this doctrine is future freedom.⁴³³ The following account of Smith's theory offers a discussion of his 'future freedom' based analysis of the doctrine of restraint of trade.

The doctrine of restraint of trade, according to Smith, is based on the view that all restraints of trade are *prima facie* bad. He argues that the objective normative value of future freedom is universally accepted. However, he explains that the objective criteria of future freedom is also capable of justifying a restraint of trade. This interpretation the doctrine of restraint of trade conforms with the first model of analysis to which I have referred in the introduction to this chapter.

Scope

Smith examines the restraint of trade doctrine by considering the contract under the three tests of scope, necessity (or legitimately protectable interests) and reasonableness. The determination of scope considers the relevance of the doctrine of restraint of trade to the particular contract at issue. Smith argues that in order for a contract to be considered within the scope of the doctrine it must: (a) be relatively onerous in nature, i.e. with regard to its duration and other obligations; (b) have been agreed to in circumstances in which self interest would have proved a 'weak' check for a party, i.e. where that party was sufficiently desperate to sign almost any contract which was offered to him/her; and (c) present a strong potential for cognitive error with regard to its terms, e.g. the high risk of error which could arise in agreeing to terms based on speculations of commercial success or circumstances in which the covenantor lacks access to legal advice.⁴³⁴ Therefore, the scope test presents an examination

⁴³² *Supra*.n.83.

⁴³³ 'Reconstructing Restraint of Trade' (1994) *OJLS* 15 565 at 566.

⁴³⁴ *Ibid.* at 571.

of the potential for negotiating defects as well as the substantive contractual burdens of the covenantor. Smith explains that if the requirements of the scope test are thus satisfied, the legitimate interests test, the next stage may then be considered.

Legitimate interests

The function of the restraint is to protect the covenantee's legitimate interests. Smith's account of the legitimate interests test initially appears rather restricted with regard to the covenantee's claims. For instance, an interest may be legitimately protected if it is necessary to facilitate the achievement of positive goals. The protection of legitimate interests can justify a restraint if it promotes the liberal perfectionist aim of living a valuable life.⁴³⁵ There is an objective social value in living a valuable life and any interest which is deemed a 'necessary incident to a successful contractual relationship' would be regarded as a legitimate interest under the doctrine of restraint of trade.⁴³⁶ Smith argues that such 'necessary incidents' are determined by reference to industry practices.⁴³⁷ If we apply this analysis to common music industry practices we could argue that the payment of advances is a necessary incident to the successful performance of exclusive recording and music publishing agreements. Advances or 'investments' can be deemed as legitimate interests and thus, are capable of being protected under the restraint of trade doctrine. Legitimate interests are vulnerable and legitimately subject to protection.⁴³⁸ However, it must also be noted that advances are always recoupable. The recoupment of 'necessary incidents' will not in itself free the artist from the restraint. The artist would remain tied to the contract after the 'necessary investment' has been recouped. He/she would be thus retained for further options by the provision of further advances until all the option periods have been fulfilled.

The problem with Smith's argument here is that it is difficult to apply to exclusive multi-option contracts. The exercise of every option would give rise its own measure of

⁴³⁵ *Ibid.* at 574.

⁴³⁶ *Ibid.* at 575.

⁴³⁷ *Ibid.* at 576.

⁴³⁸ *Ibid.* at 576. Indeed Smith considers the payment of advances in the music industry as 'highly

‘necessary’ investment, and yet the technical restraint of trade is not applied on an option by option basis but rather over the complete number of potential options periods in the contract as a whole. The particular contracting practices of the music industry suggests that Smith’s reliance on industry practices, to determine ‘necessary’ and legitimate interests, can prove controversial in some instances. Moreover, it would also appear that by measuring legitimate interests by reference to industry practices Smith ultimately determines the severity of the restraint and future freedom in accordance with industry norms.⁴³⁹

If we follow Smith’s argument which determines ‘necessary incidents’ in terms of industry practices, legitimate interests will be interpreted with regard to two important considerations. In the first instance, industry practices are set by dominant actors within the industry. In the music industry this role is predominantly filled by the ‘industry major’ and large independent record and music publishing companies. Consequently, the ‘industry practice’ standard on which Smith appears to rely for his determination of a ‘necessary incident’ of the contract reflects only the views of the dominant contracting party. Therefore, this factor limits the sources for inquiry. However, we could justify Smith’s position by asserting that the legitimate interests test considers the burdens placed on the covenantee as a result of the contract. The covenantor’s views may be of lesser priority due to the fact that the purpose of the legitimate interest test is to only evaluate the covenantee’s interest and nothing more. This justification leads to the second point with regard to ‘necessary incidents’.

The second and related factor, with regard to ‘necessary incidents’, considers the width of claims for legitimate interests. Is the burden claimed by the covenantee legitimately attributed as a burden of the particular contract at issue? According to Smith, increasing profitability is not a legitimate interest nor a necessary incident of a contract, because any form of financial consideration, in this context, can only be justified to the extent that it relates to the ‘viability of the relevant positive endeavour’.⁴⁴⁰ It would appear that this

speculative’. My research suggests that this is not necessarily the case, see chapter 2.

⁴³⁹ It may be possible to argue that industry norms can be determined in terms of a liberal perfectionist society but Smith is not clear on this point. See Hugh Collins *infra*.n.551.

⁴⁴⁰ *Supra*. n.433 at 577. I find this quite a surprising view because arguably, the whole point to trade

qualification of the use of industry standards in the determination of restraint of trade is restricted to those industry practices which only endorse liberal perfectionist values.⁴⁴¹ However, he is unclear as to what constitutes the 'relevant positive endeavour'. The 'necessary' investment required to achieve the 'relevant positive endeavour' could extend beyond the payments made directly to the artist. Smith suggests that the determination of 'necessary incidents' would have to be restricted to direct contractual investments with regard to the actual contract, despite the prevalence in industry practices to include 'indirect' investments as well, in the calculation of 'investment'.⁴⁴² According to Smith, the legitimate interests test is 'a recognition that limits on future autonomy may be acceptable if they are necessary in order to achieve valuable goals'.⁴⁴³ Smith claims that this test would naturally lead to a conclusion of reasonableness which is founded on the objective liberal perfectionist ideal of individual well-being. A reasonable limit to future freedom in these terms must favour individual well-being and equally, individual well-being would endorse a reasonable restraint. Individual well-being is then identified on the basis of liberal perfectionist values of leading a socially and morally valuable life. However, in practice this argument is unhelpful because it is too general a basis on which to determine the validity of a restraint of trade, which also requires an evaluation of economic factors. These factors cannot be identified by liberal perfectionism other than by reference to industry practices which, as I have explained above, are treated quite ambiguously by Smith.

Reasonableness

The final part of Smith's conception of the restraint of trade theory is the 'reasonableness test', the issue which he considers the main element of all restraint of trade decisions. He suggests that a reasonable restraint should reflect 'no more than adequate

and commerce is to engage in a financial or value determined exchange.

⁴⁴¹ I am making an assumption here because once again Smith is never very clear on this point but Collins appears to formulate this view with greater clarity, see *infra* n.552.

⁴⁴² *Supra* n.433 at 576.

⁴⁴³ Smith, S. *The Restraint of Trade* (1994) Oxford University DPhil thesis, 297.

protection' for the covenantee, in light of the legitimate interests which have been identified above. The test for reasonableness is a substantive inquiry but does not consider contractual consideration because Smith asserts that contractual consideration is an aspect of fairness rather than future freedom and therefore he excludes it from his inquiry.

Reasonableness would be determined by testing the '*severity* of the restraint (its duration, geographical scope, and the range of activities restricted) against [the] *nature of the interest* being protected.'⁴⁴⁴ The tie must reflect the extent of the covenantee's interests/investments. Moreover, it appears to demonstrate an exercise of balancing the burdens which have been directly imposed by the contract. Smith explains that the burden of a restraint imposed on the covenantor should be no more severe than necessary to safeguard the legitimate interests of the covenantee. This is a balance of necessity. He explains that 'necessity' is an 'underdetermined' standard which suggests that this measure (not unlike the application of wealth maximisation under the theory of economic efficiency) claims no moral value.⁴⁴⁵

Future freedom

There is a second consideration with regard to the 'necessary incidents' interpretation of reasonableness which Smith thinks is often ignored by the courts. This is a 'value laden' concept which could be loosely termed 'future freedom'. Indeed this value underpins any assessment of the unsettled nature of 'necessity'. Smith considers this value 'objective' because he maintains that preserving a person's future contractual freedom is an objective and therefore, universally accepted and socially valuable concept which is recognised by the law. There is a universally accepted value in preserving future contractual freedom in order to enhance the range of contractual opportunities for the parties.⁴⁴⁶

Indeed he claims that as a consequence of this normative and objective value, the

⁴⁴⁴ *Supra*. n.433 at 578.

⁴⁴⁵ *Ibid.* at 577 and 578. A similar argument is made with regard to the economic efficiency theory by Richard Posner. I shall discuss it in due course.

common law upholds ‘the rule against self-enslavement contracts’.⁴⁴⁷ There is no objective value in enjoying the benefits of a contract which also ‘enslaves’.

Smith’s interpretation of self-enslavement contracts appears somewhat obscure. It is unclear whether future freedom condemns as valueless self-enslavement contracts: (i) all long-term exclusive contracts or; (ii) contracts which fail to specify an expiry date or; (iii) contracts which deny the artist any control in the manner in which he/she may perform the contract. With regard to (i) Smith’s theory would run counter to the House of Lords decision in the *Nordenfeldt* case, which endorsed the reasonableness of a twenty five year restriction.⁴⁴⁸ Indeed, the judicial acceptance of the fifteen year maximum duration in the *George Michael* case would also prove contrary to Smith’s view.⁴⁴⁹ With regard to (ii), the courts in the *Stone Roses* and *Holly Johnson* cases held that such contracts would fail for uncertainty. In the context of common contracting practices in the music industry, points (i),(ii) and (iii) would independently render most exclusive multi-option recording contracts self-enslavement contracts. In the UK, record companies routinely draft standard contract terms for 6 to 8 uncapped options and include the right to reject material which fail to reach a ‘merchantable’ or ‘commercially accepted’ standard of quality.⁴⁵⁰ Future freedom would not include within its scope uncapped exclusive multi-option contracts, nor those agreements which deny the artist commercial and artistic control over the creation and marketing of the work because these contracts would reduce the range of contractual opportunities for these artists. Nevertheless, these practices are common through out the UK and US music industry and often endorsed by the courts.

The issue of lengthy contracts was one of the concerns which Lord Reid raised in *Schroeder*. Being contractually tied for a lengthy period as in point (i) would affect the future

⁴⁴⁶ *Supra*.n.433 at 591.

⁴⁴⁷ *Ibid* at 597, fn 68. Smith refers to an American ‘peonage’ case which suggests that a ‘bar against slavery contracts can be applied to relationships short of slavery.’

⁴⁴⁸ *Nordenfeldt v. Maxim Nordenfeldt* [1894] AC 535.

⁴⁴⁹ Smith considers decisions which fail to support his position as mistaken or incorrect decisions. He concludes that these errors may have been induced by the difficulty in assessing the complex factual and economic issues involved in these cases. See *supra*. n.433 at 579.

⁴⁵⁰ See chapters 2,4, and 6.

freedom of the artist not merely because he/she would be unable to negotiate a better agreement elsewhere (whilst remaining tied to the contract), but also if he/she were unable to commercially release his/her works. This latter issue could amount to the professional sterilisation of an individual. Smith's views and those of Lord Reid would coincide quite comfortably on this assessment of the rule against self enslavement. Indeed, Smith concludes that: 'Interpreted broadly, the rule against contracts of self-enslavement can be used to invalidate restraints which, though necessary, are extremely onerous.'⁴⁵¹ In the context of recording and music publishing agreements future freedom suggests that direct investments, in the form of advances, cannot buy onerous contractual obligations because future freedom cannot be sold for a price. The 'onerousness' of the contract is ultimately determined in terms of the scope of the restraint and represents the professional nature of the artist's obligations – an important life choice. For example, a ten year restraint would well represent the entirety of a moderately successful artist's professional life in the 'pop' recording industry. Therefore, any medium to long term standard exclusive recording or music publishing contract could, in itself, be considered onerous under Smith's theory. For instance, the restraint in his analysis would find invalid and unenforceable the potential fifteen year restraint in George Michael's 1988 contract, despite the large sums in advances which he received. Smith suggests that the main problem with this sort of restraint is that 'it leaves open the possibility that an individual's efforts and opportunities may be effectively ignored for a significant period of time',⁴⁵² thus limiting the artist's future contracting options and indeed his/her career as a songwriter and/or recording artist. Therefore, this type of restriction, particularly over a long period and where the professional capacity of the artist is concerned, is a threat to individual well-being; and consequently, not a valuable goal.⁴⁵³ Smith's argument would probably not accept the inclusion of 'escalation' provisions with regard to advances and royalties as a partial remedy to this problem.

⁴⁵¹ *Supra*. n.433 at 579.

⁴⁵² *Supra*. n.443 at 290.

⁴⁵³ In 'Future Freedom and Freedom of Contract' *MLR* 59 (1995) 167, Smith defends J.S. Mill's statement that the 'principle of freedom cannot require that he [the would-be slave] be free not to be

The underlying point to Smith's argument is that present contractual freedom is validly restricted by the one principle that parties are not at liberty to contract away their future freedom. Therefore, freedom is not absolute, but qualified. Ultimately, individual well-being in the form of professional freedom is not the foundation of liberal perfectionism. Indeed, the theory of liberal perfectionism is derived from the Millian 'harm' principle which seeks to restrict contracting parties from freely negotiating morally 'bad' contracts. Contract law is thus restricted to only allow parties to do non-harmful 'things' because the law does not have an obligation to validate and enforce morally 'bad' contracts. Indeed the positive role of contract law as a 'power-conferring legal doctrine' is to assist parties to achieve valuable aims.⁴⁵⁴ However, this position appears to introduce a moral dimension to the definition of contract law, which Smith and all other legal positivists deny. Smith's position suggests that if exclusive multi-option contracts such as that signed by George Michael in 1999 are considered as instances of 'self-enslavement' and therefore harmful, then the law does not have to enforce such contracts. This is the underlying basis of the future freedom argument.

In light of his argument thus far, Smith explains that reasonableness also 'entails comparing the restraint's effects on [the covenantor's] future autonomy against the goal which it serves, and considering whether a less restrictive restraint might accomplish the same purpose'.⁴⁵⁵ According to Smith, the ultimate assessment of a contract under the restraint of trade doctrine is then portrayed not in terms of risk assessment of contractual exchange which is a characteristic of substantive fairness but rather on the basis of well-being under the circumstances of necessary incidents. He states that a 'perfectionist theory justifies the non-enforcement of overly restrictive covenants on the ground that they unduly constrain the future autonomy of one or both of the contracting parties'.⁴⁵⁶ His position appears to

free'.

⁴⁵⁴ Smith, S. 'In Defence of Substantive Fairness', (1996) 112 *LQR* 138 at 145. In this article Smith commends Herbert Hart's positivist interpretation of the role of contract law as a 'power-conferring legal doctrine' in the *Concept of Law* OUP (1961) at 27-38.

⁴⁵⁵ *Supra*.n.443 at 297.

⁴⁵⁶ *Ibid.* at 1.

suggest that even the provision of investment, in the form of generous advances for the artist, cannot transform an onerous ‘self-enslavement’ contract into one which serves positive goals and fosters well-being. Individuals must be able to control their lives, particularly in terms of their occupations in order to achieve future well-being. Consequently courts should refuse to enforce exclusive ties which deny individuals this control, even if they have voluntarily agreed to do so in exchange for generous consideration.⁴⁵⁷

In Smith’s view protecting future individual autonomy can be understood in terms of the contract law. He reiterates Raz’s view that a person needs an adequate range of options from which to make valuable life choices, and that this type of autonomy is important throughout the individual’s life.⁴⁵⁸ He argues, that the law should help ‘citizens live good lives by promoting good choices about how to live and by dissuading, or at least not facilitating, bad choices.’⁴⁵⁹ Therefore, diminishing the ability to act autonomously in the future is a threat to autonomy itself, particularly when important life choices are concerned.⁴⁶⁰ Moreover, losses of autonomy which fail to serve any positive goals are not reasonable.⁴⁶¹ This position appears to be an explicit disapproval of long term agreements *per se*. Indeed, much of Smith’s argument on the basis of future freedom suggests a fundamental objection to long term agreements as morally bad. However, Smith also includes the ‘lack of proportionality’ as a standard to measure reasonableness (and ultimately future freedom) which weakens his argument. Nevertheless, the application of ‘proportionality’ is a far clearer explanation of how the law determines the validity of restraints.

Proportionality

Smith explains that where only one contracting party enjoys the right to control the duration of the contract the other party may have suffered a disproportionate lack of

⁴⁵⁷ *Ibid.* at 2.

⁴⁵⁸ *Supra.* n.453 at 177.

⁴⁵⁹ *Supra.* n.443 at 2.

⁴⁶⁰ *Supra.* n.453 at 178.

⁴⁶¹ *Ibid.* at 179.

autonomy. Although at first glance, Smith's description of proportionality appears to refer to a potential negotiating disability, his concern seems to consider substantive issues only. In this context, the standard inclusion of uncommitted as opposed to committed contractual options by record companies and music publishers, may be an indication that the contract lacks proportionality. Furthermore, the concern, in *Schroeder*, expressed by Lord Reid with regard to the lack of reciprocity of contract termination and commercial release rights would also reflect the law's concern for a lack of contractual proportionality. Smith explains that the 'disproportionate' loss of future freedom 'outweighs the good of the relevant achievement, even though that achievement cannot be realised without the loss.'⁴⁶² An application of this reasoning to the terms of exclusive multi-option recording and music publishing agreements would render them disproportionate, if they did not also always include reciprocal termination and commercial release rights. This is an important point to bear in mind because almost all such contracts in both the UK and US would fall within this category.

Smith states that proportionality is not determined according to the subjective preferences of the individual parties concerned but rather on the objective normative criteria of autonomous well-being identified by the theory of liberal perfectionism. Smith equates restraints which are unnecessary and unreasonable to those which are disproportionate. Therefore, a reasonable contract would be one with proportionate restrictions. Proportionality, it would appear, is judged against necessary incidents which, according to Smith, are ultimately questions regarding industry practices and 'experiences'.

Another problem with Smith's analysis of restraint of trade theory is that in including the test for proportionality, he introduces a concept which is essentially a concern for substantive fairness and weakens his positivist position. The issue of proportionality has been raised in caselaw in the interpretation of the restraint of trade doctrine. However, Smith distorts the function of proportionality by merely confining its application to the duration of the contract, without considering it in the context of the whole contract.

The concept of proportionality does not mean identical but rather commensurate

⁴⁶² *Ibid.* at 179.

rights and obligations, and this is a point which Smith neglects to address. Freedom is ultimately measured in terms of fairness and proportionality, because it will not assist the efforts of an artist who seeks to escape his/her obligations from a proportionate contract by claiming that it was not free. If this were not so, the assent to any term of exclusivity would amount to an acceptance of a 'self-enslavement' contract.

Some observations

Smith's interpretation of liberal perfectionism theory suggests that lengthy restraints and those which do not promote individual well-being in accordance with liberal perfectionist goals, will fail the test of future freedom. Therefore a lengthy term in itself would not be considered invalid unless it has promoted a liberal perfectionist goal. Now let us say that the goal of George Michael's contract was for the artist to have the opportunity to earn from his career and maximise his trading capital. This goal has brought the argument back to remuneration and the issue of fairness (in assessing the professional worth of the artist) which is essentially an economic measure. Smith appears to accept this outcome and indeed endorses the economic efficiency analysis of wealth maximisation in support of his argument.⁴⁶³ Indeed he seems to suggest that as long as wealth maximisation policies act in harmony with those fostered by liberal perfectionism then, this comfortable co-existence would illustrate the ideal paradigm of contract. Smith argues that ultimately liberal perfectionist social policies will always override contrary wealth maximisation economic interests.

However there remains some major inconsistencies in Smith's theory. For instance, his inclusion of proportionality with regard to the determination of reasonableness is incompatible with his earlier denial of the relevance of consideration. Formerly Smith

suggested that consideration was a matter of contractual exchange and ‘price’ (of work) rather than the freedom to work.⁴⁶⁴ Therefore, consideration concerned matters of fairness rather than future freedom, particularly since the latter did not include an inquiry into the substantive adequacy of consideration. However, in introducing the concept of proportionality Smith somewhat ‘muddies the waters’. Proportionality is an inquiry into the adequacy of the substantive exchange: the contractual consideration. If we used Smith’s account of economic efficiency as industry standards to set the benchmark for proportionality, then the ultimate measure of the restraint would not be in accordance with freedom. Therefore, once again Smith’s theory illustrates some internal inconsistencies.

Furthermore, Smith’s account of the ‘scope’ of the restraint of trade doctrine is no more than a reference to negotiating deficiencies or procedural unfairness. His ultimate reliance on a conception of procedural and substantive fairness illustrates the weakness of his account of the restraint of trade doctrine. Moreover, it validates the conceptual significance of procedural and substantive fairness in the determination of restraint of trade.

Lengthy restraints lack value, Smith asserts, because they also carry a far greater chance for mistakes in contracting for ‘future contingencies’.⁴⁶⁵ Smith’s fundamental concern on this point is centred on the uncertainty and complexity of assessing long term factors and projecting them far into the future. The contract would of course remain certain but only by reference to the facts known to the parties at the date on which it was signed. Smith demands certainty about the future not merely from the terms of the contract but also from ‘actual, and especially present and personal experience’.⁴⁶⁶ Smith therefore appears to determine the legitimacy of the contract terms on the basis of present market standards. This quest for certainty has, in effect, tied the liberal perfectionist interpretation of the doctrine of restraint of trade to the norms of the market. Moreover, this fusion of liberal perfectionism with market

⁴⁶³ See *supra*.n 454 at 156 where Smith equates fairness with economic efficiency theory. I shall discuss the latter theory in due course. Hugh Collins offers a more advanced version of argument, see *infra*.n.552.

⁴⁶⁴ This is the position of economic efficiency scholars—they rather say that fairness is about price only, and ‘non- price- aspects of the contract should not be considered on determining fairness.

⁴⁶⁵ *Supra*.n.453 at 186.

standards is emphasised by Smith in his view that any deviation from the ‘normal’ community market standards can often harm the ability of individuals ‘to plan and thereby to achieve autonomous, fulfilling lives’.⁴⁶⁷

However, the mutual exclusivity of freedom and fairness which Smith seeks to assert at the outset hinders any explanation of the above inconsistencies posed by the liberal perfectionist account of restraint of trade. Furthermore, Smith argues that contractual freedom could lead to an unfair contract, whilst contractual fairness could result in an unduly onerous contract. The logic of Smith’s argument suggests that a contract could be both harmful and harmless at the same time. It could be harmfully fair or harmlessly unfair! This is not a helpful guide for judges or practitioners alike. The division, in itself, between fairness and freedom does not serve a practical purpose. Moreover, the isolated and compartmentalised approach which Smith adopts towards the concerns of fairness and freedom fails to reflect both negotiating and judicial practice.

Future freedom is built on the premise that in some circumstances present autonomy must be sacrificed in order to secure future freedom; however this proposition lacks practical value because Smith’s argument suggests that freedom is a goal to which we aspire today but will never attain, because it can only be done so tomorrow! Freedom will always be in the future and never in the present and therefore in practice freedom will always be unattainable. Future freedom is an illusory concept.

Despite the fundamental inconsistencies and contradictions in Smith’s work, his theory raises some very relevant matters with regard to exclusive recording and music publishing contracts. The control of the duration of the contract and exploitation of the copyright are relevant elements in the determination of contractual freedom. However, the particular concerns raised by the theory are merely part of a larger canvas regarding the nature of exclusive personal service contracts.. The theory of future freedom, merely in itself, is an

⁴⁶⁶ *Ibid.* at 186. Here Smith favours J.S. Mill’s theory of classical liberalism.

⁴⁶⁷ *Supra.* n.454 at 157.

incomplete account of the law; and consequently, it fails to provide an adequate theoretical guide for both judges and those who draft such agreements.⁴⁶⁸ Ultimately, a concern for mere future freedom fails to reflect practice. A practical account of the restraint of trade doctrine requires an evaluation of both procedural and substantive fairness.

VII (iii) Industry standards and the perfectly competitive market: Economic Efficiency

Smith's liberal perfectionist theory of the doctrine of restraint of trade must ultimately accept the fundamental role played by the principle of fairness and its practical operation in his theory. Moreover, the interpretation of the doctrine of restraint of trade in UK caselaw has inevitably involved an assessment of procedural and substantive fairness. In the US the operation of the principle of fairness under the terms of the doctrine of unconscionability is overt and undisputed.

Fairness centres on the nature of the exchange: the contractual consideration. Smith's liberal perfectionist analysis fails to dismiss the legitimacy of this inquiry into the adequacy of the contract. One of the dominant theories in contemporary contract law, the theory of economic efficiency, suggests that whilst we can include contractual consideration as an objective and inevitable aspect of the contract, the assessment of the substantive fairness of a contract is not in itself an issue for judicial scrutiny.

The argument for an economically efficient interpretation of the law finds its most prominent advocate in the American judge Richard Posner. He describes economic efficiency as a theory of pragmatism but which is also strongly linked with the classical liberalism.⁴⁶⁹ Indeed he considers the fusion of pragmatism and liberalism as a means of advancing legal theory.⁴⁷⁰ In this regard, it is fair to conclude that the Smith's account of the law in terms of

⁴⁶⁸ It is interesting to note that Smith's works on restraint of trade were written just prior to the *George Michael* decision. He mentions the *Holly Johnson* case only in passing.

⁴⁶⁹ Posner, R. *Overcoming Law* Harvard University Press (1995) at 11 and 23.

⁴⁷⁰ *Ibid.* at 29, Posner states that 'Liberalism ... is the political philosophy best suited for societies in which people don't agree on the foundations of morality, and pragmatism is the philosophy of living without foundations. So liberalism and pragmatism fit well with each other...'

liberal perfectionism shares much in common with the theory of economic efficiency.

Posner suggests that individual freedom and well-being may only thrive under the umbrella of a free market. A free market would naturally endorse individual economic prosperity. According to Posner, economic efficiency theory encourages individual freedom in positive terms such as 'human autonomy, capability, or self-realization'.⁴⁷¹ However he maintains that it does not specifically endorse particular 'moral' values' because it is merely instrumental and eschews substantive moral claims. That is the fundamental reason which precludes judicial scrutiny of the adequacy of contractual consideration. Moreover, Posner claims that 'nothing in economics prescribes an individual's goals.'⁴⁷² The similarity of this assertion to those initially expounded by Smith is coincidental but nonetheless inevitable as they are both endorsing positivist theories drawn from classical liberalism. Liberal perfectionism and economic efficiency describe the law as a value neutral instrument to achieve particular 'majoritarian' social policy goals. Economic efficiency promotes the objective social measure of wealth maximisation but does not claim any distributive aims. Posner argues that ultimately, social preferences for freedom and autonomy can only be practically measured in terms of economic indicators: 'liberty dissolves into wealth and we are back to economics'.⁴⁷³ However, this is first and foremost a descriptive fact rather than a normative goal.

Empirical standards

Posner explains that economic efficiency is framed from an empirical point of reference. He argues that an observation of market practice, such as the use of standard form contracts or adhering to the 'going market rate', is a far more rational and logical indicator of certainty than fallible human 'calculators' such as judges. Moreover, he states that empirical data provides socially valuable '...norms of disinterestedness and predictability'.⁴⁷⁴

'A market may behave rationally, and hence the economic

⁴⁷¹ *Ibid.* at 26.

⁴⁷² *Ibid.* at 16.

⁴⁷³ *Ibid.* at 28.

⁴⁷⁴ *Ibid.* at 20.

model of human behaviour apply to it, even if most of the individual buyers (or buys) are irrational. Irrational purchase decisions are likely to be random and hence cancel each other out, leaving the average behaviour of the market to be determined by the minority of rational buyers (or purchases).⁴⁷⁵

Therefore, according to Posner, objective market standards are set by the rational minority of marginal or sophisticated consumers, who have negotiated the best bargain for themselves under the prevailing economic circumstances. His claim is that the rational market offers the best price obtained as its standard rate.

The generalities of the economic efficiency theory thus discussed requires greater consideration in the context of the music industry. The Canadian law and economics scholar Michael Trebilcock has attempted to apply the theory of economic efficiency to exclusive recording and music publishing agreements in the music industry. Moreover, he has analysed the *Schroeder* decision in terms of this theory. In particular, he examines the relevance of the judicial scrutiny of standard form contracts in this case.

The perfect market

Trebilcock considers the doctrine of restraint of trade in terms of economic efficiency theory. The reasonableness of the restraint, he argues, arises from the presumption that industry practices are always fair and consequently the substantive contracting practices in a given industry will always be fair.⁴⁷⁶ If we apply economic efficiency analysis to the any contract we will find it both procedurally and substantively fair. The notion of an unfair bargain either in its procedure or in its substance is alien to the theory of economic efficiency and this is because the *a priori* conditions in which economic efficiency may operate does not create a contracting environment in which unfairness may arise. *A priori* bargain imbalances do not exist in the ideal or perfect market in which economic efficiency operates, at least in theory.

Trebilcock offers the following explanation for the existence of the perfect market

⁴⁷⁵ *Ibid.* at 16.

conditions. Contracting parties are primarily interested in minimising overall transaction costs and he accepts this proposition as an objective fact. On the basis of this assumption he argues that economic efficiency theory provides the most cost effective approach to contract making. Consequently, an economically efficient contract would result in mutual benefit, in some way, to both contracting parties.⁴⁷⁷ These circumstances reflect the efficiency pre-conditions to the contract. It is not a measure of the benefit but rather a recognition of the contractual parity obtained when both parties receive benefit from the agreement: the 'mutual' benefit. Therefore, the 'mutual benefit' derived by each party need not even be proportional, but rather that each party did in fact receive a contractual benefit. In this regard, it may be argued that the mere offer of a contract by a record company or music publisher to an artist could be considered as mutually beneficial in itself.⁴⁷⁸

Trebilcock argues that a perfectly operating market is enhanced by the use of standard form contracts.

'In a perfectly competitive market, with many sellers and many buyers, each supplying or demanding too insignificant a share of total market output to influence terms, all participants, sellers and buyers, are necessarily confronted with a take-it- or-leave-it proposition.'⁴⁷⁹

Therefore, a perfect market would require a 'range of alternative sources of supply' from which customers may make their choices.⁴⁸⁰ He explains that these conditions of 'substantial substitutability' would be equally applicable in the operation of a merely 'workably' competitive market.⁴⁸¹ This pre-requisite market condition justifies the use of industry standard form agreements in the contracting process and consequently the concept of substantial substitutability creates a uniformity of market standards in a perfectly competitive market. Trebilcock concedes that the music industry does not quite reflect this market model for a standard of substantial substitutability. Nevertheless, he argues that any viable industry

⁴⁷⁶ Trebilcock, M *The Common Law of Restraint of Trade* (1986) at 161.

⁴⁷⁷ *Ibid.* at 166.

⁴⁷⁸ This illustration characterises a 'pareto superior' outcome to the bargain, which may be explained as follows: a pareto superior outcome signifies a transaction in which at least one party is better off and no one is worse off. See further, Posner, *The Economics of Justice*, (1983) Harvard University Press at 88.

⁴⁷⁹ *Supra.*n.479 at 166.

⁴⁸⁰ *Ibid.* at 166.

in the 'real world' market will be unable to operate on a long-term competitive basis without providing for a 'substantial measure of substitutability' and conversely it may be argued that any viable industry would, by definition, offer a substantial measure of substitutability.⁴⁸²

In the context of the music industry Trebilcock claims that whilst each 'standard' contractual package may include a degree of 'uniqueness', individual suppliers will be able to adjust the 'price' in order to attain compliance with standard industry practices.⁴⁸³ Price terms are generally negotiable whilst 'non-price' elements of the contract are seldom negotiable and even on those rare occasions when a small measure of bargaining arises he considers such events non-consequential. This is not surprising since major contractual terms such as duration, product release rights and the control of copyright are, more often than not, non-negotiable but it is arguable that sometimes the negotiations of 'non-price' terms do eventually have a trickle down effect within the overall industry.⁴⁸⁴ Price terms are not standard, and represent only those terms which would not have a significant direct economic impact on the contract, and may be negotiable; whereas non-price terms are standard industry terms and consequently, even a minor contractual concessions thus obtained in a non-price term during the bargaining process would not affect the contract's adherence to industry standards. Judges ought not to 'reform' non-price terms and should only interfere with price terms in circumstances of an imperfect market. The problem here is that if non-price terms are non-negotiable and also not those into which the courts may inquire, then there is a danger that these non-price terms could set an exploitative standard, particularly in an industry where there may a great disparity in bargaining strengths; and therefore the potential for an abuse of bargaining power does exist. The use of standard form contracts could arguably amount to some form of abuse of a dominant bargaining power.

⁴⁸¹ There are similarities here with Raz's theory of liberal perfectionism and the need for individuals to have an adequate range of 'good' choices, see *supra*.n.425 at 373-377.

⁴⁸² *Supra*.n.476 at 167.

⁴⁸³ *Ibid.* at 167.

⁴⁸⁴ It is arguable that sustained concerns regarding standard non-price terms could eventually transform non-price terms into negotiable price terms. The recent concern in the US regarding the non-negotiable industry standards pertaining to the control of copyright in the work(s), and the increasing interest particularly amongst recording artists to acquire this control could eventually result in copyright terms being considered as 'price' terms. See chapter 1.

Trebilcock promotes the efficiency in adhering to standard contracts because they provide substantial substitutability and argues that the inability to negotiate 'price' terms in perfect market conditions is not unfair. He suggests that the concept of substantial substitutability is further enhanced by the numerous 'suppliers' within the music industry and he states that low market entry barriers in both the UK and USA have produced an adequate number of suppliers in order to create a workably competitive market.⁴⁸⁵ However, he fails to take into account the stratified nature of the industry which places the handful of 'industry majors' at the apex of this market pyramid and the commercial distribution channels that are still primarily controlled by the 'industry majors'.⁴⁸⁶ Entry barriers at this level are naturally high. Therefore, the low 'entry level' argument only exists in the middle and lower range of the industry.

Trebilcock suggests that the presence of 'disk-leggers' and other 'pirates' operating within the industry in fact 'understate the number of firms active in the industry and overstate the effective levels of competition'.⁴⁸⁷ The advent of internet distribution and the onset of cyber-piracy give additional importance to this statement.⁴⁸⁸ Trebilcock argues that the loss of profits from music piracy is far more acute than it may appear at first glance and in the interests of economic efficiency 'harsh' clauses in standard form contracts would be required to counter this problem.⁴⁸⁹

Standard Forms and Transaction Costs

Trebilcock explains that the use of standard form contracts provides many benefits. First and foremost, it reduces transaction costs as contracts need not be negotiated afresh with every commercial transaction. It also provides certainty to the consumer, which Trebilcock

⁴⁸⁵ *Supra*.n.476 at 168.

⁴⁸⁶ The nature of the industry, in general, is discussed in Chapter 1.

⁴⁸⁷ *Supra*. n.476 at 170.

⁴⁸⁸ Chapter 1 provides a brief discussion on the effects of the Internet on the music industry.

argues is important for any contractor. The use of standard form contracts relieves the consumer of the difficulty in assessing 'how likely that certain risks may materialise, and if they do, what kinds of costs are likely to be entailed'.⁴⁹⁰ Information gathering, market analysis and risk assessment is costly and the humble unknown artist is not likely to be in a position to gather the relevant material in order to make such complex calculations. The inability to negotiate terms is the price which the buyer pays in order to know the disadvantages of the contract from the outset. A standard form contract is the price which an artists pays for 'certainty' at the date when the contract is signed. Certainty concerns the allocation of risk of contractual failure in the music industry and the extent to which it can be achieved is illustrated by the low risk investments that are generally made by the music industry. In determining the certainty of the return of investments made in already well established artists, the industry not only considers the 'track records' of these artists which would demonstrate their 'low' risk status, but also their access to assets in order to assess future risk allocation for themselves; and more importantly their negotiating power to reject standard terms.

Trebilcock explains that in a 'workably competitive market the perceived bargaining disparities between the parties is not a concern because bargaining inequalities do not exist under these market conditions and consequently, there is no need to insist on a 'fair' process of formal negotiation as a pre-requisite for a valid contract. Moreover, even if the contract were indeed formally negotiated it would still reflect industry practices. Competitive markets exist only in circumstances of *a priori* procedural fairness, and as a consequence the resulting market/industry practices must be substantively fair. Standard form contracts are market efficient and thus fair, and it is immaterial that one party appears to be stronger than the other. Trebilcock's argument suggests that standard form contracts are fair *ab initio* if they promote a workably competitive market and consequently the 'voluntary' and cost efficient

⁴⁸⁹ Trebilcock wrote this account of the music industry before the onset of the economic damage from internet piracy, he was addressing 'disc' pirates and the new CD piracy which was emerging in the US in the mid- 1980s

⁴⁹⁰ *Supra.* n.476 at 177.

allocation of risk in these contracts are also fair.⁴⁹¹ These appear to be the underlying points to his argument.

Calculating the risk

Trebilcock explains that the voluntary allocation of risks is a calculation of the cost of failure rather than the outcome of the contract.⁴⁹² In this sense, he likens this calculation of risk to those used in the formation of insurance contracts. This is an unfortunate comparison because, unlike insurance contracts, recording and music publishing contracts aim to create copyright works which are valuable assets for the benefit of both parties. Another important difference between insurance contracts and music industry contracts is that the latter are generally exclusive and are usually extended only at the discretion of the dominant party by virtue of the system of contractual options. Furthermore, Trebilcock fails to recognise the unique nature of the music industry, which ‘invests’ for a successful outcome rather than for one which is unsuccessful. The contracting attitudes of a number of the more successful independents appear to recognise this difference. My empirical research suggests that the overall failure rate in the industry which was estimated at 90% in the *Holly Johnson* case cannot be readily translated to all independent music enterprises.⁴⁹³ For instance, a very successful UK independent assessed its market failure rate at only 30-40%. This is particularly important to note since it is the independent companies within the industry which appear to take the greatest risks where unknown artists are concerned. Trebilcock claims that the high risk nature of the music industry justifies the desire of record companies and music publishers to: (a) offer long term multi-option contracts where only they retain the periodical right to exercise the options; and (b) control and direct the commercial exploitation of the copyright.

Argument (a) points to the ability of the record company or music publisher to reap the long term profits for having made the initial investment in the artist and would appear to

⁴⁹¹ *Supra*. n.476 at 176.

⁴⁹² *Ibid.* at 174-175.

support the position of Parker J in the *George Michael* case with regard to the validity of the common industry policy of cross-subsidising interests across the ‘portfolio’ of artists in the company by tying individual artists for lengthy periods and indeed, Trebilcock endorses the spreading of risk in this manner.⁴⁹⁴ This argument would justify tying both low and high risk artists to long term restraints. Moreover, he suggests that a rejection of this argument would eventually lead to a reduction in the investment in unknown artists. This is rather an odd comment because young unknowns are the ‘lifeblood’ of the industry, so there will always be a market for them. Furthermore, in practice the record companies and music publishers who do make such ‘risky’ investments are those least able to control the market or bear market failures.⁴⁹⁵ The rationale of spreading the risks by cross-subsidisation of interests or indirect costs was rejected by Dillon LJ in the *Holly Johnson* case as one which could logically tie the artist indefinitely.⁴⁹⁶ The inconsistent approaches of the courts on this point suggests that balancing the restraint was not in fact, a concern for risk allocation in circumstances of failure but whether the contract itself was fair *vis-à-vis* the parties in light of the contractual exchange. George Michael would have posed a far lesser risk for market failure than Holly Johnson. However, Michael received far greater monetary rewards from his contract than did Johnson and this was the essence of the balance within the restraint. Sony’s risk allocation argument was not based on Michael’s market status but rather its own costs.

Trebilcock argues further that if artists had preferred shorter terms at even higher risk calculations, the market would have acted accordingly in order to accommodate these requirements.⁴⁹⁷ However, this claim fails to recognise that artists who adhere to standard form contracts in the interests of economic efficiency, are not usually in a position to make such demands. The humble newcomer to the industry would hardly be in a position to act as the ‘rational buyer’, because this group of artist would always be stunted in the negotiation and setting of industry standards. Moreover, the fact remains that lengthy ties are favoured by

⁴⁹³ *Supra*.n.112 at 74.

⁴⁹⁴ *Supra*.n.476 at 186.

⁴⁹⁵ I have argued this point in some depth in Chapter 4.

⁴⁹⁶ I have discussed this point in Chapter 3.

music publishers and record companies, and most probably for reasons of economic efficiency. For instance, it is arguably less efficient to make short term investments without being able to exploit and build upon the potential successes of the artist in the long term.⁴⁹⁸

Argument (b) is far more complex. The current and future right to exploit the copyright in a work has rarely been considered as a distinct element of the exchange. In most instances, such rights are generally non-negotiable and the guaranteed release rights do not feature often in standard form contracts, particularly where the humble newcomer is concerned.⁴⁹⁹ In practice the release of a work is rarely denied by the record company or music publisher, for quite obvious efficiency reasons.⁵⁰⁰ There would be no sterilisation of the artist's output and consequently there would be no professional sterilisation of the artist. That would be the most economically efficient account of practice, as no record company or music publisher would want to have antagonistic relations with an unhappy and unwilling artist.⁵⁰¹ Artists however have an interest in securing, or at least attempting to secure healthy royalty rates in exchange for the copyright control of the works. Royalty rates are generally non-negotiable particularly where the modest unestablished artist is concerned, but few courts and artists have considered fairness in terms of the royalty rates, and fewer still have determined them against copyright ownership of the works. The balancing of royalty rates against copyright control considers the long term interests of the artist and importantly, it indicates the incentives and rewards for the artist rather than the risk of failure. Trebilcock's risk argument fails here because copyright and royalty interests are only relevant after success and profits have been achieved. Where the exploitation of backcatalogues are concerned the investment in the original production of the work would have been repaid and in some instances, many times over. The long term exploitation of copyright and payment of royalties

⁴⁹⁷ *Supra.* n.476 at 187.

⁴⁹⁸ This is a good example illustrating the fundamental conceptual differences in preferences between liberal perfectionism and wealth maximisation.

⁴⁹⁹ See chapters 4 and 6.

⁵⁰⁰ See chapters 2, 4 and 6.

⁵⁰¹ If the artist has been commercially successful then it would make sense to renegotiate the contract. If on the other hand, the artist has not been successful then his/her options would not be exercised and he/she would be free to negotiate a contract elsewhere.

points to the element of incentives and rewards rather than risks of failure. If these issues do not concern risk, then are matters regarding royalties and copyright ownership outside the ambit of economic efficiency and thereby not subject to industry standards?

Trebilcock's economic efficiency evaluation of contracting practices would suggest that all new 'unknown' artists would be considered as likely market failures, and as such their contracts would reflect the costs of such inevitable failures. Moreover, he calculates the costs of potential failure on the basis of the 'joint value, of the respective resources' of the parties; and in order to assesses 'joint value', economic efficiency would have to refer to the objective market status of the respective parties.⁵⁰² Consequently Trebilcock is unclear whether an unknown and untried artist could represent a value measurable at the time of the contract, and perhaps in these circumstances he may be only able to identify the 'hypothetical' new artist who is expected to fail merely as a matter of general industry statistics. The joint value test in these cases suggests that the risk would only be assessed in accordance with the value of the resources offered by the record company or music publisher, because industry statistics would more or less assess the untried artist as a pre-determined loss. The 'joint value' assessment has not been reflected in judicial interpretation and therefore, Trebilcock's analysis on this point is not relevant to the measure of fairness in (individual) cases.

An economically efficient allocation of risk is an exercise in cost justification which aims to maximise the 'joint value of the respective resources' of the parties. Trebilcock argues that under the terms of any standard form agreement, 'cost-justified' restraints and burdens are accepted as valid, in terms of economic efficiency theory, as a bench mark for market practices.⁵⁰³ However, 'non-cost-justified discrimination' of a party, if proved substantial will not fall into this category of valid restraints and such instances may include 'generalised informational breakdowns'.⁵⁰⁴ Trebilcock argues that since non-cost justified restraints do

⁵⁰² *Supra*.n.476 at 174.

⁵⁰³ *Ibid.* at 179.

⁵⁰⁴ *Ibid.* at 180. 'Informational breakdown' pertains to the lack of knowledge regarding standard industry practices and the types of transactions being conducted by the 'rational buyer' (or rational

not reflect market practices, they can be struck down if they are not trivial in substance.

Reasonableness

Trebilcock argues that a cost justified restraint is economically reasonable, both subjectively and objectively because it reduces overall transaction costs. This result assists individual contracting parties by maximising the combined value of the wealth of both parties, which would be far greater than merely maximising only one party's wealth. This is essentially a utilitarian argument. Trebilcock explains that it also benefits the economy as a whole by encouraging such wealth maximisation endeavours and furthermore, he endorses Posner's view that wealth maximisation in this manner actually assists individual well being and freedom. Trebilcock proposes that cost effectiveness is a reflection of market practices. Market practices signify the objective benchmark in a 'workably' competitive market in which the reasonableness of a restraint may be justified.⁵⁰⁵ Moreover, he suggests that such bench mark practices reflect the 'realized expectations of the marginal (sophisticated) consumers in the relevant market'.⁵⁰⁶ These are the minority of rational consumers in the market place who have managed to extract the best 'deal' in accordance with their bargaining status, and they set the new standard thus making the 'old' standard inefficient.⁵⁰⁷ According to Trebilcock, the contractual terms negotiated by the marginal artist determines the industry standard of reasonableness. In support of his claim it is arguable that the 'mega deals' which the industry superstars (the sophisticated customers) have struck with record companies from the later 1980s onwards have trickled down, to some extent, and improved the terms for some of the artists on the lower rungs on the industry ladder.⁵⁰⁸ However, it is equally valid to suggest that the improved terms for these (more humble) artists were a result of the success in court of artists such as Holly Johnson and Stone Roses and Teena-Marie Brockert; but it is

artist).

⁵⁰⁵ *Ibid.* at 186.

⁵⁰⁶ *Ibid.* at 180.

⁵⁰⁷ *Ibid.* at 180.

⁵⁰⁸ See chapter 2.

debateable whether the courts were deciding these cases in reference with wealth maximisation standards or other factors. Trebilcock argues that it is only the contract which substantially diverges from the 'realized expectations' of the marginal (sophisticated) consumer that may be struck down by a court and consequently, economic efficiency theory requires any cost-justified restraint, thus negotiated, be upheld by the courts. The court may only intervene to correct the practices of an uncompetitive market.

Judicial interpretation ex post facto

In light of the discussion, thus far, Trebilcock argues that judicial reluctance to accept the validity of standard form contracts, on the basis of their adherence to industry practices is unreasonable. Furthermore, he seriously doubts the ability of the courts to 'weigh market wide considerations' and make their own deliberations on what ought to be fair. In particular, he questions the expertise of courts to ascertain market dominance and its abuse, because, he explains, market dominance does not invalidate the use of standard form contracts and he suggests that as long as there is no evidence of an abnormal market power, such as the absence of competition, a standard form contract should be upheld by the courts.

Trebilcock also claims that when courts interpret the validity of contracts on a term by term basis, i.e. according to only the duration term or the reciprocal release rights or the royalty rates, rather than as a whole, the bargaining process will become distorted.⁵⁰⁹ This is a valid point because there is nothing to commend the interpretation of contract terms in isolation. However, Trebilcock's concern does not arise from this objection because he claims that any judicial decision which specifically reallocates risks, impedes both economic efficiency and certainty of contract. Therefore, economic efficiency appears to reject the notion of implied terms of 'fairness' unless they arise from industry practice.⁵¹⁰

Trebilcock suggests that if a sufficient number of 'affected' customers are dissatisfied

⁵⁰⁹ *Supra*.n. 476 at 175.

with the current market practices, the market would voluntarily adjust itself accordingly, without the need for ‘*ex post, ad hoc*’ judicial intervention with regard to the interpretation of ‘harsh clauses’.⁵¹¹ The market would act in order to maintain business goodwill amongst its customers by altering its practices accordingly. For instance, the fact that in recent years, an increasing number of the more successful artists in the UK have been able to secure ‘guaranteed release’ terms in their contracts suggests that Trebilcock’s view is not entirely unfounded. Nevertheless one could argue, once again, that the court decisions in past cases such as *Schroeder* and *ZTT* would have had a more powerful influence on the drafting of current contracts. Trebilcock suggests however that suppliers would always by-pass the effect of a court decision with regard to a specific term, such as duration, and compensate this reallocation of risks by redrafting other terms of the contract. Such ‘compensation arrangements’, he suggests, will be cost effective, in order to compensate for the non-cost effective judicial intervention. These ‘compensation arrangements’ would thereby justify the restraint in accordance with economic efficiency.⁵¹² In this context Trebilcock also criticises the concept of minimum threshold standards set by the court in the *Schroeder* case. He argues that the cost increases which could result from this ‘minimum-wage’ standard, would subsequently lead to a reduction in royalties and in the offer of option periods.⁵¹³ This appears to be a rather naive position to take particularly since, in practice, record companies and music publishers are never keen to minimise option periods whilst always seeking to reduce royalty payments.⁵¹⁴

In applying the economic efficiency model of the restraint of trade doctrine to the *Schroeder* decision, Trebilcock raises, in particular, the following claims: (a) if the court had referred to market practices in order to ascertain the reasonableness of the contracts, the

⁵¹⁰ This explanation ties in quite well with the decision in *Contemporary Mission*, in which the court held that an implicit duty of good faith or reasonable efforts could be satisfied by the application of sound business judgement in the performance of contractual obligations, see *supra*.n.237.

⁵¹¹ *Supra*.n.476 at 176.

⁵¹² My research confirms this but only to a very limited extent.

⁵¹³ *Supra*.n.476 at 187 and 188.

⁵¹⁴ It is an accepted policy, within the music industry, to maximise options and minimise royalty commitments. See the discussion on this point in Chapter 6 and to a lesser extent Chapter 4.

restraint would have been upheld as valid; and (b) the court, and in particular Lord Reid, ought not to have included a requirement for reciprocal termination and product release rights in order to prevent economic sterilisation of the artist.⁵¹⁵ Claim (a) is a general but fundamental criticism of the court for not deciding in terms of the economic efficiency theory and consequently, Trebilcock argues that judges should not attempt to impose their 'own' contractual standards on a 'workably competitive market' which is operating in terms of economic efficiency. Claim (b) attacks Lord Reid's concerns regarding the artist's future economic freedom. Trebilcock explains that a 'good faith' principle in contract law would ensure that an artist would not be economically sterilised. This argument is in contrast with Lord Reid's view, in *Schroeder*, that even an explicit 'good faith' contractual provision would not, in itself, ensure the exploitation of copyright in order for the artist to profit from his/her talents. Nevertheless, Trebilcock suggests that 'good faith' can be validly interpreted in terms of economic efficiency as reasonable industry practices.⁵¹⁶ Indeed, Trebilcock refers to the implicit conditions of contractual 'good faith' in the US Uniform Commercial Code to support his position.⁵¹⁷ Consequently, he claims that in identifying 'reasonable promotional efforts', a 'legal term implied to this effect would have merely paralleled, the economic forces pushing in the same direction'.⁵¹⁸ Moreover, forming a contract in 'good faith', he suggests, is merely the legal effect of an economically efficient decision. In practice it would not be efficient to 'sterilise' an artist despite the contractual rights which the record company or music publisher may possess to do so. However, this explanation of 'best efforts' fails to address Lord Reid's concerns regarding economic sterilisation of the artist and even where third party assignees may be involved.⁵¹⁹

Trebilcock offers another economically efficient reason for the 'harsh clauses' in the

⁵¹⁵ Trebilcock fails to indicate another significant reason why Lord Reid was probably incorrect: copyright is an exclusive right and to demand reciprocal release rights would have interfered with the exercise of this right.

⁵¹⁶ *Supra*. n.476 at 183.

⁵¹⁷ The UK does not have a developed 'good faith' doctrine and the scope of the Unfair Terms in Consumer Contracts Regulations 1999 is quite narrow.

⁵¹⁸ *Supra*.n.476 at 183. See also *supra*.n.510.

⁵¹⁹ In the *George Michael* case, Parker J used the efficiency argument to defeat this claim by Michael, *supra*.n.133.

standard contracts of new comers, such as Tony Macaulay. He argues that such clauses reflect the 'part-time' 'hobby' nature of their musical activity, i.e. song writing ,and this view suggests that Trebilcock views the activities of industry newcomers as no more than a trivial pastime. His argument appears to be quite similar to Stephen Smith's acceptance of the validity of lengthy yet trivial restraints under the terms of the theory of liberal perfectionism. However, this type of claim is questionable particularly when considering the fact that commercial success in this 'part-time' hobby activity could inevitably, and immediately lead to a full time and sometimes lengthy musical career. Under these circumstances the economic impact of the contract would alter radically, whilst the original terms would remain unchanged. It is unclear whether Trebilcock would advocate that the parties should renegotiate the contract under such circumstances, in the interests of economic efficiency. Indeed Trebilcock is silent on this matter. The practical point here is that record companies and music publishers would not offer long term exclusive contracts unless they anticipated a professional recording or music publishing career for the artist. If this were not so, it would be a waste of time, investment and effort, and probably not even economically efficient for that matter. The final objection to the distinction between full-time and part-time artists is that this divide confirms the stratification of the status of artists and consequently, Trebilcock 'reintroduces' economic imbalances to the perfect market place. This point is equally applicable when he distinguishes artists according to their market value or bargaining status.

The underlying point to economic efficiency theory is that wealth maximisation is an objectively accepted measure, which justifies the practices of contracting in an economically viable business such as the music industry. According to Trebilcock this is a fair standard which ought to be accepted by the judiciary. He concludes that the judicial 'redistribution' of risks in *Schroeder*, disturbed an economically efficient transaction, i.e. one which was negotiated without an aberration in the process of contract formation and in a market which did not exhibit an abnormal distribution of market power. Trebilcock concludes that the *Schroeder* decision represented a cost increasing exercise which would not be passed to the consumers of Macaulay's music, but rather to future contracting artists. Consequently,

Trebilcock considers the *Schroeder* decision unfair. However, linking industry practices to the concept of fairness is an incorrect reading of the complexities of the doctrine of unconscionability. It is interesting to note that in this sense, Smith also makes a similar error in linking fairness to industry practices.⁵²⁰

Some more observations

Economic efficiency theorists cite three general values which signify the importance of using industry practices as a benchmark for judicial practice: certainty, freedom and equality.⁵²¹ They argue that these values allow individuals the freedom to pursue rational life plans, and this is an admirable aim of any liberal society. However, the arguments offered by economic efficiency to defend this ideal are somewhat flawed.

Trebilcock makes his argument for economic efficiency on the basis of *a priori* perfect market circumstances which are derived from an efficient maxim of market parity. Market parity in this sense enhances social values of egalitarianism and autonomy and consequently, it is quite surprising that Trebilcock is willing to accept the value of the theory of economic efficiency even in circumstances where the market is only 'workably competitive', rather than perfect. In a 'workably competitive' market economic efficiency will tolerate inequalities and a lack of freedom. Trebilcock's advice to judges that they should accept this margin of toleration may be practical, but it contradicts the egalitarian and liberal social values, which economic efficiency claims to endorse.

The point that Trebilcock neglects to address is that circumstances in which the potential for the abuse of dominant bargaining positions, do exist in 'workably competitive' markets. My foregoing discussion on economic efficiency theory suggests that the music industry is only, at best, a 'workably competitive market', and the laudable founding presumption of the perfect market does not exist in practice. This failure renders industry practices unrepresentative of perfect market standards, and therefore an 'objective reason' for

⁵²⁰ See Smith, *supra*.n.454.

justifying economic efficiency now appears flawed. The point which economic efficiency fails to address is that sometimes, the mere operation of a viable industry should not be automatically interpreted as evidence of a workably competitive industry. That is the reason why both the US and UK have enacted major legislation regulating important and substantial commercial activities such as consumerism and employment.⁵²² The fact that legislation has been required to regulate such large areas of the economic sector in both nations suggests that most markets are naturally inclined towards uncompetitive practices, and may continue to function viably under these circumstances. Therefore *a priori* perfect market standards appear to explain the exception rather than the rule. The theory of economic efficiency appears to be built on an exception rather than a rule. In these circumstances judicial intervention ought to be encouraged in order to remedy *a priori* market imbalances. Moreover, since it would appear that vast sections of the economy are susceptible to market imbalances, any judicial reliance on industry standards to gauge fairness seems questionable.

Although the theory of economic efficiency illustrates the importance of economic indicators in the contracting process, it does not provide a comprehensive explanation of the legal conception of fairness. The effectiveness of industry standards is an important, albeit not the prime, consideration in the interpretation of fairness by the courts. A thorough appreciation of relevant industry practices, assists those who negotiate, draft and interpret exclusive multi-option recording and music publishing contracts to understand the economic factors against which such contracts are made. However, merely complying with industry practices is not sufficient to render them fair.

Posner has an answer to some of the arguments which I have raised. He suggests that in circumstances where economic efficiency calculations lead to 'illiberal' consequences, such as 'enforcing contracts of self-enslavement', a liberal minded economic efficiency theorist would return to the Millian position: that 'every person is entitled to the maximum

⁵²¹ These values of certainty, freedom and equality are interpreted in terms of industry standards, autonomy and the perfect market which is free from *a priori* bargaining imbalances.

liberty-both personal and economic-consistent with the liberty of every other person in the society.’⁵²³ Posner’s proposal suggests that there are times when such ‘mental externalities’ fail to separate economic efficiency from liberal perfectionism, and this is not surprising since both theories are derived from classical liberalism.⁵²⁴ Indeed, economic efficiency and Smith’s interpretation of liberal perfectionism share much in common. Perhaps the only important distinction between the two theories is that economic efficiency is bound in the preservation of past industry practices, whilst liberal perfectionism is determined in terms of the preservation of future contractual freedom, and neither attempts to consider the shaping of present standards.

VII(iv) The meaning of Fairness: the Doctrine of Unconscionability

The theories of economic efficiency and liberal perfectionism are both founded on socio-economic practices. Economic efficiency aims to promote contractual freedom under the umbrella of perfect market practices, whereas, liberal perfectionism claims to promote contractual freedom in terms of liberal perfectionist social values and practices. The key concerns for fairness or unfairness cannot, in theory, arise in the world of liberal perfectionism or economic efficiency because the concept of substantive contractual ‘unfairness’ does not exist within the ‘proper’ application of either theory to general contract doctrines, on which cases regarding exclusive contracts have been brought. These theories dismiss the overt interpretation of substantive fairness, but the problem with this approach is that it does not always account for judicial practice either in the UK or the US. Moreover, the covert explanations of fairness which have been offered by both liberal perfectionism and economic efficiency tend to produce internally inconsistent interpretations of the law and practice.

⁵²² The numerous legislative efforts in these sectors of the economy is not only evidence of the large extent to which naturally occurring market imbalances exist but also the social policy concerns for the protection of individuals transacting in the economy, from unfair market practices.

⁵²³ *Supra.* n. 469 at 23.

Economic efficiency theory fails individual contractors because the preceding discussion illustrates that the practices of the efficient market place do not always guarantee ultimate individual autonomy, which it claims to achieve. Therefore, it is important to recognise that socio-economic practices and goals do not necessarily translate into legal standards which courts should and do apply. However, it is also worth noting that in some circumstances the socio-economic concerns raised by liberal perfectionist and economic efficiency theories can prove useful as background factors for courts to consider in the determination of the overall fairness of a contract.

The courts have determined fairness or rather unfairness in terms of contractual disparity between the parties, and have referred to both procedural and substantive concerns in exclusive multi-option recording and music publishing agreements. An 'overt' theory of fairness was recognised by Karl Llewellyn the principle architect of the US Uniform Commercial Code. His explanation of fairness was particularly aimed at combating extortionate practices in the negotiating and drafting of standard form contracts; however his reasoning can be applied generally as well.⁵²⁵

Assent

Llewellyn, identifies the practical inequality of bargaining power between parties as an objective *a priori* fact in the majority of standard form contract making and this position is in stark contrast to the presumption of bargaining parity under the theory of economic efficiency. The principle of contractual fairness, according to Llewellyn, is founded on the fact that the abuse of a dominant bargaining position such as the dictating of terms in standard form contracts could result in unfair outcomes for the weaker party. Indeed, his primary concern appears to be directed at the vulnerable party who is unable to assert his/her negotiating right freely in order to avoid an unfair contract. Llewellyn describes the circumstances of negotiating a contract when there exists a great disparity in bargaining

⁵²⁴ *Ibid.* at 24.

power as one in which:

‘the one party lays his head into the mouth of a lion - either, and mostly, without reading the fine print, or occasionally in hope and expectation (not frequently solid) that it will be a sweet and gentle lion.’⁵²⁶ ... ‘not all dominant parties are nice lions, and even nice lions make mistakes’.⁵²⁷

Therefore, this is the common pre-contractual position between the parties.

Llewellyn suggests however, that occasions do arise when ‘two fist-ed bargainers on either side have worked out in the [standard] form a balanced code to govern the particular line or trade or industry,...’⁵²⁸ This is the ideal situation of pre-contractual parity. This type of contractual relationship was well illustrated by Lord Diplock in *Schroeder* as one in which contracting standards and practices may have developed over a significant period of trade between two seemingly evenly matched bargaining parties.⁵²⁹ Consequently, these contracts do not require as much judicial vigilance as the standard form contracts which have been merely dictated by the dominant party. This view suggests that such occasions of demonstrable negotiating parity counters the initial presumption of bargaining inequality. Any contract in which a term is simply dictated by the dominant party to the weaker party will not fit this ideal of pre-contractual parity. Indeed, Llewellyn suggests that the majority of contracting parties would not be thus considered:

‘The one case in a thousand where the dirty clauses have been read and truly agreed to can, for my money, be discarded both as *de minimis* and to keep the issue from disturbing all the litigation to which it is in fact irrelevant. The common law technique, when the facts run so profusely in a single direction, would be a simple “conclusive presumption”- that the boilerplate [non-negotiable term] has not been read’.⁵³⁰

The lack of assent appears to be the procedural presumption to the inquiry of fairness. One could argue that this lack of assent could be derived from commonly occurring circumstances of contracting such as: the use of standard term/form contracts and/or a lack of alternative

⁵²⁵ Llewellyn’s concern for standard form contracts was at a time when the classical contract doctrine and formalism appeared to have no answers for the increase in standard form contracts.

⁵²⁶ Llewellyn, K. *The Common Law Tradition: Deciding Appeals* Little, Brown & Co, Inc., (1960) at 362.

⁵²⁷ *Ibid.* at 363.

⁵²⁸ *Ibid.* at 363.

⁵²⁹ See chapter 3.

⁵³⁰ *Supra.* n.526 at 371, fn 338.

sources of supply and consequently there is a rebuttable presumption that substantively unfair contracts lack assent.

Assent, or the lack of it is a necessary element in the understanding and explanation of fairness. However, it has no more than a procedural function in the determination of fairness and one which may be rebutted at the outset with substantive evidence. Nevertheless, it serves a very necessary function, because the importance of the concept of assent is that it helps us to identify the economically weaker participants in our community. These are the parties which are least likely to negotiate contracts that meet a minimum threshold of substantive fairness.

‘The answer, I suggest, is this: Instead of thinking about “assent” to boilerplate [non-negotiable] clauses, we can recognize that so far as concerns the specific, there is no assent at all. What has in fact been assented to, specifically, are the few dickered terms, and the broad type of the transaction, and but one thing more. That one thing more is a blanket (not a specific assent) to any not unreasonable or indecent terms the seller may have on his [standard] form, which do not alter or eviscerate the reasonable meaning of the dickered terms’.⁵³¹

Although the lack of assent is a necessary albeit rebuttable presumption in understanding the lack of contractual fairness, Llewellyn delves deeper into what is essentially a consideration of the substantive contract.

Having already identified the objective fact that there exists an inequality in the bargaining positions where most standard form contracts are concerned, Llewellyn’s analysis of fairness is a consideration of ‘unreasonable’ or ‘indecent’ standard (non-negotiable) terms or those terms which could alter or invalidate the reasonable meaning of any negotiated term. For example, in a recording or music publishing agreement the ability to negotiate some of the terms may yet be rendered ineffective by the operation of non-negotiable terms of the contract. A fair interpretation of a contract demands that ‘indecent’ and ‘unreasonable’ terms cannot be legitimately expressed in the contract. Individual terms of the contract are considered but only with reference to their effect on the other terms of the contract. In essence, the concern for contractual assent is not directed at specific terms or the lack of

⁵³¹ *Ibid.* at 370.

express assent to 'boilerplate' terms. It is a far more subtle exercise which evaluates the interaction of terms in order to deduce the existence of a lack of assent to the substance of the contract as a whole.

Substantive evidence of assent

The interpretation of the substantive evidence of assent or the lack of it is contextual. It is considered in terms of 'the only intention which can in reason be worked out as common to the two parties, granted good faith'.⁵³² Llewellyn's underlying point does not appear to be merely a question of assent to standard terms which are unreasonable or render negotiated terms unreasonable, rather his central inquiry appears to be directed at identifying the fundamental reason for the existence of the contract. Why did the parties enter the transaction in the first place? What was the contract supposed to achieve? What was the value of the whole exercise? A conception of fairness which fails to recognise these factors of primary contractual aim, and thereby denies either party of fulfilling it, is deficient and lacks assent. This is perhaps the reason why Llewellyn questions the validity of onerous provisions which have not been explicitly agreed to by the parties and in doing so he addresses the value of autonomous individual choice: the assent.⁵³³ It would appear that the substantive evidence must then be interpreted in the context of the individual aims of the parties, which perhaps can only be considered objectively in terms of their respective 'accommodated' goals. In this sense Llewellyn's inquiry into the nature of contractual fairness suggests a co-operative rather than a competitive approach to the relationship which may probably be a useful 'starting-point' particularly in the circumstances of lengthy exclusive personal service agreements.⁵³⁴

The point to any contract is to successfully accommodate the aims of one party with that of the other. It is in this respect that the *Croce* case refers to a sense of 'mutuality' in what the contract is supposed to achieve. Llewellyn's argument is that parties who are naturally bargaining from widely divergent bargaining positions may not achieve this desired

⁵³² *Ibid.*

⁵³³ *Ibid.* at 371.

outcome in practice. These are circumstances in which subjective practice does not correspond with the objective ‘accommodated’ aims of the parties. For instance, a record company which aims to exploit the artist for profit, particularly for a lengthy duration, without paying sufficiently high royalty rates will fail this contractual aim to create a co-operative enterprise. Llewellyn’s argument encourages a co-operative rather than a competitive approach to contract negotiating, drafting (and ultimately performance too).

The spirit or iron core of the contract-implying terms and interpreting intentions

A ‘balanced’ accommodation of the aims of the respective parties would constitute the common primary aims of the contract. Llewellyn determines the common primary aims of the parties in the context of the ‘good faith’ interpretation of the contractual intentions of the parties⁵³⁵ and this would be in keeping with the ‘spirit of the contract’ and not contravening the ‘iron core’ of the contract.⁵³⁶ The ‘spirit’ or ‘core’ of the contract is an objective reference point and failing to keep to the spirit of the contract or contravening its core would, in effect, result in failing to perform the contract. Llewellyn suggests that the interpretation of the ‘iron core’ of the contract as a whole and indeed even the determination of any implicit terms is based on a ‘good faith’ (co-operative) view of the original contractual intentions of the parties. The assumption here is that the parties did not contract in bad faith; one party did not knowingly deceive or mislead the other as to his/her intentions. The practical results of the contract should reflect these intentions.

In this sense it may be argued that whereas a mandatory duty to exploit the copyright may not be expressly provided for in the contract nor would it be in accordance with efficient industry standards to require this obligation, it may still be in the ‘spirit of the [particular] deal’ and therefore implicit to the contract in question, to make such demands on the record company or music publisher. The alternative view suggests that it would be an example of ‘bad faith’ and unfairness in this instance if the artist was not also offered guaranteed release

⁵³⁴ I have discussed co-operative and competitive negotiating policies in chapter 4.

⁵³⁵ *Supra*.n.526 at 371.

rights or generous rewards.⁵³⁷ The terms of the contract and its performance must not deprive the artist of its benefits, i.e. the freedom and ability to form a career and earn from the exploitation of his/her music, and this view is the key to the interpretation of the contract. In this sense, the determination of bad faith and unfair terms can be traced back to the reason for contracting in the first place and the representations of contractual intentions. Indeed the judgement of Cardozo J in *Wood v. Lucy Duff-Gordon* lends support to this approach.⁵³⁸

Therefore, whilst industry standards are undoubtedly important in considering the circumstances of contractual performance in 'good faith', the concept of industry practices, is not, in itself, a manifestation of fairness. In determining the 'iron core' of the contract or the 'good faith' intentions of the parties at the time of the contract it is useful to consider Robert Hillman's view that the court must distinguish the 'laudable exercise of one's contract rights on the one hand and the engagement in "sharp" practices on the other'.⁵³⁹ 'Standard' but exploitative industry practices may fail as practices in bad faith.

The fundamental element of the proposition posed by Llewellyn is why did both the parties agree to contract with each other in the first place: what was the contract meant to achieve? In this regard, both the particular circumstances of the contracting parties and the background of socio-economic practices and policies against which the contract was drafted will be relevant factors in determining the 'core' or the 'spirit' of the contract. The realist judge would make this determination by considering both what he/she would think is right and also what the community would consider right and just, and indeed in accordance with what the community would expect from a judge dispensing justice. This could imply an interpretation of a minimum threshold of community intolerance and indeed would require some consideration of a social consensus on a set of values. Therefore this theory of adjudication is not merely textual but rather a contextual analysis of the law and the particular

⁵³⁶ *Ibid.* at 368.

⁵³⁷ Guaranteed release rights allows the artist to terminate his/her contract if the record company or music publisher fails to release a work within a stated period and within a specified territory. See further chapter 2.

⁵³⁸ See further, *supra*.326. The judgements and adjudicative method of Cardozo J (the presiding judge in the case) were particularly admired by Llewellyn, see further Slawson (*supra*.n.221 at 136).

community it serves.⁵⁴⁰

A broad contextual analysis of commercial practices was proposed by Friedrich Kessler (Llewellyn's colleague at Yale in the 1930s and 40s) with regard to standard form contracts based on 'what the weaker contracting party could legitimately expect by way of services according to the enterprise's "calling", and to what extent the stronger party disappointed reasonable expectations based on the typical life situation'.⁵⁴¹ To some extent this measure could point to a socio-economic sense of fairness which puts a moral value on price. However, the so-called 'grand style' judging which Llewellyn encouraged in order to secure justice, against the severity of formalist rules does not evaluate the interpretation of fairness beyond this point.⁵⁴² Indeed he thought that fairness was ultimately a concern to do justice and particularly for the weak contracting party.

Modern developments of the legal realism can be distinguished between two mainstream philosophies: market individualism and consumer welfarism.⁵⁴³ The former addresses the ideologies of the market (efficient risk allocation) and individualism (freedom of contract). Consumer welfarism broadly appeals to the ideals of 'good faith', reasonableness, fairness, proportionality, the avoidance of unjust enrichment and the prevention of the abuse of a dominant bargaining position. Llewellyn's interpretation of the 'realist' theory suggests a welfare orientated context to the interpretation of fairness.⁵⁴⁴

⁵³⁹ Hillman, R. *The Richness of Contract Law* Kulwer Academic Press (1997) at 146.

⁵⁴⁰ See further, Llewellyn, K. 'Some Realism About Realism' (1931) 44. *Harv.L.R* 1222.

⁵⁴¹ Kessler, F. 'Contracts of Adhesion' 43 *Colum.L.Rev* 629 (1943)

⁵⁴² *Supra*.n.526 at 222.

⁵⁴³ See Adams, J. and R. Brownsword, '*Understanding Contract Law*' 3rd edition Sweet & Maxwell (2000) at 39-40.

⁵⁴⁴ In this light it is not surprising that Alan Schwartz suggests, albeit incorrectly I think, that Llewellyn was in fact an early law and economics scholar. Schwartz argues that the primitive means of collecting and evaluating statistical information during the 1930s and 40s, had in fact hindered Llewellyn's development of his theory in this direction. See further Schwartz, A. 'Karl Llewellyn and the Origins of Contract Theory', in Kraus, J. and S. Walt *The Jurisprudential Foundations of Corporate and Commercial Law* Cambridge University Press (2000). Posner would consider this type of law and economics scholar as one expounding 'normative' or 'welfare' economics. He states that 'Normative economics holds that an action is to be judged by its effect in promoting the social welfare... and considers it as a form of utilitarianism. See *supra*.n.478 at 49.

Fairness as welfare

Any discussion of the interpretation of standard terms, in the context of contemporary welfare theories, which is drawn against a broad Anglo-American background is fraught with difficulties because: (a) contemporary social welfare theories have developed from overt political activism which has been limited, to some extent, by jurisdiction and political culture, and consequently the welfare policies in the UK for instance may not enjoy a similar role and status in US society;⁵⁴⁵ and (b) the debate is far too wide and varied for a comprehensive coverage of all theories of social welfare, particularly within the scope of this thesis. However the approach of modern welfare theories in Anglo-American law share many common features and my discussion albeit necessarily brief will attempt to address common issues of general application to the laws of both the US and UK.

Roger Brownsword suggests that legal doctrines do generally reflect welfarist philosophies so that the judicial concern with regard to the contracting parties' intentions is actually a concern for welfare.⁵⁴⁶ He considers the nature of judicial intervention on this point by distinguishing between a minimum threshold level of welfare which certain types of contractors should be able to achieve; and maximum welfare which strives to always protect the weaker party against the dominant party.⁵⁴⁷ The effect of 'best faith' in the contracting relationship is considered in terms of individual 'personal' welfare.⁵⁴⁸

Minimum threshold welfare confirms the approach of the courts both in the UK and US. Cases such as *Schroeder* and *Brockert* support this theoretical account of the law because these cases point to a minimal interventionist approach by the courts in circumstances where the humble unestablished artist has no opportunity to effectively negotiate his/her recording or music publishing contract. Maximum welfare suggests a link between legal doctrine and particular political policies of resource distribution in the welfare state, whilst 'personal'

⁵⁴⁵ See Waddams, S. 'Comments on Welfarism and Contract Law' in Brownsword, R. *et al* (editors) *Welfarism in Contract Law* (1994) Dartmouth at 248.

⁵⁴⁶ See Brownsword, R 'The Philosophy of Welfarism and its Emergence in the Modern English Law of Contract', see *ibid.* at 38 and 44.

⁵⁴⁷ See *ibid.* at 39-45.

⁵⁴⁸ *Ibid.* at 45 and 46.

welfare is determined in the context of the individual circumstances of the particular contract. Brownsword's approach appears to be one chiefly based on a concern for individual welfare whereas a maximum welfare interpretation of fairness has been proposed by Hugh Collins.

Maximum welfare and social markets

Hugh Collins classifies minimum and personal welfare at a local legal level which may sometimes run counter to the global concerns of social welfare for members of the community as a whole: maximum welfare. He considers the social consequences of maximum welfare far reaching and consequently, he appears to suggest that any consistently workable legal model of welfare must be primarily global rather than local.⁵⁴⁹ Therefore, Collins claims that the overall conception of contract law must be in terms of this distributive model. However, he suggests that the welfare model can only prove workable if it also includes a parallel market efficiency mechanism to act alongside it. Indeed, he argues that a maximum welfare model can only be sustained by a parallel market efficiency system⁵⁵⁰ because the wealth maximisation ethos of efficient markets would produce the necessary overall community resources, which could then be redistributed in accordance with welfare policies. In this regard, he cites the liberal perfectionist paradigm as a potential social model with which this type of distributive justice could be achieved. He argues that maximum welfare is based on the need for individuals to enjoy a 'fair measure of autonomy to lead a chosen life plan'. Consequently it is important for society to provide sufficient resources for individual autonomy.⁵⁵¹ The problem with this analysis is that it appears to lead us back to all the inconsistencies which were previously identified with regard to the theories of liberal perfectionism and economic efficiency. However, Collins attempts to combine the effects of both social and market priorities in order to construct a far richer account of the law under the

⁵⁴⁹ See Collins, H. 'Disclosure of Information and Welfarism', *ibid.* at 100-101.

⁵⁵⁰ In this regard Collins considers the usefulness of the Pareto superior model, see *ibid.* 98.

⁵⁵¹ See Collins, H. *The Law of Contract* 3rd edition Butterworths (1997) chapter 2.

framework of a social market.⁵⁵²

Collins considers the contemporary structure of markets in the context of its social dimensions.⁵⁵³ He argues that contract doctrines are structured in terms of the classical contract paradigm of freedom which does not inquire into the substantive terms of the contract. However these doctrines are interpreted by the courts in terms of fairness. In this sense fairness appears to have an instrumental rather than a conceptual role in contract law, and is concerned with securing welfare for vulnerable contracting parties.

However Collins suggests that the courts do not generally interpret contract doctrine in overt terms of fairness, and usually couch their decisions in the language of the classical model of contract doctrine: fairness is a covert principle of the law. For example, the doctrine of consideration does not require an enquiry into the adequacy of consideration, though the courts have interpreted it in terms of contractual benefits and burdens in order to ascertain whether consideration, at a 'conceptual' level exists; the doctrine of restraint of trade is perceived by the courts in terms of the balance of contractual obligations;⁵⁵⁴ implied terms are interpreted as reasonable expectations of a 'fair price' and the 'reasonable balance' of obligations;⁵⁵⁵ and undue influence which though need only be an abuse of trust, confidence and negotiating influence, is easier to prove with evidence of substantive disparity in contractual benefits/burdens.⁵⁵⁶ A lack of fairness on these grounds for instance could be seen as a market failure and a challenge to a truly competitive market, and therefore judicial

⁵⁵² *Ibid.* 29. Collins refers specifically to Raz's theory of liberal perfectionism as a potential model of the practice of autonomy within a social context (*supra*.n.425); and arguably Collins' theory marries the harm principle of liberal perfectionism to the pareto superior aspect of economic efficiency theory quite neatly.

A similar view is suggested by the US legal scholar Jules Coleman. He links the pareto superior model of economic efficiency to the Rawlsian contractarian model of autonomous consent and social policy. Rawls' position is that as long as the weaker parties gain some benefit, fairness may be achieved. Coleman contends that a modified pareto superior model could thus be supported by the *a priori* contractarian model of social consensus derived from Rawls' theory of rights, see Coleman, J. *Market, morals and the law* CUP 1988 at 101 and more generally Rawls, J. *A Theory of Justice* Harvard University Press (1971). A discussion of the complexities of Rawls' theory is warranted but it is beyond the scope of this thesis.

⁵⁵³ *Supra*.n.551 at 229. 'The virtue [of the market] consists in the capacity of individuals to use markets to make choices which contribute to their chosen way of life... The availability of such choice is ensured by a free market in goods and services'.

⁵⁵⁴ *Supra*.n.551 at 260.

⁵⁵⁵ *Ibid.* at 258.

intervention is only justified, when the contract demonstrates evidence of a considerable lack of proportion in exchange values.⁵⁵⁷ Fairness is thus measured not in terms of the economic efficiency but in the context of the social market.

Collins suggests that the ultimate guide to the interpretation of fairness cannot be limited by a general rule, but rather considered in terms of reasonable expectations, proportionality and negotiating fairness.⁵⁵⁸ In this sense it may be argued that the judicial interpretations of the doctrine of restraint of trade for instance, are ultimately justified on principles of fairness; and consequently it would appear that fairness has in fact a significant role in contract doctrine. It would seem that an ultimate evaluation of the operation of fairness in contract law, suggests that the courts are clearly acting quite overtly in applying it, and cases such as *Schroeder* provide a good illustration of this position. Indeed this point runs counter to Collins' earlier views.

Collins' consideration of the interpretations of common law contract doctrines in the UK in terms of the principle of fairness is equally applicable to US contract doctrine; and this facilitates a general discussion of the principle of fairness in the socio-economic context of Anglo-American contract law.

Collins explains that his approach can be summed up in three types of judicial inquiry: 'unjustifiable domination, equivalence of exchange and the need to ensure co-operation'.⁵⁵⁹ In this sense he distances himself from the pure economic efficiency model which seeks no more than a defence of wealth maximisation without any analysis of the (non-economic) social costs of market failure. A market fails when these three measures for judicial concern are not met in any transaction. Moreover, he suggests that the traditional economic analysis of the markets which lacks a social dimension, is an inadequate account of judicial practice. Therefore even so-called industry standard terms are subject to this evaluation and can warrant judicial intervention, in order to rectify abusive practices which

⁵⁵⁶ *Ibid.* at 256.

⁵⁵⁷ *Ibid.* at 261.

⁵⁵⁸ *Ibid.* at 264.

⁵⁵⁹ *Ibid.* at 28.

lead to market failure on this basis. To an extent Lord Diplock's judgement with regard to the industry standard contract in the *Schroeder* case, can be interpreted to illustrate this point.

Collins extends this model of the social market to consider wider legislative policies of distributive justice, and he asserts that the normative concerns of the social market engender successful socio-economic interaction, which in the context of both the UK and US could be loosely termed as 'liberal welfare'. He suggests that a rich conception of the law would interpret contracts in terms of the social market, and in the context of the three judicial concerns about 'unjustifiable domination, equivalence of exchange' and co-operative contracting practices. The most significant aspect of this position is that these three issues specifically raised by Collins points to a primary concern for individual interests, rather than a global welfare maximisation policy; and perhaps this is a factor which undermines the breadth of an essentially utilitarian paradigm such as the social market.

Personal individual welfare and mutual respect

Brownsword defends the interpretation of contract law as a co-operative rather than a competitive process,⁵⁶⁰ and within a creative relationship such as that between an artist and his/her record company or music publisher, this view is particularly apt.⁵⁶¹ However unlike Collins, Brownsword recognises and asserts the point that the personal and individual interests of the parties are perhaps the prime concern for the judicial application of the principle of fairness. He suggests that contracting parties act with concern for each other in prudent or 'enlightened' self interest, and this is particularly evident when contractual relationships span a lengthy period.⁵⁶² This inclination for prudent self interest is more likely to nurture a more successful long term contract than a competitive stance. In this sense, co-operative contracting attitudes reflect an individualistic ethos, which is well illustrated in the

⁵⁶⁰ However, Brownsword does point out that the court may not always view the contractual process in this light. For instance, he refers to the House of Lords decision in *Walford v. Miles* [1992] 1 All ER 453, in which Lord Ackner describes the adversarial nature of the negotiating process as a fact. See *supra*.n.545 at 47.

⁵⁶¹ See chapter 2.

⁵⁶² See Brownsword, R. *Contract Law, themes for the twenty-first century* Butterworths (2000) at 16.

nature in which artists' contracts with record and music publishing companies are generally negotiated. For instance, the respective parties would have agreed to form a long term exclusive contractual relationship for individual profit (individual self interest). Indeed artists, however ignorant, do not sign long term recording or music publishing agreements merely for the sake of signing them. They sign such agreements in order to build careers as musicians, and indeed to ultimately benefit financially from their labours, under the substantive terms of the agreement. Record companies would, in 'good faith', deny that they were drafting agreements which deprived artists of these aspirations, but equally, record companies and music publishers enter such contracts in order to market and profit from the commercial talent of the artist. Consequently they are not obliged to release the work if to do so would defeat this underlying point to the contract. Indeed these observations are not controversial, and illustrate an objective fact that parties do assent to contracts as part of a co-operative exercise, and equally to negotiate for 'core' individual benefits.

Brownsword's account of contract law adopts a rich and complex interpretation of fairness, which appears to be drawn from individualist conceptions of prudent or enlightened self-interest. This interpretation of the co-operative social market, which is founded on prudent individual self-interest, applies the principle of fairness in terms of the reasonable expectations of the parties acting in 'good' faith. His explanation of the direction in which interpretative priorities for fairness guide contract law, suggests a complex interaction between individual contractors and the co-operative social market. Reasonable expectations are measured in terms of both industry practices as well as the particular circumstances of individual cases; and consequently, ⁵⁶³ generalised conceptions of fairness and the co-operative social market are bound to have some impact on this determination.⁵⁶⁴ For instance, the validity and determination of the role of release rights and release obligations in a particular contract, may be interpreted in this context.

Brownsword carries the argument further by suggesting that specific contractual

⁵⁶³ *Ibid.* at 226-7.

⁵⁶⁴ *Ibid.* at 225.

obligations have to conform to a regime of political and legal rights,⁵⁶⁵ and more particularly fit within a framework of local contract doctrines.⁵⁶⁶ Structural fit appears to be considered in terms of ‘formal rationality’ by Brownsword.⁵⁶⁷ This type of localised structural fit, reins in the potential for any substantive excesses which could arise in an interpretation of fairness if it (the substance) were not thus controlled and guided. The structural or procedural fit in any given case is moulded from principle. Therefore legal principles constrain the discretion which is exercised over the interpretation of substance.⁵⁶⁸ Brownsword refers to the application of legal principles, which thus guide judicial discretion, in terms of ‘instrumental rationality’.⁵⁶⁹ He reconciles this type of textual interpretation of the principle of fairness with the substantive concerns of the prudent self interest of the particular individual operating within the social market.

Determining a fair contract in terms of the individual self-interest model, requires an examination of the contractual benefit.⁵⁷⁰ In the context of exclusive multi-option recording and music publishing agreements, benefits can be distinguished between short term (advances) and long term (royalties) payments. These benefits must be determined against the respective burdens which they impose (on the artist) such as the number of exclusive options per contract, as well as the transfer of the interest/control in the exclusive copyright in the musical works.

The conception of prudent self-interest transforms the welfare model of contractual fairness into a rights based model of contract. In this sense it may be argued that Brownsword has in mind a contractual model of egalitarian rights, based on incentives and the opportunity of the parties to realise their trading capital within a co-operative contracting framework. I

⁵⁶⁵ *Ibid.* at 165. It would appear that Brownsword favours an ‘interpretive’ legal method reminiscent of that propounded by Ronald Dworkin, see further Dworkin, R. *Law Empire* Fontana (1986), particularly chapter 7.

⁵⁶⁶ See Dworkin *ibid.* at 195-224 and 250-254.

⁵⁶⁷ *Supra*.n.562 at 210-215.

⁵⁶⁸ Collins dismisses ‘fit’ and more importantly the integrity theory of adjudication expounded by Dworkin, as a ‘closed doctrinal system of thought’, see *supra*.n.551 at 7. I do not agree with Collins’ views here.

⁵⁶⁹ See *supra*.n.562 at 115-221.

⁵⁷⁰ Even Collin’s admiration of liberal perfectionist (as a setting for the social market) is not sufficient to deny his account of the law of this essential fact.

would suggest further that this individualist conception of contractual rights is more akin to the liberal egalitarian views of Ronald Dworkin, rather than those expounded by ‘rights’ theorists such as John Rawls and Robert Nozick.⁵⁷¹ We could consider this as an interpretation of co-operative contracting on terms of mutual respect between the parties, in order to achieve a common purpose or enterprise: to profit from a commercially successful venture. Our interpretation of a contract would be based on this egalitarian concept of fairness.

Individual welfare and prudent self-interest can be comfortably read in terms of a party’s right to mutual respect.⁵⁷² Mutual respect reflects a rights based egalitarian theory such as the integrity theory of Ronald Dworkin, which seeks to support equality of opportunity and resources for individuals: ‘Liberal equality is equality of resources not welfare’.⁵⁷³ In this sense fairness as mutual respect is both procedural and substantive in nature. We could argue that mutual respect guarantees that parties should have enjoyed equal resources with which to strike a fair bargain, and in this context an artist’s access to independent legal advice may be considered crucial in discerning procedure.

Therefore procedure is the primary objective but mutual respect requires substantive results too. Substance provides evidence to support procedure and *vice versa*. Cases such as *Witmark*, *Croce* and *Schroeder* are good examples of this interpretation of the fairness. Substantive fairness requires a consideration of the incentives to the contract, and whether contractual consideration indicates the best interpretation of the incentives for which the parties entered the contract. This sort of judgement is necessarily subjective in its application but also objective in the sense that it must conform to legal principles. The measurement of

⁵⁷¹ See further, Rawls (*supra* n.552) and Nozick, R. *Anarchy, State and Utopia* Basic Books (1974).

⁵⁷² In *Life’s Dominion: An argument about abortion and euthanasia* Harper Collins (1995), Dworkin offers a detailed discussion on the individual’s right to be treated with dignity and respect. We define ourselves and our own worth or dignity in the manner in which we treat others. In this sense, an individual’s self-respect is derived from the respect which he/she gives others. The concept of self-dignity is integrated with the concept of mutual respect and *vice versa*.

Liberal egalitarianism recognises individual autonomy as a right to which every member of a community is entitled. This right is enjoyed by each individual as an equal member of that community.
⁵⁷³ Dworkin, R. *The Tanner Lectures on Human Values XI* Salt Lake City: University of Utah Press (1990) at 36. For the purposes of this discussion, I shall use the terms ‘integrity’ and ‘liberal equality’ to refer to the same concept of egalitarian rights.

the benefit would have to point to an answer which best interprets the incentive(s) which motivated the respective parties to enter the contract.⁵⁷⁴

The essence of the integrity argument is that it is an indication of disrespect to a party when the other denies him/her procedural fairness so that he/she may not freely conclude a contract.⁵⁷⁵ Ultimately our concern for him/her does not arise from welfare, but rather from the fact that any common negotiating disability which the artist, for instance, may have suffered denies him/her mutual respect and equality of rights to freely negotiate a fair contract. These are the fair conditions of mutual respect in which a contract may be freely accepted. Integrity's concern for individual opportunity and access to resources is founded on an interpretation of egalitarian rights theory which is intrinsic (conceptual), instrumental and global in its application.

Principles, Policies and Practices

The discussion on the concept of fairness suggests that it is ultimately a complex interaction between procedure and substance. The *a priori* presumption of inequality of bargaining power is represented by contracts which include non-negotiable 'boilerplate' terms. This presumption suggests 'a lack of assent' in the contracting process, and can only be rebutted by a) evidence of bargaining parity or b) evidence of substantive fairness. Substantive fairness considers the contract as a whole in order to ascertain the fundamental point to the contract. This is the incentive for the parties to enter into the contract. Consequently the assessment of fairness has both objective and subjective value.

We assume a co-operative rather than a competitive negotiating stance as an objective

⁵⁷⁴ I have offered a very, very brief description of Dworkin's interpretive theory of legal adjudication. A far more comprehensive account of this theory can be found in Dworkin's *Law's Empire*, *supra*.n.565 at chapters 6-11.

⁵⁷⁵ Dworkin's account of autonomy recognises individual freedom but unlike Raz' liberal perfectionist theory, it does not prescribe an individual's actions beyond this initial assertion of freedom. Dworkin's theory of liberal equality revolves around the ideal of individual freedom and equality within a community. In a truly free democracy, freedom, equality and community are integrated with each other, such that one cannot exist without the other(s).

value of the contract so that both parties are able to achieve profit (from their enterprise). The contract should successfully accommodate their respective subjective goals. Remuneration is commensurate to the necessary contribution which each party brings to the contract, and this is a complex contextual analysis which requires a determination of the individual contract, as well as an appreciation of issues of socio-economic policy. For instance, the 'investment' which each party brings to the contract is an important consideration of their respective individual claims and rights, but of lesser importance is the consideration of industry contracting customs. However the legislative background of socio-economic policies within which exclusive multi-option recording and music publishing agreements may fall is also relevant to the judicial inquiry, and consequently policies in the context of employment law for instance may prove particularly pertinent with regard to the interpretation of exclusive multi-option recording and music publishing agreements. In practice, those who negotiate, draft and interpret these contracts must ensure that remuneration must reflect the 'spirit of the contract', because in almost all cases it represents the incentive or rationale for the parties to enter the contract.

The spirit or core of the contract reflects its rationale and incentive for the legitimate contractual assent. Therefore, the scope of the inquiry into the substantive fairness of the contract must interpret the incentive and rationale to entering the contract from the 'adequacy' of contractual remuneration. It is a consideration of the overall effect of the terms of the contract. The conceptual importance of contractual remuneration is its reason for assent. The legitimacy of assent is drawn from the ideal of mutual respect between the individual parties. Normative concerns for fair contracts suggest a prudent self-interest or limited co-operative interpretation of the contracting process, and this appears to be reflected in practice as well.⁵⁷⁶ In this context the idea of professional worth and the artist's trading capital must be considered against the level of investment which record companies and music publishers ought to be encouraged to make (within the limitations of a 'co-operative' contractual

⁵⁷⁶ Brownsword suggests that this is the 'essential ethic of contract' (*supra*.n.562 at 15-16, and 22) and he supports his position by referring to Stewart Macaulay's empirical research into business practices.

relationship). For instance, artists should be able to negotiate generous royalty provisions in exchange for transferring control of the copyright to the record company or music publisher. This is an important point to bear in mind particularly with regard to exclusive multi-option recording agreements which according to industry practices tend to offer 'boilerplate' royalty provisions in most agreements; and moreover, copyright control customarily remains with the record company for the entire statutory copyright period. The lack of fairness on these matters may be compounded by poor royalty rates as well as the offer of minimal advance payments, in order to produce the work. Unless the contract also provides for some redress such as default release rights, this type of contract could be deemed unfair. The point here is that the artist must find a benefit from the contract whether it be in advance payments or royalties, and the material failure to do so would strike at the heart of the exclusive and multi-option nature of the contract. This is the rationale to the contract. Furthermore the use of discretion within the terms of the contract, particularly with regard to release rights must be interpreted in accordance with mutual respect for the other party; however this is not to suggest that any party should act with complete disregard to its own self interest as well. For instance, the corporate policies for the exploitation of the musical work and the accounting practices for the payment of royalties, ought to demonstrate mutual respect for the artist by offering more transparent accounting practices, and also by allocating a share of the profits which represents both the immediate and the long-term interests of the artist (for at least his/her commercial contribution to the success of the work).

David Slawson suggests that a lack of procedural fairness in itself may not be sufficient to satisfy the conditions for unconscionability, and that it can only contribute or add weight to the substantive effects of a contract in order to produce an unfair contract .⁵⁷⁷

Perhaps this point must be borne in mind by those negotiating, drafting and interpreting hard bargains. It may be claimed that the harder the bargain: the greater the need to ensure that the negotiating circumstances do not lack procedural fairness. In practice however, it is only the humble unestablished artist who benefits from the inquiry into fairness, and perhaps this is

because the substantive terms in his/her contract are more likely to demonstrate a lack of assent and mutual respect. The important point is that all contracts must demonstrate evidence of procedural and substantive fairness.

Brownsword's identification of enlightened or prudent self-interest can be taken one step further and modified in terms of the integrity theory (proposed by Dworkin) as mutual respect between the parties. The application of the integrity theory first requires a procedural inquiry into the conditions in which a fair contract may be freely accepted; and in this context the use of standard form contracts is relevant to such an assessment of procedure. Secondly, any irregularities with regard to the first must be supported by evidence of material divergence of benefits, in the substantive terms of the contract, which is determined from the reasonable expectations of the parties, and this is done so in light of the motivation to enter that particular contract. Contractual assent is discerned from considering the quality of the core, and this view draws on Llewellyn's concern for the ineffectiveness of negotiated terms when the effect of 'boilerplate' terms ultimately taint the assent to the contract. The egalitarian rights foundation of Dworkin's integrity theory transforms the assessment of reasonable expectations (of a contract) from 'enlightened' individual interest to mutual respect. Each party has the freedom to enter a fair contract and this view has been echoed in the law's interpretation of the doctrine of restraint of trade, undue influence and unconscionability.

Dworkin's views suggest that those who interpret these contracts must first aim not only to achieve justice between the individual parties at issue, but also that the best interpretation of the contract would then aim to satisfy the distributive goals of liberal equality, though this latter aim need not always expressly arise in every interpretative exercise.

If we consider localised interpretations of fairness between parties, as those assisting in identifying the essential core of contractual benefits, which provide the incentive for each party to enter the contract, then our global distributive goals would demonstrate a general

⁵⁷⁷ *Supra*.n.221 at 142.

community concern to foster an egalitarian approach to the allocation of resources and opportunities for individuals (in the community).⁵⁷⁸ Liberal egalitarian values endorse individual rights to lead flourishing lives and in this context,⁵⁷⁹ the interpretation of fair terms in exclusive multi-option recording and music publishing agreements ought to encourage the further creation of and exploitation of the works.⁵⁸⁰ Mutual respect between the parties would entitle artists to contractual terms which recognised their long-term professional interests, and this is not a matter of welfare but rather a fair acknowledgement of mutuality in opportunity and resources. These are the conceptual dynamics which interpret the fairness of contracts.

⁵⁷⁸ The liberal egalitarian community is a community of individuals. For very thorough discussions of Dworkin's account of the values of the liberal egalitarian community see *supra*.n.573.

⁵⁷⁹ Dworkin's conception of human life is not merely instrumental because individual's are seen as ends in themselves. He adopts the Aristotelian sense of a universal good life as attaining a flourishing life. However, a good life must also be relative to the interests of the particular individuals. It is important to note that Dworkin is not a natural lawyer. See further *supra*.n.572.

⁵⁸⁰ I offer a similar arguments for the interpretation of the copyright provisions in the US Constitution, see further *supra*.n.31.

Chapter VIII

Final Thoughts

VIII (I) Tying some loose ends

(a) Mutual respect

In the last chapter I emphasised the importance of mutual respect between the parties in order to freely attain a fair contract. Mutual respect is conceptually important because it signifies the ‘essential ethic’ of contractual assent. Mutual respect (as contractual assent), rationalises the fact of contract making.

Legitimate contractual assent requires support from substantive evidence to provide the incentives for entering the contract. The incentives which motivate artists to enter exclusive multi-option recording and music publishing agreements are discerned from determining the ‘core’ or ‘spirit’ of the contract; and in particular the benefit or remuneration provisions of the contract. For the most part, the decisions of the courts appear to endorse an interpretation of contractual fairness based on this co-operative approach to the contractual enterprise. Indeed the co-operative model based on mutual respect between the parties offers the best interpretation of the contractual obligations in exclusive multi-option recording and music publishing agreements.

The core of the contract must indicate incentives for the parties and its purpose extends beyond merely providing contractual consideration. The conceptual significance of incentives is not only to recognise the individual autonomy exercised in contract making, but also to recognise each party’s right to equal opportunities and resources within the law to strike a fair bargain.

(b) Incentives

Throughout this thesis the particular distinction between advances and royalties has been made, because these two aspects of remuneration perform essential functions within recording and music publishing agreements: royalties represent long-term income whereas advances signify short-term income. The conceptual significance of royalties is that it illustrates the artist's long term interest in the work and more specifically in the copyright control of the work. The royalty provisions in a contract signify the benefits which the artist receives for having surrendered copyright control/interest in the work to the record company or music publisher. In most music publishing agreements royalty figures are negotiable and fairly generous percentage figures, particularly with regard to the mechanical copyright in the work(s). Recording artists appear unconcerned about 'boilerplate' royalty figures and copyright control terms until well into their careers. The point which must be emphasised is that all artists should aim to make the most of the valuable copyright which they produce and this is usually achieved by being able to negotiate decent terms for royalties on the profits of their endeavours. If this were not so, there would be no point or incentive for the artist to enter the contract: the enterprise would be futile.

The major difficulty in considering royalties in the determination of remuneration is the fact that royalty figures operate as percentage points of contractual profit. The actual profit, if the sound recording is released, may be great or meagre. However, the lack of accuracy in measuring royalty figures beyond percentage points of future profits is indeed a major drawback to any measurement of remuneration. Furthermore, it has been argued that the technical issues concerning the different means of calculating payment and deductions, pose particular difficulties in forecasting even approximately quantifiable figures. Nevertheless the practical industry considerations which are involved in contracting and marketing removes much uncertainty. The calculation of royalties on the basis of future market profits may not be a precise exercise, but predicting an artist's commercial success need not necessarily amount to mere speculation.

In determining remuneration, particularly where recording agreements are concerned, it is debatable whether contemporary UK courts would be willing to inquire specifically into matters of royalty allocation. For instance, in the *George Michael* case, Parker J declined to consider the royalty figures in Michael's 1988 contract with Sony. Indeed, he thought that an inquiry into the complexities of the royalty structure in Michael's contract was not a matter for the court. Downgrading the conceptual significance of royalties may particularly concern the more seasoned artist during the process of contractual renegotiations because a record company may be prepared to increase the level of advances per album, in order to gain more option periods, rather than to increase the royalty rate. This approach is not helpful for the renegotiating artist who seeks to maximise the fruits of his/her long term commercial success, by attempting to negotiate for higher royalty figures.

The controversial *Buchwald* case suggests that the issue of royalties can be reviewed in the US courts without much hesitation. Moreover, the successful settlement of the Dixie Chicks dispute with Sony suggests that the issue of fair royalty percentages must consider the effect of royalty accounting systems employed at the broader industry level and this concern appears to affect the recording industry in particular. If unconscionable accounting standards are being used across the industry then courts should not shun the opportunity to evaluate and identify seemingly complex accounting practices as unfair. This was the position of the court in *Buchwald*. In this case the unfairness of the royalty accounting structure was compounded by the fact that the industry concerned was oligarchical in nature. However the most important point in *Buchwald* is the fact that the remuneration failed to demonstrate an incentive or motivation to enter the particular contract.

In their action against Sony, the Dixie Chicks claimed procedural unfairness from the fact that as unestablished artists they were offered 'boilerplate' standard royalty accounting provisions that were not only onerous and substantively unfair, but to which Sony had not drawn their attention. Royalty provisions which unfairly deny the artist the fruits of his/her labour must be balanced against the extent of his/her copyright control/interests in the

work(s). Sony settled amicably before it was ordered to disclose its accounts to the scrutiny of the Dixie Chick's accountants. The possibility of being ordered by a court to expose its financial records for external inspection may have persuaded Sony to come to an amicable settlement with the Dixie Chicks. The *Buchwald* and *Batfilm* cases suggest that US courts are prepared to examine royalty structures in order to consider the fairness of payments to artists.

The Dixie Chicks dispute serves to emphasise a growing concern amongst recording artists that the standard industry royalty accounting structures fail to remunerate them in accordance with the long term income status of royalties and in relation to their commercial success. In the current climate, improving the royalty accounting structures to offer greater transparency may instil greater confidence (amongst artists) in industry practices. Furthermore, the inclusion of mini-max provisions for determining advances and royalty payments, may also prove beneficial in the fostering of a co-operative relationship.

The ability to allocate remuneration between advances and royalties is a significant bargaining advantage. More fundamentally, the 'non-negotiable' status of royalty figures in most exclusive multi-option recording agreements, both in the UK and the US, must be examined against the non-negotiability of provisions pertaining to the record company's control over the copyright.

It is important to consider the test for remuneration with far more rigour than has been the case previously. This is because the complex structure of payment in the music industry is based on two types of exclusivity: the exclusive personal service contract and the exclusive control of copyright. Once the provisions for advances and royalty percentages have been proportionately apportioned, then the artist with bargaining power has the ability to negotiate the allocation of benefits between the two sources of remuneration. The nature of the principal source of benefit should direct the exercise of discretion, in the performance of the contract by the music publisher or recording company. For instance, if the royalties are to provide the principal source of contractual benefit, then the copyright must be exploited so that the artist would in fact receive his/her benefit.

The decisions of the courts suggest that the humble artist, who receives no more than sufficient advances for the production of the work would have to rely on healthy royalty figures in order to reap the professional rewards of a long-term contract. Arguably such contracts may only be justified by reference to 'professionally rewarding' levels of remuneration both in terms of advances and royalty percentages. For instance, in circumstances where the advance levels amount to no more than the sums reasonably required for the production of the work, and the royalty percentages are paltry then the contract is clearly unfair. The artist would not receive any benefit from this type of contract. Furthermore, proper royalty arrangements must be accompanied with realistic release commitments, and this is particularly crucial when the principal benefit of the contract is to be derived from royalty payments. A denial of these rights as a consequence of an abuse of dominant bargaining strength, would be a denial of the 'mutual respect' which should be extended by one party to another in the contracting process.

The right to a minimum level of remuneration is the standard which unites the industry superstar with the humble newcomer. To this extent there is an inquiry into the fairness of the contractual exchange, primarily in terms of contractual advances. In this sense, the courts have endorsed a minimum wage policy. Judicial policy has thus interpreted long term contracts in terms of *quasi* employment obligations. Therefore, merely offering a recording contract in itself, with nothing substantially more, cannot amount to minimum remuneration. Once a minimum substantive threshold of remuneration has been met, then the courts are unlikely to inquire into the adequacy of the remuneration. Furthermore, *Schroeder* and *Buchwald* suggest that industry standard terms pertaining to duration, advance levels, royalties and the control of copyright are not automatically considered fair standards and consequently, it is important to note that the threshold minimum standards are not necessarily reflected in 'independent' industry practices.

UK caselaw suggests two distinct means by which the courts will measure remuneration: (a) in accordance with the duration of the contract; and (b) the negotiating status of the artist. In either case, the courts provide only one solution: they are willing to

offer no more than a minimum level of remuneration to the artist. However a proper evaluation of remuneration would have to consider the function of royalties as the potential principal benefit of the contract, as well as its relationship with the copyright control in the work(s).

The courts appear unwilling to assess this essential relationship between copyright interests and royalty percentages. In most negotiating circumstances where copyright control and royalty figures are both offered as 'boilerplate' terms, the fairness of the practical outcome of the balance between these terms, requires judicial evaluation which the UK courts often neglect. The non-negotiability of copyright control is not in itself an issue, but rather the argument here is that the artist should be amply rewarded in royalties for having surrendered his/her interest in it. Furthermore, the issue of royalties and copyright control has become particularly important with growing concerns regarding the exploitation of and profits from backcatalogues, as well as the profits made from the internet distribution of the work(s). Royalty rates ought to fairly reflect the nature of these sources of 'income', particularly when advance payments have been modest.

The music industry tends to claim that the level of advances offered to the artists depends very much on his/her market status. Record companies for instance, are unlikely to even offer contracts to artists without adequate market testing. Successful results from market testing are highly likely to ensure a certain number of future sales. The discussion in the preceding chapters suggested that the amount of advances offered to the artist would generally reflect this extent of projected market support. Consequently, the record company is unlikely to invest beyond this level at least in order to recoup all the production costs. Furthermore, there is some evidence that record companies are, as a matter of policy, unlikely to release works which do not have a very strong potential to recoup the advances paid. Although, such an event is unlikely to arise often, this general policy is quite common within most record companies. It must be noted that in practice (see chapter 4 and 6), any form of 'artistic sterilisation' such as the failure to release the work of the artist rarely occurs because (a) it is usually much cheaper to release the work and at least recoup some of the costs; and

(b) there would generally be no commercial advantage in continuing a contract with an unco-operative artist, as it would be more economical to come to an agreement to terminate the contract. However this last argument may not be effective when an artist is keen to break a fair agreement in order to enter an exclusive contract with a rival recording or music publishing company.

The shrewd and safe investment strategies of most of the industry majors and large independents suggest that the music industry is not quite the high risk business which many claim, and in fact the payment of advances are rarely wildly speculative. Moreover, the short term nature of the exercise of each option allows record companies and music publishers to reassess the contract frequently. In most cases it is incorrect to deem each advance payment, particularly to the unestablished artist, as a long-term investment. Nevertheless, a multi-option exclusive contract remains a long term obligation for the artist and the nature of this commitment, particularly for unestablished novices in the music industry, is akin to a *quasi* employment relationship which imposes particular obligations on recording and music publishing companies. The underlying point to this argument is that artists should be able to reap the rewards of commercial success from their professional lives and in particular, the humble artist, who would be less likely to strike a bargain which maximised his/her trading capital, may require additional protection from the law.

Some of the concerns expressed in the English courts, regarding minimum standards in remuneration, have parallels in the judicial interpretation of fairness in exclusive multi-option recording and music publishing agreements in New York and California. Both caselaw and specific statutory mechanisms offer a degree of guaranteed benefits as remuneration. However, a specific appreciation of the distinction between advances and royalties is only overtly recognised in the California courts though New York caselaw such as *Mellencamp* and *Witmark* appear to identify the nature of the particular contractual benefit, which is due to the artist by considering the 'core' contractual obligations.

The core of the contract (the incentive) in most cases is measured in terms of remuneration in the form of advances and/or royalties. Options are generally balanced against

advances whilst royalties represent the payment for the artist's surrender of the copyright interest in the work(s). The payment of remuneration may be distributed between advances and royalties and it is important to bear in mind that this type of allocation of payments must reflect fair payment practices. This is particularly important where the artist is contracting at the more modest level of the industry because he/she may not be always able to negotiate terms for incentives which reflect the ideal of mutual respect between the parties.

If the advance (present income) levels paid are no more than necessary to produce the work then generous levels of royalties (as future income) should be included in the contract; and this ought to imply an obligation to release the work(s) as well. On the other hand the payment of very high advances which far exceed the costs of producing the works(s) would not necessarily require similarly generous royalty levels.

Fair incentives should also consider the long term nature of an artist's career which could well extend beyond the expiry of his/her contract. In these circumstances, the exploitation of the back catalogue of his/her works should reflect mutual respect for the artist's contribution to the success of the work(s). In the event that the record company is unable to provide fair incentives in the form of decent royalties for backcatalogues, the contract ought to make adequate provisions for the artists to be able to gain copyright control in his/her work(s) without undue financial difficulties.

The underlying point to the argument is that both artists and their recording and music publishing companies ought to be encouraged with incentives to produce works. The fairness of tying an artist for any length of time and gaining exclusive copyright control to exploit the work(s) both require justification with regard to the payment of royalties as well as advances.

(c) Assent

Procedural fairness in the form of contractual assent represents an exercise of present individual freedom (present autonomy) to enter the contract under fair conditions. Contractual

assent is a manifestation of mutual respect between the contracting parties; and it is the humble newcomer to the industry who appears to require the particular attention of the courts merely because he/she is not usually in a position to extract a contract which reflects mutual respect between the parties. Therefore it is this category of artist who appears to be more vulnerable to any exploitative practices within the industry.

Although record companies and music publishers appear to regard the need for independent legal advice as an important issue, the decision in *Croce* suggests that the lack of independent legal advice is not necessarily an impediment to a substantively fair contract. However, it could be argued that access to independent legal advice is sufficient to rebut any *ab initio* presumption of lack of assent, and that the parties in fact enjoyed bargaining parity. Indeed both the Recording Industry Association of America (RIAA) and the court in the *George Michael* case seem to take this view.

The *Croce* case suggests further that signing both a music publishing agreement, and a recording agreement (and indeed any other related contract) with the same corporate entity may not render a substantively fair contract unfair. With regard to multiple contracting in the UK, caselaw suggests that such 'multiple' 'tie-in' contracts are a concern for the courts when a fair contract could be tainted by its association with an unfair contract. Lawyers in both the US and UK caution artists against signing such 'tie-in' contracts.

Issues of standard form contracts and the lack of sufficient substitutability are not uncommon procedural problems in the music industry. Ultimately however, matters of procedure must be measured by reference to the incentives offered in the contract. This would mean that the measurement of advances, royalties and the contractual rights to acquire the copyright in the work(s) (after the expiry of the contract), underpin the assessment of assent. Procedure is integral to substance and *vice versa*.

VIII (ii) Conclusion

The contract model which best illustrates the concerns of the courts both in the UK and the USA can be broadly described as one which serves the ideals of liberal equality. In this context, Dworkin's theory of integrity offers an application of the principle of contractual fairness on the basis of mutual respect between the parties. Consequently, the principle of fairness recognises the freedom of individuals to be able to strike fair bargains. The law enforces this right. Contract law is thus drawn from concerns for individual freedom as well as the fairness of the contractual incentives which reflect mutual respect between the contracting parties. The focus on the particular incentives for the respective contracting parties points to a co-operative approach in determining the reasonable expectations of these parties. This is the fundamental principle of fairness which underpins legal interpretation.

The Labor Code section 2855 (the seven year rule) and the Civil Code section 3423 (minimum guaranteed payments) have determined contract terms in California as a matter of implementing social policy. In time, the current concerns of the Recording Artists Coalition (RAC) in California, regarding royalty accounting structures and also the severity of the seven year rule may be addressed by the state legislature. Social policy can be driven by the activities of pressure groups such as the RAC and even the RIAA or promoted in accordance with an international agenda (such as the WIPO Copyright Treaty and the Phonogram Treaty).

Industry practices aim to maximise commercial activities and wealth. In this context industry practices ought to consider the need to retain business confidence as well. These obligations involve transparency in accounting practices, non-exploitative deductions in the profits and perhaps far more effective and scrupulous industry self regulation. Such good practices already exist in some quarters, and this is an encouraging sign. However, the integrity theory of law suggests that social policy and industry practices are secondary to any judicial consideration of fairness, though their effects may sometimes coincide.

Any account of contractual remuneration must consider advances and royalties as distinct entities; and the allocation of remuneration ought to reflect the low risk nature of the industry. The potential for profit has been increased yet further with the advent of on-line

distribution of music and therefore, the offer of a long term contract is a clear indication, not only of the long term expectations, of the artist, but also of the obligations of the record company or music publisher. In light of these factors exclusive multi-option recording and music publishing agreements are increasingly being viewed (by artists), in terms of *quasi* employment contracts rather than purely commercial bargains; and the issue of contractual payment is often considered with reference to long and short term income opportunities.

If record companies and music publishers, fail to address these grievances then artists, particularly the more established ones, may look elsewhere, in an attempt to find professionally rewarding contractual remuneration for their creative labours.

I have already suggested in chapter 1 that the enormous potential for relatively inexpensive world wide distribution of sound recordings offered by the internet has introduced many concerns for the recording industry. In the context of exclusive agreements with artists the most pertinent issue is the fact that the great opportunities offered by the internet will enable artists to by-pass the distribution channels offered by the record companies to release their music. In order to meet the new challenges posed by the internet, the role of the record company may have to be restructured into a combined A&R and financing business operation. Consequently, their ability to and practical justification for controlling the copyright for the exploitation of the work may become weakened. The artist who is not dependent on receiving advances may not have any need for a recording company, and perhaps it will only be the industry novice who will have to rely on a record company as a financier and A&R advisor. In the current economic climate the industry majors may probably only carry on their operations on this basis.⁵⁸¹

Long term exclusive contracting in the music industry will not be defeated by social policy nor upheld by industry standard practices. These factors of policy and practice would have only a minimal effect on the determination of fair terms in exclusive multi-option

⁵⁸¹ There may be a concerted effort on the part of the industry majors to buy up successful independent companies in order to acquire their 'A&R' personnel. Indeed, the recent acquisition of Zomba by BMG may have been partly motivated by the latter's desire to acquire Zomba's recognised A&R team.

recording and music publishing agreements. It is only the co-operative principle of fairness, based on the mutual respect between the parties and the need to recognise the individual's incentive to enter the contract, which will prove the determinative factor in this interpretative exercise. However the swift and enormous advances in technology suggests that the demise of exclusive multi-option recording and music publishing agreements is only a matter of time; and the contracts which are currently being negotiated will probably represent the last generation of such agreements. Nevertheless, the concept of fairness (which may be interpreted in terms of individual incentive, mutual respect and co-operation) that governs any contract would remain constant and undiminished.

Zomba was set up in the early 1980s and quickly achieved a reputation for recognising and developing young artists. It's A&R team has been vital to this success.

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