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## Selling Out for a Song: “Artist Abuse” and Saving Creatives from Servitude and Economic Disadvantage in the Entertainment Industry

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# Selling Out for a Song: “Artist Abuse” and Saving Creatives from Servitude and Economic Disadvantage in the Entertainment Industry

Rick G. Morris\*

## ABSTRACT

*Artists drive the entertainment industry with their creative work, and in some cases, there are protections for artists when it comes to their work, wealth, and autonomy. However, the area of contracts called “private law,” under which artists’ contracts fall, is lightly regulated in comparison to other employment agreements. Artists, often at the beginning of their careers, are signed to long-term contracts that take advantage of them and do not provide adequate compensation. Artists might be locked into contractual arrangements that they cannot free themselves from. Sometimes, they are directly cheated. And much of this comes from people they trust, including their managers, agents, and even family members and friends. Artists have complained publicly for years and have taken what actions they could to improve their situations. This article examines various forms of contractual “artist abuse” in the entertainment industry. Next, this article looks at the lifecycle of these arrangements and artists’ means of working to free themselves, including self-help practices and the use of applicable law. Finally, in light of the risks of bad contracts, this article visits current discussions for reform and suggests practical revisions to the contractual and negotiating processes that could help reduce the conflict and human suffering caused by over-reach, power differences, and entrenched practices in any industry where personal services contracts are used.*

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## I. INTRODUCTION

Creative artists have suffered from fraud, deceit, and other artifices that have deprived them of the fruits of their creative work—the stories are numerous throughout the history of entertainment. Most recently, however, the public observed how artists have been placed into what is effectively servitude through lengthy contracts, fraudulent management, and even at least one long-lasting conservatorship that deprived the artist of the ability to reap the benefits of her labor while others drew millions of dollars from the proceeds of her work. This raises the question of whether there are existing methods to protect artists, and whether more should be done in the future.

One of the most recent and highest-profile examples of an overreaching conservatorship is that of Britney Spears. Spears began her compensated ca-

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reer as the understudy for a role in the off-Broadway musical *Ruthless*<sup>1</sup> and was also a contestant on the popular television show *Star Search*.<sup>2</sup> Her first recurring role was in *The All-New Mickey Mouse Club*, and she later became one of the most popular singers in the world at an early age.<sup>3</sup> Until the age of majority—eighteen in California—Spears’s affairs were managed by her parents, who, of course, took salaries for themselves for the career management they provided. As an adult, Spears married, had children, and continued to perform regularly, but after divorcing her husband and losing custody of her children, she experienced a particularly difficult period during which she shaved her head and damaged a car with an umbrella.<sup>4</sup> Subsequently, Spears’s parents began proceedings to protect her.<sup>5</sup> As Spears turned twenty-six years old, her parents petitioned a court for a temporary conservatorship that eventually moved to permanent status and lasted thirteen years,<sup>6</sup> until she

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1. Elisabeth Vincentelli, *Britney Spears and Natalie Portman battled for an off-B’way role in ‘92*, N.Y. POST, (Sept. 8, 2014, 10:27 PM), <https://nypost.com/2014/09/08/britney-spears-and-natalie-portman-battled-for-an-off-bway-role-in-92/> [https://perma.cc/ZYX9-4K3E].
2. Sarah Hearon, *Britney Spears’ Ups and Downs Over the Years*, US MAG. (Aug. 18, 2022), <https://www.usmagazine.com/celebrity-news/pictures/britney-spears-ups-and-downs-over-the-years/> [https://perma.cc/D2BX-9GYF].
3. *Id.*
4. Rachael Chang, *Britney Spears’ Conservatorship: A Complete Timeline*, BIOGRAPHY (Aug. 24, 2021), <https://www.biography.com/news/britney-spears-conservatorship-timeline> [https://perma.cc/F68V-RK9W].
5. *Id.*
6. Ms. Spears’ situation became a popular cause and received much publicity. Many news organizations picked up the story and did exceptional levels of long-form reporting including entire documentaries: The *New York Times* produced two documentaries on Ms. Spears including *Framing Britney Spears* and *Controlling Britney Spears*, (covering the surveillance used during the conservatorship). See ‘*Framing Britney Spears*’, NY TIMES, (Nov. 2, 2021), <https://www.nytimes.com/article/framing-britney-spears.html> [https://perma.cc/TG8G-9LVQ]; ‘*Controlling Britney Spears’ Reveals Details of Her Life Under Conservatorship*, NY TIMES, (Sept. 24, 2021), <https://www.nytimes.com/article/controlling-britney-spears.html> [https://perma.cc/UVJ2-QE7A]; see also Liz Day, *The Handling of Britney Spears*, N.Y. TIMES (Feb. 5, 2021), <https://www.nytimes.com/2021/02/05/insider/britney-spears-father-documentary.html> [https://perma.cc/3LLY-JK7W]. The BBC made a documentary on Britney Spears’ conservatorship. See Roisin O’Connor, *The Battle for Britney review: BBC documentary fails to make sense of a complex subject*, THE INDEPENDENT, (May 5, 2021), <https://www.independent.co.uk/arts-entertainment/tv/reviews/the-battle-for-britney-spears-review-bbc-b1839768.html> [https://perma.cc/J4P6-BVLZ]. CNN made a documentary on Britney Spears and her conservatorship titled *Toxic: Britney Spears’ Battle for Freedom*. See Chloe Melas, *5 revelations from CNN’s Britney Spears special report*, CNN (Sept. 26, 2021),

was thirty-nine years old.<sup>7</sup>

One allegation in the conservatorship petition was that Spears could not function as an adult. To the contrary, however, Spears was a significant performer in many different areas—she released hit albums, toured the world, and started a residency in Las Vegas.<sup>8</sup> Yet, her father, who served as her guardian, and a court deemed Spears unfit to regulate her own affairs.<sup>9</sup> A contract was signed for a Las Vegas residency, even though Spears was supposedly incapable of regulating her basic everyday needs. Her father obligated her to work a grueling performance schedule<sup>10</sup>—including singing and dancing for his and others' livings.<sup>11</sup> Spears worked as many as seven days a week, was involuntarily on Lithium, and had every aspect of her life controlled.<sup>12</sup> During that time, she made millions of dollars.<sup>13</sup> Spears testified in court about her claims of forced labor and abuse as well as her belief that she was unable to petition to end her conservatorship.<sup>14</sup> And, at one point, Spears called 911 to report herself as a victim of conservatorship abuse.<sup>15</sup> The *New*

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<https://www.cnn.com/2021/09/26/entertainment/britney-spears-cnn-special-report/index.html> [<https://perma.cc/Z279-HZJ9>].

7. Chang, *supra* note 4.
8. Jon Blinsein, *Britney Spears' Conservatorship: What's Going on and What's Next?*, ROLLING STONE (Nov. 12, 2021), <https://www.rollingstone.com/music/music-news/britney-spears-conservatorship-timeline-1193156/> [<https://perma.cc/EU8C-7XJG>].
9. *Id.*
10. Chelsea White, *In The Zone! Britney Spears posts late night bathroom selfie revealing amazing results of her grueling performance schedule*, THE DAILY MAIL, (Dec. 8, 2015), <https://www.dailymail.co.uk/tvshowbiz/article-3350576/Britney-Spears-posts-late-night-bathroom-selfie-revealing-amazing-results-gruelling-performance-schedule.html> [<https://perma.cc/CJL3-XHGE>]. Ms. Spears was not only appearing in her Las Vegas residency but also recording a new album at the same time.
11. Jennifer Drysdale, *Read Britney Spears' Full Statement Against Conservatorship*, ET ONLINE NEWS, (June 23, 2021), <https://www.etonline.com/read-britney-spears-full-statement-against-conservatorship-167826> [<https://perma.cc/Y475-PR7F>].
12. *Id.*
13. Bob Allen, *Britney Spears' Piece of Me Residency Final Figures: 248 Shows, 916,184 Tickets sold, \$137.7M Earned*, BILLBOARD (Jan. 23, 2018), <https://www.billboard.com/pro/britney-spears-piece-of-me-residency-final-figures/> [<https://perma.cc/6SXP-YU3X>].
14. N.Y. TIMES, *supra* note 6.
15. Blinsein, *supra* note 8 (citing Ronan Farrow & Jia Tolentino, *Britney Spears' Conservatorship Nightmare*, THE NEW YORKER (July 3, 2021), <https://www.newyorker.com/news/american-chronicles/britney-spears-conservatorship-nightmare> [<https://perma.cc/H9GP-RJZP>]).

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*York Times* explained that an investigator who interviewed Spears in 2016 reported that “Spears informed the investigator that she wanted the conservatorship terminated as soon as possible. ‘She [was] “sick of being taken advantage of” and she said she [was] the one working and earning her money but everyone around her [was] on her payroll.’”<sup>16</sup>

Spears’s life, as it was, could fit within the definition of “servitude.” Involuntary servitude is banned by the Eleventh Amendment of the U.S. Constitution.<sup>17</sup> The U.S. Supreme Court has interpreted that provision most recently in *United States v. Ike Kozminski*,<sup>18</sup> where it held that involuntary servitude includes either “physical” or “legal” coercion and that forced labor can be involuntary servitude, including when there are mental health issues.<sup>19</sup> In *Kozminski*, a husband and wife invited two laborers of low mental capacity to their farm and started out paying them for their labor. The couple eventually stopped paying the laborers and threatened them when they wanted to leave. This type of mental and legal coercion was sufficient for the Court to find for the laborers.<sup>20</sup>

Spears was similarly situated; while not on a farm, she was also coerced into labor, and, in order to break the cycle, she eventually had to refuse to work until her conservatorship issue was settled.<sup>21</sup> Spears’s public refusal to work eventually got her a new court hearing where she was permitted to address the judge independently.<sup>22</sup> A public uproar formed using the colloquialism “Free Britney” and spreading the word on her “possible captivity” via social media.<sup>23</sup> Britney’s supporters showed up and protested in front of

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16. Liz Day, Samantha Stark and Joe Coscarelli, *Britney Spears Quietly Pushed for Years to End Her Conservatorship*, N.Y. TIMES, (Nov 2, 2021), <https://www.nytimes.com/2021/06/22/arts/music/britney-spears-conservatorship.html> [https://perma.cc/92X9-PNA6].
17. U.S. CONST. amend. XIII, § 1 (“Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.”).
18. *United States v. Kozminski*, 487 U.S. 931, 935 (1988).
19. *Id.* at 952.
20. *Id.* at 953.
21. Joe Coscarelli, *Britney Spears Announces ‘Indefinite Work Hiatus,’ Cancels Las Vegas Residency*, N.Y. TIMES (Jan. 5, 2019), <https://www.nytimes.com/2019/01/04/arts/music/britney-spears-cancels-vegas-residency.html> [https://perma.cc/F37S-PKH6].
22. Chloe Melas et al, *Britney Spears Asks Court to End Her Conservatorship*, CNN (June 23, 2021), [https://www.cnn.com/entertainment/live-news/britney-spears-court-hearing-conservatorship-june-2021/h\\_991c09492e508c6e68f68d6f449710cc](https://www.cnn.com/entertainment/live-news/britney-spears-court-hearing-conservatorship-june-2021/h_991c09492e508c6e68f68d6f449710cc) [https://perma.cc/5CF5-Y5R7].
23. Laura Newberry, *Britney Spears Hasn’t Fully Controlled Her Life For Years. Fans Insist It’s Time To #FreeBritney*, L.A. TIMES (Sept. 18, 2019), <https://www.latimes.com/entertainment/celebrity/la-ent-britney-spears-20190918-story.html>.

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the court and in other public spaces to gain attention.<sup>24</sup> The lawyer<sup>25</sup> and a bank that were trustees of Spears's conservatorship exercised their professional judgment and resigned from their roles.<sup>26</sup> Eventually, the court found that Spears was able to be released from her conservatorship.<sup>27</sup> After her conservatorship was terminated, one of the first things Spears did was to finally marry her long-time boyfriend, Sam Asghari.<sup>28</sup>

Another example of an egregious and long-lasting case of contractual servitude is that of Prince Rogers Nelson. Prince was a world-famous recording star who produced prodigious amounts of artistic product. He often argued with Warner Bros., his record label, over artistic control, over releasing more of his music, and over the size of his contract, which he thought should match other artists, including Madonna and Michael Jackson.<sup>29</sup>

In 1993, in an attempt to get out of his contract, Prince changed his name to the unpronounceable glyph and wrote the word "slave" on his cheek for multiple appearances.<sup>30</sup> Prince was eventually released from his contract, found other record companies to work with him, and later founded his own

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[www.latimes.com/california/story/2019-09-17/britney-spears-conservatorship-free-britney](http://www.latimes.com/california/story/2019-09-17/britney-spears-conservatorship-free-britney) [<https://perma.cc/SJ9N-NLL8>].

24. *Fans Show Support Outside Dramatic LA Hearing In Britney Spears' Conservatorship Case*, CBS NEWS: L.A. (Sept. 29, 2021, 2:03 PM), <https://www.cbsnews.com/losangeles/news/dramatic-la-hearing-set-wednesday-in-britney-spears-tumultuous-conservatorship-case/> [<https://perma.cc/S84W-T2Y3>].
25. Joe Coscarelli et al., *Britney Spears's Lawyer Asks to Step Down from Court-Appointed Role*, N.Y. TIMES (July 6, 2021), <https://www.nytimes.com/2021/07/06/arts/music/britney-spears-lawyer-conservatorship.html> [<https://perma.cc/L4B6-KF4V>].
26. Liz Day et al., *Company Set to Manage Britney Spears's Estate Asked to Withdraw*, N.Y. TIMES (July 1, 2021), <https://www.nytimes.com/2021/07/01/arts/music/britney-spears-bessemer-trust-conservatorship.html> [<https://perma.cc/XGX6-6GTG>].
27. Doha Madani, Bianca Seward & Morgan Sung, *Britney Spears Free From Conservatorship, Judge Rules*, NBC NEWS (Nov. 12, 2021, 5:00 AM), <https://www.nbcnews.com/pop-culture/pop-culture-news/prewrite-britney-spears-conservatorship-termination-hearing-rcna4481> [<https://perma.cc/2PGG-3U7X>].
28. Chloe Melas, *Britney Spears and Sam Asghari are married*, CNN (Jun. 10, 2022), <https://www.cnn.com/2022/06/10/entertainment/britney-spears-wedding/index.html> [<https://perma.cc/6Y9K-EUYM>].
29. Melinda Newman, *Inside Prince's Career-long Battle to Master His Artistic Destiny*, BILLBOARD (Apr. 28, 2016), <https://www.billboard.com/music/features/prince-battle-to-control-career-artist-rights-7348551/> [<https://perma.cc/6HSZ-2P5H>].
30. *Id.*

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record company.<sup>31</sup> Prince also expanded his independence by being one of the first artists to distribute his work directly via the internet; and he was an early artist to negotiate to take control of his own master recordings.<sup>32</sup> After years of legal challenges, in 2014 Prince made a deal to gain control of his back catalog—a deal made possible by the impending “copyright termination” rights that were to vest thirty-five years after the recordings.<sup>33</sup>

Prince made a cause out of the contractual injustice and racist treatment of artists, and he held those views to the end of his life. He passed away on April 21, 2016. Just months before his passing, Prince met with the media and was quoted as repeating his concern about the industry: “‘Record contracts are just like—I’m gonna say the word—slavery,’ . . . ‘I would tell any young artist . . . don’t sign.’”<sup>34</sup>

Michael Jackson took up the case for artists, too. In 2002, Jackson joined a coalition to battle against record company contracts that exploit artists.<sup>35</sup> Jackson made it clear that “[r]ecord companies have to start treating their artists with respect, honor[,] and financial justice.”<sup>36</sup> Around the same time, Reverend Al Sharpton’s National Action Network, a civil rights organization, planned a summit to create communication between labels and advocates for artists.<sup>37</sup> This organization recognized the existing issues and advocated for artists.

These are just a few of the many artists who have been taken advantage of in the entertainment and media industries. This article will look at the various forms of contractual possible “artist abuse,” the applicable law, and the self-help practices of the artists, and suggest revisions to the contractual and negotiating processes that should help reduce the conflict and human suffering caused by over-reach, power differences, and entrenched practices.

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31. *Id.*

32. *Id.*

33. Eriq Gardner & Ashley Cullins, *Prince’s Legal Legacy: Contract Fights, Copyright Battles and Changing His Name*, THE HOLLYWOOD REP., (Apr. 21, 2016, 1:26 PM), <https://www.hollywoodreporter.com/business/business-news/princes-legal-legacy-contract-fights-886521/> [https://perma.cc/8FFK-8SAW].

34. Eric Deggans, *Prince Compares Record Contracts to Slavery in Rare Meeting with Media*, NPR, (Aug. 9, 2015), <https://www.npr.org/sections/thetwo-way/2015/08/09/430883654/prince-compares-record-contracts-to-slavery-in-rare-meeting-with-media> [https://perma.cc/3E7L-XUB3].

35. Gary Susman, *Michael Jackson Joins Artists’ Fight Against Labels*, ENTERTAINMENT, (June 6, 2002).

36. *Id.*

37. Billboard Staff, *New Sharpton Group Plans Music Summit*, BILLBOARD (June 10, 2002), <https://www.billboard.com/music/music-news/new-sharpton-group-plans-music-summit-75473/> [https://perma.cc/9HXT-YJHA].



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## II. POWER STRUCTURES AND INDUSTRY PRESSURES IN ENTERTAINMENT CONTRACTS

Numerous are industry conditions that cause artists to be economically disadvantaged—conditions under which other employees would have courses of action to remediate problems with their pay. A normal employee, for example, might have several routes of remediation within their company to help with shortfalls in their pay. They could look for help from a union, from state fair-pay authorities,<sup>38</sup> or from federal labor regulators.<sup>39</sup> However, an artist usually signs a contract, and, because contracts are “private law” between two people of capacity, an artist cannot use these measures.

In entertainment contracts, the parties are not necessarily of equal savvy or of equal bargaining power. When an artist feels disadvantaged, the artist may claim that the contract was unconscionable,<sup>40</sup> but depending on the situation, the parties might be at least of equal capacity.<sup>41</sup> Once a person meets the minimum criteria for signing a contract, courts are not eager to modify the bargained-for exchange.<sup>42</sup> The power and knowledge imbalance may lead artists to resort to public remedies for contractual difficulties. For example, Scarlett Johansson discovered that her movie contract might not cover the change exercised by Disney during the COVID-19 pandemic to shift her most recent movie, *Black Widow*, from a theatrical release to a mixed theater and streaming release, thereby allegedly depriving her of a significant portion

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38. *E.g.*, Department of Labor, N.Y. Gov., <https://dol.ny.gov/> [<https://perma.cc/JEE8-HXWC>]; Labor and Workforce Development Agency, CAL. Gov, <https://www.labor.ca.gov/> [<https://perma.cc/DD55-ZKXW>]; Illinois Department of Labor, ILL. Gov., <https://www2.illinois.gov/idol/Pages/default.aspx> [<https://perma.cc/FG2A-TAJU>].
39. NATIONAL LABOR RELATIONS BOARD, <https://www.nlr.gov/> [<https://perma.cc/D7A8-T4QU>].
40. Jennifer A. Brewer, *Bankruptcy and Entertainment Law: The Controversial Rejection of Recording Contracts*, 11 AM. BANKR. INST. L. REV. 581, 582 (2003).
41. RESTATEMENT (SECOND) OF CONTRACTS §12 (AM. L. INST. 1981). Capacity to contract is an easy standard to meet. A person is able to enter into a contract unless they are (a) under legal guardianship (b) considered an “infant” under law (before their eighteenth birthday) they may enter into only a voidable contract, (c) Mentally ill or defective, or (d) intoxicated.
42. *See generally* Karen Eggleston et al., *The Design And Interpretation Of Contracts: Why Complexity Matters*, 95 NW. UNIV. L. REV. 91 (2000). The interpretation of contracts depends on many factors. Among these are whether a court believes in the textuality (four corners) method of interpretation or the contextuality (situations between the parties) method of interpretation. However, if a contract is complex and contains more information about the wishes of the parties the courts do not tend to move from text to context.

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of her back-end compensation.<sup>43</sup> The change in the distribution of her movie would have purportedly resulted in a loss of millions for Johansson. She not only sued Disney but also released details of the purported bad deal to the public, which built public support that may have influenced Disney to settle quickly.<sup>44</sup> The appearance of possible gender inequity in the situation was easy to infer. Also, the power structures create additional risks for artists. If an artist sues their management company for malfeasance, what is the chance another management company or agent might want to pick them up? A lawsuit can be a practical path to ending an artist's career<sup>45</sup> or can cause them to be "blacklisted" in the industry.<sup>46</sup>

Industry negotiators could take umbrage with the idea that artists are totally alone, just asking to be taken advantage of. Entertainment companies would state that artists are unknown, and the company is taking a huge risk by signing artists; only one out of many become successful. Thus, the view of entertainment companies might be that those who are successful need to pay for the societal opportunity of providing profits sufficient for the record company to take a chance on the next rising prospect. Companies might argue that they provide international distribution contracts that are not easily duplicatable. Further, companies are highly sophisticated in terms of business infrastructure and likely possess knowledge in areas of which artists might not be aware, such as the ability to collect royalties worldwide from the many performing rights organizations, challenge copyright infringements of the artist's work, and issue take-down notices in order to maximum royalties and protection. Companies also would argue that they provide other services—both direct, like maintaining the artist's website and fan club, and indirect, like lobbying for favorable laws and protections for an artist's work.

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43. Joe Flint & Erich Schwartzel, *Scarlett Johansson Sues Disney Over 'Black Widow' Streaming Release*, WALL ST. J. (July 29, 2021), <https://www.wsj.com/articles/scarlett-johansson-sues-disney-over-black-widow-streaming-release-11627579278> [<https://perma.cc/AWD4-LV9C>].
  44. Kim Masters & Tatiana Siegel, *Scarlett Johansson, Disney Settle Explosive 'Black Widow' Lawsuit*, THE HOLLYWOOD REP. (Sept. 30, 2021), <https://www.hollywoodreporter.com/business/business-news/scarlett-johansson-disney-settle-black-widow-lawsuit-1235022598/> [<https://perma.cc/AN6M-TXRW>]. The lawsuit was settled after a matter of weeks. The public relations battle included other stars speaking out on behalf of Scarlett Johansson's position.
  45. Eileen Reslin, *NeNe Leakes claims she's 'blacklisted' by Bravo amid discrimination lawsuit*, PAGESIX, (May 3, 2022), <https://pagesix.com/2022/05/03/nene-leakes-claims-shes-lawsuit/> [<https://perma.cc/DKP7-UB3C>].
  46. Diana Falzone, "You Will Lose Everything": Inside the Media's #MeToo Blacklist, VANITY FAIR, (Apr. 16, 2019), <https://www.vanityfair.com/news/2019/04/the-metoo-blacklist> [<https://perma.cc/356N-TLT9>]. Television personalities claim they are person non-grata after settling #MeToo lawsuits.

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Further, companies can argue that the risks they are taking risks when, for example, producing and airing television shows, which warrants calculated adjustments to actor salaries and show funding. Companies would argue that the period during which there is deficit financing—during the production of the seasons before there is a corpus of enough episodes to provide independent value—the company is particularly vulnerable. For streaming services, there is no advertising in many of the shows, however, steaming services have detailed records on the number-of-plays per show and some demographic information on who is watching. In many cases, they do not sell advertising, they sell information and subscriber attention, and they might be funding programming to influence their subscriber and viewer count. The finances of television, are obscure; and the finances of the streaming services are even more opaque. The lack of transparency disadvantages artists working in these media form determining their comparative worth and their negotiations.

Finally, the live theatre is interesting because it is heavily unionized and is more transparent. The main venues for non-traveling shows include New York and surrounds, Los Angeles, Chicago, London, and large cities worldwide. Artists involved in live theatre are often part of unions and are parties to contracts that provide enough information into the functioning of the shows. Even so, the theatre is also a risky business, with most shows never running long enough to recoup their start-up investments. “Only one out of five Broadway productions recoups its investment”—which has been true for about sixty years.<sup>47</sup>

There are two sides to every story; however, when looked at from the macro perspective somehow artists are filing bankruptcy, not the media companies; and artists have short career spans on television, but television companies have been around for decades.

### III. THOSE WHO TAKE ADVANTAGE OF INDUSTRY PRACTICES, ACCESS, AND TRUST

Over-reaching by contract can be observed in the treatment of the 1990s singing group known as the Backstreet Boys. *USA Today* claimed that their contracts were “webs of robbery,”<sup>48</sup> and there are reported additional claims of theft by their manager.<sup>49</sup> The members of the Backstreet Boys were man-

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47. Brooke Sopelsa, *The Risks, Rewards and Realities of Investing in Theater*, CNBC (Oct. 18, 2010), <https://www.cnbc.com/2010/10/18/the-risks-rewards-and-realities-of-investing-in-theater.html> [<https://perma.cc/5FPJ-3H9N>].

48. *Id.*

49. Timothy Bella, *Lou Pearlman Was A Disgraced Mogul Who Defrauded '90s Boy Bands. Then Came the \$300 Million Ponzi Scheme.*, WASH. POST (Mar. 13, 2019), <https://www.washingtonpost.com/nation/2019/03/13/lou-pearlman-was-disgraced-mogul-who-defrauded-s-boy-bands-then-came-million-ponzi-scheme/> [<https://perma.cc/9X7L-JJZQ>].

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aged by Lou Pearlman. He was famous for micro-managing the careers of his groups and for underpaying them. Pearlman eventually filed for bankruptcy. In the final payout from the bankruptcy estate of Pearlman, the Backstreet Boys received only \$99,000, some studio audio tapes, and posters; the group had asked for \$3.45 million.<sup>50</sup>

Like the family members who took advantage of their children, it would surprise few that managers have also taken advantage of their contracted bands. In addition to being charged with keeping the money they should have paid to the bands, Pearlman also caused the boy bands to go through a “band bootcamp” to practice for hours in airplane hangars that were located Florida.<sup>51</sup> After two years of touring for their album and grossing \$10 million, Pearlman had a dinner for NSYNC where he distributed their first checks—the band expected large checks, and were shocked when Pearlman presented each member a disappointing \$10,000.<sup>52</sup> The members of NSYNC had a family-member lawyer review their contract, and the group discovered Pearlman made himself a sixth member of the band, meaning that in addition to the fees for his management, he made one-sixth of the band’s profits.<sup>53</sup>

One of the most famous public recitations of a recording contract leaving artists inadequately compensated came when the band TLC accepted a Grammy award.<sup>54</sup> TLC was the highest-selling act of the year and won two Grammy Awards but, the TLC members described themselves as “broke” and under stress.<sup>55</sup> The members of TLC filed for bankruptcy and sued to be released from their contracts. Although the suit was settled and was subject to confidentiality agreements, it was closely watched because the bankruptcy code does not normally permit the use of bankruptcy merely to get out of

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50. *Id.* Previously, the Backstreet Boys sued their record company for \$75 million and sought release from their contract. Joe Dangelo, *Backstreet Boys Sue for \$75 Million, Release from Contract*, MTV NEWS, (Nov. 26, 2002), <https://www.mtv.com/news/my7tp2/backstreet-boys-sue-for-75-million-release-from-contract> [<https://perma.cc/FPV9-Y26F>].

51. Andrea Mandell, *5 shocking ways the Backstreet Boys, ‘N’N Sync got swindled by the man who created them*, USA TODAY, (Apr 9, 2019), <https://www.usatoday.com/story/life/music/2019/04/05/lou-pearlman-film-reveals-how-backstreet-boys-n-sync-lost-millions/3373395002/> [<https://perma.cc/X7DK-45AJ>].

52. *Id.*

53. *Id.*

54. TLC at the 1996 Grammy Awards Press Conference talking about being BROKE!, YOUTUBE (Nov. 23, 2013), <https://www.youtube.com/watch?v=1Cf9NCIMe8c> [<https://perma.cc/JUQ8-A47W>]. (“We are not going to sugar coat anything anymore.”; “We have been quiet long enough.”; “We are the biggest-selling female group ever.”; “And . . . we are broke as broke can be.”).

55. *Id.*

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burdensome contractual provisions, such as one prescribing low levels of royalties.<sup>56</sup>

Taylor Swift, one of the most renowned and successful singer-songwriters of all time, had a typical first recording contract. This contract provided that the label would own the first six albums Swift recorded, or it would run for thirteen years.<sup>57</sup> Five of Swift's most successful albums were produced pursuant to this contract.<sup>58</sup> While Swift was a songwriter on most of the songs on those albums, and thereby entitled to a share of the publishing royalties, her performances of the songs were owned by her recording company. Swift would have received a percentage of sales, but the majority of control was held by her record company, in the typical fashion for a recording contract. When her recording company eventually decided to sell her "master recordings" to Scooter Braun, Swift explained that the situation was her "worst case scenario," as Braun had been involved in "incessant, manipulative bullying" toward Swift.<sup>59</sup> Swift protested publicly and eventually used a provision of the Copyright Act to re-record her songs and label them as *Taylor's Version*. This has allowed her to recapture some of the performance royalties for those albums and is a strategy that helps defeat the value of the original music—at least to the extent fans support artists through purchases and streams of the new version, and not the original.

#### A. Trust Issues: Agents, Managers, And Family Members

The number of individuals drawing from an artist's profits can be significant. The primary three roles that interact with an artist regarding legal and representative matters are an artist's agent, manager, and lawyer. The agent procures work for the artist;<sup>60</sup> managers "shape artists' careers,"<sup>61</sup> and law-

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56. Beth Burkstrand, *TLC Settles Suit, Setting Aside a Troubling Use of Bankruptcy*, N.Y. TIMES (Nov. 25, 1996), <https://www.nytimes.com/1996/11/25/business/tlc-settles-suit-setting-aside-a-troubling-use-of-bankruptcy.html> [https://perma.cc/56RF-EKFF].

57. Brittany Spanos & Amy X. Wang, *Taylor Swift 'Absolutely' Plans to Re-Record Catalog After Big Machine Deal*, ROLLING STONE (Aug. 21, 2019), <https://www.rollingstone.com/music/music-news/taylor-swift-absolutely-plans-to-re-record-catalog-after-big-machine-deal-874173/> [https://perma.cc/2CB7-ZRG8].

58. *Taylor Swift Albums and Songs Sales*, CHARTMASTERS (July 31, 2022), <https://chartmasters.org/2022/07/taylor-swift-albums-and-songs-sales/> [https://perma.cc/S76W-48WP].

59. Steven J. Horowitz, *Taylor Swift vs. Scooter Braun and Scott Borchetta, Explained*, VULTURE (Nov. 15, 2019), <https://www.vulture.com/2019/11/taylor-swift-scooter-braun-and-borchetta-feud-explained.html> [https://perma.cc/7ERD-TNBS].

60. David Zelenski, *Talent Agents, Personal Managers, and their Conflicts in the New Hollywood*, 76 U. S. CAL. LAW. REV. 979, 979 (2003).

61. *Id.*

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yers manage the contracts and legal strategies. One commentator explained that “[a]gents present artists with employment opportunities[,] and managers suggest which of those opportunities they should accept.”<sup>62</sup> But the lines can get blurry—sometimes an artist has an agent-manager; sometimes a lawyer gives career advice.

California attempts to separate the roles via its labor code and also by licensing agents.<sup>63</sup> But other states have different rules; for example, in Illinois, one must be registered as an “employment agency” to procure jobs for people, including artists, but the registration process is not burdensome.<sup>64</sup> And even in California, the lines are often crossed; it is not uncommon for the agent and the manager to take on part of the other’s role, and that supposed separation is governed by an ineffective regulation scheme.<sup>65</sup>

And others within an artist’s inner circle may perform parts of those jobs. For example, when giving legal advice, a lawyer may likely offer suggestions on the risks and opportunities presented by particular career decisions.<sup>66</sup> Or in the important area of taxation of income, those in the roles of manager, lawyer, and accountant might all have input.<sup>67</sup> Others come into an artist’s life on perhaps a project-by-project basis and stay longer—a producer, for example, might work with an actor on one project but then later provide leads for future employment.<sup>68</sup> Some roles have professional regulations within their states, but others do not.<sup>69</sup> Thus, an artist might be unable to identify who is responsible for what and who may be overstepping.

Familial relation does not protect an artist from possible overreach. While all allegations, Britney Spears’s attorney made a filing that included a report from *Forbes* that Spears’s “net worth is “shockingly low” given a string of four albums and concert tours since the conservatorship began in

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62. *Id.*

63. *Id.*

64. 225 Ill. COMP. STAT. ANN. 515/1.5 (2017).

65. Zelenski, *supra* note 60, at 980.

66. See L. Camille Cordova, “Stronger” Together: Kanye Could Have Owned His Masters by Engaging in Collective Bargaining, 22 PEPP. DISP. RESOL. L.J. 39, 54–55 (2022).

67. See *Taxes for the Performing Artists FAQs*, SCREEN ACTORS GUILD – AM. FED’N OF TELEVISION AND RADIO ARTISTS, [https://www.sagaftra.org/files/sa\\_documents/FAQ\\_PTEOE-Tax.pdf](https://www.sagaftra.org/files/sa_documents/FAQ_PTEOE-Tax.pdf) [https://perma.cc/E2YY-MP6D].

68. Vinny Ribas, *Advantages In Hiring An Experienced Producer For Your Demos Or Master Recordings*, INDIE CONNECT (2012), <https://indieconnect.com/advantages-hiring-experienced-producer-demos-master-recordings/> [https://perma.cc/9N47-SVVM].

69. Zelenski, *supra* note 60, at 985, 992–94.

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2008.<sup>70</sup> *Forbes* calculated some of the costs of the conservatorship as possibly \$2.4 million in wages over the years, \$2.1 million from her Las Vegas Residency, and \$500,000 from her *Femme Fatale* tour.<sup>71</sup> Including the legal fees over the years, one source estimates that Spears's father spent \$36 million of her money.<sup>72</sup>

Unfortunately, the usual remedies afforded to most people tend not to be available due to the existence and terms of the recording or performance contracts.<sup>73</sup> And many contracts detour controversies to arbitration.<sup>74</sup> Further, legislatures are not particularly concerned about the often millionaires inhabiting the entertainment business; they are working to protect people they consider more conventionally vulnerable.<sup>75</sup> Artists are not all the same—some are at the beginning of their careers or otherwise vulnerable in artistic expression and financial results.<sup>76</sup> The “artist abuse” not only affects the superstars but often more tragically, the younger artists.<sup>77</sup>

Colonel Tom Parker, Elvis Presley's agent, signed Presley at a young age and took advantage of him for many years. An agent typically receives ten percent of an artist's earnings,<sup>78</sup> but Parker received much more:

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70. Elizabeth Wagmeister & Gene Maddaus, *Britney Spears' New Lawyer Suggests her Dad Dissipated Her Fortune*, VARIETY (July 26, 2021), <https://variety.com/2021/music/news/britney-spears-conservatorship-father-jamie-spears-fortune-1235027944/> [<https://perma.cc/Y9V3-G3HA>].
  71. Madeline Berg, *How Much Has Britney Spears' Dad Earned Controlling Her Life?*, FORBES (June 24, 2021), <https://www.forbes.com/sites/maddieberg/2021/06/24/how-much-did-britney-spears-dad-earn-controlling-her-life/?sh=6895d4f97a6b> [<https://perma.cc/R2JC-SRAA>].
  72. Elizabeth Wagmeister, *Britney Spears Claims Father Took Millions, Tried to Pitch His Own Cooking Show During Conservatorship*, VARIETY (Jan. 18, 2022), <https://variety.com/2022/music/news/britney-spears-father-conservatorship-show-pitch-1235156922/> [<https://perma.cc/HKM3-8Y3D>]. Even husbands might not be looking out for your best interest. Ike Turner of the duo Ike and Tina Turner “micromanaged every aspect of her career . . . even withholding finances. Julie Miller, *Tina Turner Is Still Haunted By Her Abusive Marriage to Ike*, Vanity Fair (Mar. 25, 2021), <https://www.vanityfair.com/hollywood/2021/03/tina-turner-ike-documentary-real-life> [<https://perma.cc/EF8J-BV7E>].
  73. Cordova, *supra* note 66, at 51–52.
  74. Michelle Palagi, *Arbitration in the Entertainment Industry*, CARDOZO J. CONFLICT RESOL. BLOG (Apr. 3, 2022), <https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1030&context=cjcr-blog> [<https://perma.cc/Q999-BNY8>].
  75. See Cordova, *supra* note 66, at 41.
  76. Cordova, *supra* note 66, at 44.
  77. *Id.*
  78. *Id.*; For a discussion of the norms of agents, the California statute, and the rules of entertainment unions, see generally Zelenski, *supra* note 60.

The most flagrant deal was the March, 1973, agreement with RCA Records, which controlled the rights to all of Elvis' recordings. For \$5.4 million, Elvis waived his right to future royalties on the estimated 700 recordings he had made up to that time. To make matters worse, Presley's contract with Parker—which gave the manager a whopping 50% of the star's concert and record income—meant that Elvis only received \$2.7 million of the RCA payment. After taxes, that left him with \$1.35 million for the rights to what is arguably the most valuable body of work ever recorded.<sup>79</sup>

One judge who reviewed the contracts between Parker and Presley

. . . questioned the agreement and named Blanchard E. Tual, a Memphis attorney, to protect Lisa Marie's interests in the case. Tual undertook an extensive review of the Parker-Presley relationship. In a 300-page report filed in December, 1980, Tual charged that Parker, since Elvis' death, "violated his duty both to Elvis and to the estate . . . (by charging commissions) that were . . . excessive, imprudent . . . and beyond all reasonable bounds of industry standards."<sup>80</sup>

The rubrics and rules are so complex, sometimes even between artists, it seems like injustices might happen by accident. A very popular song, *Milkshake*, by R&B singer Kelis was sampled and used by Beyoncé. Kelis was unhappy; however, she did not own her master tapes,<sup>81</sup> so she did not have to give permission.<sup>82</sup> Kelis had not been notified that her song would be sampled, and it caused her to be upset. So much so that she called it an "act of

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79. Robert Hilburn, *ETERNAL REVENUE: Elvis' Millions Were Disappearing When Priscilla Presley Took Charge and Rebuilt the King's Fortune*, L.A. TIMES, (June 11, 1989), <https://www.latimes.com/archives/la-xpm-1989-06-11-tm-2866-story.html> [https://perma.cc/KDA4-SHEJ].

80. *Id.*

81. The term "master tapes" refers to the original edited version complete with sound effects and processing. It is the song as you probably heard it on the radio or streaming services. It is the "original, official and final recording." Cordova, *supra* note 66, at 39. There may be other, predecessor tapes, ones that recorded the performance, for example, so it is not necessarily the "original tape." However, "master tape" is the current de-facto use of language in the industry, and the stories that underly current research are full of the term. This author would suggest possible designations such as: "original reference" tape, "final edit" tape, or "final processed" tape as alternatives.

82. Cheyenne Roundtree, *Kelis Calls Out Beyoncé for 'Theft' Over-Using 'Milkshake,' But Her Real Beef Lies in Years-Old Feud With Pharrell*, ROLLING STONE, (July 29, 2022), <https://www.rollingstone.com/music/music-news/kelis-calls-out-beyonce-over-using-milkshake-but-her-real-beef-is-with-pharrell-1390071/> [https://perma.cc/6J4X-RQGP].



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theft.”<sup>83</sup> For Kelis, it seems that the issue was less about Beyoncé’s use than perhaps the record deal she received from Pharrell Williams and Chad Hugo, in which she gave away most of her rights; she was not given songwriting credit, so she does not share in the songwriting royalties.<sup>84</sup> Since she is not a songwriter and holds none of the copyrights, she did not have to give permission, and Beyonce had proceeded properly.<sup>85</sup>

Kelis’ argued that she was too young and unknowledgeable to know what she was signing at the time she signed her record contract.<sup>86</sup> She states that she did not make any money off her first two albums, but did not notice it because she was making some money from touring.<sup>87</sup> She signed a bad deal with her collaborators because, “. . .they were your friends so you trusted them, I say.”<sup>88</sup> Taylor Swift, who famously had a falling out with her record company, signed her first contract at the age of 15. She did not get out of it until she was 29.<sup>89</sup>

A common theme among these examples is that of “capacity”—not just the basic legal concepts of being of-age and mental incapacity but also the sophistication of the parties and capacity to make a knowing commitment regarding the terms of a contract.<sup>90</sup> The attributes that make entertainment contracts unique are that they are for personal services, and they may extend over a good portion of a person’s natural biological lifetime or their entire “performative lifetime.”<sup>91</sup> Further, because of the economics of the entertainment business, where most of the money is made while a product is new and fresh,<sup>92</sup> there are “financial lifetime” implications. A new movie, for example, makes most of its money in the first week of release, with the second week dropping by fifty percent.<sup>93</sup> Research confirms that sixty to seventy percent of all movies make their most money in the first week, and most

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83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. Hadley Freeman, *Unmasked singer: Kelis on music, men and her missing money*, THE GUARDIAN (Jan. 30, 2020), <https://www.theguardian.com/music/2020/jan/30/unmasked-singer-kelis-on-music-men-and-her-missing-money> [https://perma.cc/LKR7-TGX8].

88. *Id.*

89. *Id.*

90. Cordova, *supra* note 66, at 54.

91. *Id.* at 46–50.

92. Stephen Follows, *How Important is the Opening Week to a Movie’s Total Box Office?* STEPHEN FOLLOWS (June 11, 2018), <https://stephenfollows.com/how-important-is-the-opening-week-to-a-movies-total-box-office/> [https://perma.cc/PB7H-EESF].

93. *Id.*

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movies last fewer than twelve weeks in the top sixty-grossing movies.<sup>94</sup> It can mean the difference between being set for life and having a tough life.<sup>95</sup>

Issues relating to capacity in entertainment contracts can be of greater magnitude than those associated with other types of contracts. For example, if the contract for an automobile goes wrong, the risk is typically in the tens of thousands of dollars. In the right circumstances, the risks in entertainment can be in the millions of dollars.<sup>96</sup> And while there is an ability to recover the copyright, if they ever did own the copyright,<sup>97</sup> under the recent reversion clause of the Copyright Act,<sup>98</sup> that clause kicks in thirty-five years after the copyrighted property is fixed in a tangible form, so there may be little of the revenue stream left to claim.<sup>99</sup> The question here is equality of compensation for effort and effect. Kelis claims her work had a lasting impact on the music industry and her song is one of the most sampled.<sup>100</sup> Shouldn't that bring commensurate compensation?

Children are a special case and are not as protected as one might think. California has something called the "Coogan law" that helps set aside a portion of a child's income for later use,<sup>101</sup> and some other states have similar statutes. However, a young artist may not be covered at all in this new social media environment, where talent can thrive anywhere.<sup>102</sup> In the U.S., only some states have enacted a formal "Blocked Trust Account" requirement,<sup>103</sup> also known by the name of the California law, a "Coogan Trust Account."<sup>104</sup>

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94. Sitabhra Sinha & Srinivas Raghavendra, *Hollywood Blockbusters and Long-Tailed Distributions*, 42 EUR. PHYS. J. B. 293, 294 (2004); see generally BRUCE M. OWEN & STEVEN S. WILDMAN, VIDEO ECONOMICS (1992).

95. See, e.g., Joseph Diaz, *Confessions of a Diva: Toni Braxton Reveals Story Behind Bankruptcy*, ABC NEWS (Nov. 29, 2012), <https://abcnews.go.com/Entertainment/toni-braxton-reveals-story-bankruptcy-headlines/story?id=17839154> [<https://perma.cc/PQZ7-HBZX>].

96. Sinha & Raghavendra, *supra* note 94, at 294.

97. An artist may have signed away their rights to the work, especially if there was the type of over-reaching discussed herein. Cordova, *supra* note 66, at 48.

98. 17 U.S.C. § 203.

99. Cordova, *supra* note 66, at 47–48.

100. Roundtree, *supra* note 82.

101. CAL. FAM. CODE §§ 1652(b)(1), 1653(a) (2004).

102. Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them From Parents*, HOLLYWOOD REP. (Aug. 20, 2019), <https://www.hollywoodreporter.com/business/digital/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968/> [<https://perma.cc/5CX3-C554>].

103. *Child Entertainment Laws as of Jan. 1, 2022*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/whd/state/child-labor/entertainment#> [<https://perma.cc/NU2C-7RF8>].

104. CAL. FAM. CODE § 6753(a) (2004).

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These laws typically provide that fifteen percent of a child star's earnings must be set aside for their benefit.<sup>105</sup> These accounts are typically for prominent child actors and are required in only a few states, including California,<sup>106</sup> New York,<sup>107</sup> and Illinois.<sup>108</sup> Many states have laws requiring children in the entertainment industry to have a work permit or otherwise regulate child employment in entertainment,<sup>109</sup> but few require the protective trust account set aside for income.<sup>110</sup> And several states even exempt children in entertainment from some of their labor laws.<sup>111</sup> Many child stars who use YouTube and other social media platforms are exempt from even California's comprehensive Coogan Law.<sup>112</sup>

### **B. Racism and Misogyny as Potential Factors Permitting Artist Abuse**

In an important article on the shape of the media industries, Aymar Jean Christian exposes the lack of diversity in not just the productions themselves, but in the voices behind the productions.<sup>113</sup> He discusses the large-scale production environment which means many of the gatekeepers are white and part of a large-scale privilege complex of the legacy television companies. The expense of legacy production techniques leads to the exclusion of culturally marginalized creators.<sup>114</sup> He argues for more small-scale production where the voice and "cultural relation" are more important in the production of content than the wealth of technology.<sup>115</sup> The scale of media production for the large networks has entrenched a business whose constant value is to make more and more money to feed their infrastructure and salaries and ulti-

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105. CAL. FAM. CODE § 6752(b)(1) (2004).

106. CAL. FAM. CODE § 6750, *et. Seq.*

107. N.Y. EST. POWERS & TRUSTS § 7-7.1 (McKinney 2012).

108. 820 Ill. COMP. STAT. ANN. 205/12.5 (2020); *see generally* Shayne J. Heller, *The Price of Celebrity: When a Child's Star-Studded Career Amounts to Nothing*, 10 DEPAUL J. ART, TECH. & INTELL. PROP. L. 161, 162 (1999),

109. *Child Entertainment Laws as of Jan. 1, 2022*, *supra* note 103.

110. *Id.*

111. *Id.*

112. Lambert, *supra* note 102.

113. Aymar Jean Christian, *Expanding Production Value: The Culture and Scale of Television and the New Media*, CRITICAL STUD. IN TELEVISION 255, 255–56 (2019), [https://www.researchgate.net/publication/333167658\\_Expanding\\_production\\_value\\_The\\_culture\\_and\\_scale\\_of\\_television\\_and\\_new\\_media](https://www.researchgate.net/publication/333167658_Expanding_production_value_The_culture_and_scale_of_television_and_new_media) [https://perma.cc/6XA9-7WAB]

114. *Id.* at 255.

115. *Id.* at 257.

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mately increase their stock prices, not necessarily to produce art.<sup>116</sup> The motivations for attempting to deny royalties, keeping as much money as possible, and taking advantage of those who are the creators, can usually be traced to plainly visible conditions.<sup>117</sup>

History is full of stories where artists of color have been taken advantage of: Bessie Smith, one of the world's greatest Blues artists, received no royalties; Lester Chambers, a star of the 1960s whose performance with his brother Dylan Chambers was featured in Oscar-winning documentary *Summer of Soul*,<sup>118</sup> finally received his first royalty check in 1994.<sup>119</sup> Kevin Greene details long-standing issues with copyright registration depriving African-American artists of their royalties.<sup>120</sup> The practice of denying people of color the opportunity to be writers and producers of shows shut out their voices.<sup>121</sup>

Misogyny and/or sexism, implied or explicit, puts women at a disadvantage. Why, in 2021, was Scarlett Johansson having to fight for pay commensurate with her male counterparts?<sup>122</sup> And what about producers working with far-underaged females and asking them to become to avoid the child labor laws and work longer hours?<sup>123</sup> Alicia Silverstone was a rising star at a very young age. While appearing in the movie *The Crush* at the age of fifteen, a movie that made her “the object of sexual fantasy,”<sup>124</sup> Silverstone

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116. Cordova, *supra* note 66, at 53.

117. *Id.* at 52.

118. *Summer of Soul Star Lester Chambers Congratulates Questlove On Best Documentary Feature Oscar Win*, SHORE FIRE MEDIA (Mar. 28, 2022), <https://shorefire.com/releases/entry/summer-of-soul-star-lester-chambers-congratulates-questlove-on-best-documentary-feature-oscar-win> [https://perma.cc/W9CJ-H3MX].

119. Denise Oliver Velez, *Black People Create, White People Profit: The Racist History of the Music Industry*, DAILY KOS, (June 14, 2020), <https://www.dailykos.com/stories/2020/6/14/1948464-Black-people-create-white-people-profit-The-racist-history-of-the-music-industry> [https://perma.cc/8NWW-9VRN].

120. Kevin J. Greene, *Thieves in the Temple: The Scandal of Copyright Registration and African-American Artists*, 49 PEPP. L. REV. 615, 615, 639 (2022).

121. *Id.*; See Also E. Patrick Johnson, *APPROPRIATING BLACKNESS: PERFORMANCE AND THE POLITICS OF AUTHENTICITY*, Duke Univ. Press (2003).

122. Kim Masters & Tatiana Siegel, *Scarlett Johansson, Disney Settle Explosive 'Black Widow' Lawsuit*, HOLLYWOOD REP. (Sept. 30, 2021), <https://www.hollywoodreporter.com/business/business-news/scarlett-johansson-disney-settle-black-widow-lawsuit-1235022598/> [https://perma.cc/C8CF-9RXM].

123. Rich Cohen, *Alicia Silverstone: Ballad of a Teenage Queen*, ROLLING STONE, (Sept. 7, 1995), <https://www.rollingstone.com/feature/alicia-silverstone-ballad-of-a-teenage-queen-191633/> [https://perma.cc/A8CZ-LQVM].

124. *Id.*

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“was told by the producers of *The Crush* to go ahead and get emancipated—that is made legally independent of her parents.”<sup>125</sup> Being emancipated meant she would be exempt from the child labor laws and thereby able to work longer hours. Silverstone’s father participated in the process of finding a court in Oakland, California, where she could file. After her sophomore year, Silverstone quit high school.<sup>126</sup> These #MeToo practices can create an environment with the artists where there are multiple levels of fear and reluctance to come forward when they feel cheated.<sup>127</sup>

Drew Barrymore was also emancipated and was declared an “adult” by a court at the age of fourteen.<sup>128</sup> Barrymore had even been institutionalized as a minor by her mother and felt she needed to break away. Her mother was present in the court and supported her emancipation.<sup>129</sup> Even those from a privileged background can find themselves institutionalized by their parents and using the court system, in this case, to escape.

#### IV. TYPES OF CONTRACTUAL OVER-REACHING, BREACH, AND SUSPICIOUS CLAUSES

##### A. Unconscionable Contracts

Unconscionability is an important concept in contracts. It permits courts to take special action, including equitable reformation of contracts when needed.<sup>130</sup> Under the common law, and according to the *Restatement 2d of Contracts*, unconscionability is assessed at the time of the contract formation<sup>131</sup> and is indicated by excessively one-sided terms that “shock the conscious.”<sup>132</sup> Contract law gives courts important powers where a contract is unconscionable, including the ability to refuse to enforce the contract or to enforce the remainder of the contract without the unconscionable term, “or may limit the application of any unconscionable term as to avoid the unconscionable result.”<sup>133</sup> The standard for determining unconscionability is high.

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125. *Id.*

126. *Id.*

127. *See generally*, Tim Bower, *The #MeToo Backlash*, HARVARD BUS. REV. (Sept.–Oct. 2019).

128. Drew Barrymore, *Drew Barrymore: The Day I Divorced My Mother – Extract*, THE GUARDIAN (Oct. 25, 2015), <https://www.theguardian.com/culture/2015/oct/25/drew-barrymore-the-day-i-divorced-my-mother> [<https://perma.cc/NGY4-ZGU7>].

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. RESTATEMENT (SECOND) CONTS. § 208 (AM. L. INST. 2020).

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Some states have enacted legislation, rather than rely on the courts, to set what are essentially labor law standards for entertainment contracts.<sup>134</sup>

Being able to deal with unconscionable contract terms is important to the stability of the functioning of commerce. Thus, the Uniform Commercial Code (UCC) also has a provision permitting a court to refuse to enforce the entire contract or the unconscionable clause to “avoid any unconscionable result.”<sup>135</sup> Therefore, a person concerned with an unconscionable contract has three possibilities for the help: (1) the common law as reflected in the *Restatement* or their state’s common law; (2) for a commercial transaction, UCC section 2-302; or (3) a state’s additional provisions regarding contract interpretation, all as detailed above.

What still creates the disparity and differential in treatment in entertainment contracts? Sometimes an entertainment contract will indeed “shock the conscious,”<sup>136</sup> and in other cases, a bad contract, even where one does not get paid any enduring royalties, is just a bad contract. Yet the dangers of a bad entertainment contract are unique to the industry and are exacerbated by the types and lengths of contracts, the extent of the over-reach, and the fact that there is usually an experience and knowledge difference between the parties. Bright-eyed artists must essentially negotiate, blindfolded, contracts covering their entire career, sometimes with no knowledge about comparable salaries, or awareness of provisions that could steal away their livelihoods and leave them penniless.

With many goods, there is reasonable access to public knowledge about the marketplace. For example, in the stock and commodity markets, prices are usually made public rapidly through an open call and open publication of trade prices. In professional sports, union contracts typically set entry salaries or a range of salaries. In regular transactions, there are usually marketplaces where one can learn, for example, the price of the goods or salaries of similarly-situated employees. However, in the realm of personal services contracts, there is no way to judge values; it is difficult to find the prices of possible “comparables” to the product that is the artist and the artist’s work. All of the knowledge about potential profitability is in the hands of the other side, and they are looking out for their best interests—interests that might not necessarily be in line with the best interests of the artist.

## **B. Contracts That “Never” End**

Some contracts have mechanisms such as auto-renewal clauses, extended lengths, and tolling clauses that prohibit an artist from shopping their services or performing for others. In the movie industry, at the time of the studio “star system,” contracts were for six-month periods and were renews-

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134. See, e.g., CAL. LAB. CODE § 2855(a) (West 2007).

135. U.C.C. § 2-302 (LEGAL INFO. INST.).

136. Hilburn, *supra* note 79.

ble for years.<sup>137</sup> Therefore, the studio had essentially no obligation to a star beyond six months yet could extend the contract for those inactive periods to keep them obligated under contract for years.<sup>138</sup>

Companies have tried to avoid the seven-year limit<sup>139</sup> to personal services and recording contracts. One method used in the past was to not count the times of “suspensions” of their contract. A lesser-known case involved Bette Davis’ contract.<sup>140</sup> Davis sought equal pay with the male actors, as well as the ability to turn down roles, and she sought to have the suspension/extension of her contract overturned. Davis lost her case. This loss, however, was not all for naught—John Broderick performed archival research<sup>141</sup> into the case and discovered that Davis’s case caused the studio to end the practice of extending contracts beyond the seven-year limit.<sup>142</sup>

Section 2855(b) of California’s Labor Code prohibits labor contracts lasting longer than seven years.<sup>143</sup> There are, however, ambiguities in interpreting the law as applied to contracts; Courtney Love was in a case with Universal Records over the term of her contract being improperly enforced after a corporate transaction.<sup>144</sup> The lawsuit was eventually settled, resolving the question of five undelivered albums.<sup>145</sup>

*The Observer* reported that beginning with the 1999–2000 season, artists signing contracts to perform on *Saturday Night Live (SNL)* had to sign a contract that could tie them to NBC “for as long as 12 years.”<sup>146</sup> *The Observer* reported that before the new season, a contract with *SNL* typically lasted five or six years. The new contracts meant that NBC could put a star into a second series for up to another six years.<sup>147</sup> The issue for NBC was that stars gained fame on *SNL* and then could make “hundreds of millions” for

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137. John M. Broderick, *Warner Bros. v. Nelson: A Prelude to the De Havilland Law*, 41 LOY. L.A. ENT. L. REV. 111, 112 (2021).

138. *Id.* at 117.

139. CAL. LAB. CODE § 2855(b) (West 2007).

140. Broderick, *supra* note 137; *Warner Bros. Pictures, Inc. v. Nelson*, [1937] 1 K.B. 209.

141. *See generally* Broderick, *supra* note 137.

142. *Id.* at 196.

143. CAL. LAB. CODE § 2855(b) (West 2007).

144. Jeff Leeds, *Courtney Love Settles Suit Against Vivendi Universal*, LOS ANGELES TIMES (Oct. 1, 2002, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2002-oct-01-fi-courtney1-story.html> [https://perma.cc/F4RK-WB7F].

145. *Id.*

146. Peter Bogdanovich, *SNL’s Killer Contract*, THE OBSERVER (Aug. 16, 1999, 12:00 AM), <https://observer.com/1999/08/snl-s-killer-contract/> [https://perma.cc/8DNG-3ZGL].

147. *Id.*

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other studios.<sup>148</sup> The problem became how to remedy that—how to keep stars from making money off of their own talent at the normal end of their contract. Time is of the essence in entertainment. An act might be popular this year and not next year. An artist might develop and decide they do other work, like branching out from songs to television, or they may have a limited time available. Locking an artist up for seven years or more can be their entire career.

### C. Mortgaging An Artist's Future

An overreaching contract may shift the burden for expensive activities to the artists, such as those associated with recording sessions, producing a music video, or promoting an album, and make those expenses “recoupable.”<sup>149</sup> A recoupable expense is like a loan; rather than truly investing money that is at risk, the record company “advances” money to the artist for expenses. Those expenses are then recoverable against royalties. While the record company might still lose money on an artist, they have a long-enduring revenue stream to try to recover the costs of launching the artist.

And further, in a multi-record deal, the artist's next record for the same record company may be cross-collateralized with the first one. Therefore, any debt not paid off by the first record is to be paid off by the second record and any residual royalties from the first, and in deals with even more records, perhaps even the next record. The artist can find themselves in debt to the record company for years<sup>150</sup> and, if they continue to make records, in ever-increasing debt to the record company for future records.

Amy Noonan, formerly of the musical duo *Karmin*, reports that their strategy was to take as much money upfront because they realized that most acts never recoup.<sup>151</sup> And in a self-penned article for *Salon* magazine, Courtney Love herself, an important artist, did the math of a record contract.<sup>152</sup> She traces a million-dollar recording advance and concludes that after recording costs, commissions, and expenses, the four members of her

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148. *Id.*

149. Suzanne Kessler, *The Non Recording, Non Artist “Recording Artist”: Expanding the Recording Artist’s Brand into Non-Music Areas*, 20 VAND. J. ENT. & TECH. L. 515, 530 (2017).

150. See Aleia Woods, *Here’s Everything We Learned from Kanye West’s Record Label Contract*, XXL MAG. (Sept. 17, 2020), <https://www.xxlmag.com/kanye-west-record-label-contracts-details/> [https://perma.cc/WHD9-CV9T].

151. Ethan Millman, *Kanye West’s Record Deal Is Standard. That Doesn’t Mean the Record Industry Is Fair*, ROLLING STONE (Sept. 23, 2020), <https://www.rollingstone.com/pro/features/kanye-west-record-deal-music-industry-1061774/> [https://perma.cc/A7ZU-XQY8].

152. Courtney Love, *Courtney Love does the math*, SALON (June 14, 2000, 7:02 PM), [https://www.salon.com/2000/06/14/love\\_7/](https://www.salon.com/2000/06/14/love_7/) [https://perma.cc/76JV-PDRM].



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hypothetical band have \$45,000 each to live on for a year.<sup>153</sup> She then traces the income from the record, and in her example, the record makes \$411 million, the record company profits by \$4.4 million, the band members pay the record company back \$2 million in recoupable expenses, and therefore have little left for themselves and usually own none of their work.<sup>154</sup>

And a record company will frequently own the original recordings of the songs (the “master tapes”) and be able to exploit them by licensing them to commercials or other uses of which the artist may disapprove.<sup>155</sup> Or perhaps worse, Kessler notes that the record company may remove the songs from its website or listings and thereby relegate them to things that are no longer sold.<sup>156</sup> An artist hopes for a record company to be actively exploiting their work so they receive royalties. Especially if the relationship ended badly, there is no limit to what the record company will do with what is now their property. For Taylor Swift to state that the ownership of her recordings by her former producer, Scooter Braun, was “her worst nightmare” is an industry truism.<sup>157</sup> The future of the artist may be mortgaged for a long time. One of Kanye West’s contracts forbids him from retiring, providing that “at no time during the term will you retire as a songwriter, recording artist or producer or take an extended hiatus . . . .”<sup>158</sup>

#### D. Not Releasing Or Promoting Work

Most contracts require an artist to deliver albums to a record company, but the contracts generally give wide latitude to the record company regarding whether to release the artist’s work.<sup>159</sup> An unreleased album makes nothing for the artist, so artists are especially burdened with delivering albums acceptable in the eyes of the company. This burden might not necessarily complement the artists’ creativity or artistic integrity.

Pop star JoJo had a similar problem. She was signed at 13 and had a number one hit, *Leave*. JoJo was signed to a seven-album deal with her record company. But the company refused to release her second album, thereby

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153. *Id.*

154. *Id.*

155. Kessler, *supra* note 149, at 533.

156. *Id.*

157. Lisette Voytko, *Here’s Why Taylor Swift Hates Scooter Braun So Much*, FORBES (July 1, 2019, 12:14 PM), <https://www.forbes.com/sites/lisettevoytko/2019/07/01/heres-why-taylor-swift-hates-scooter-braun-so-much/?sh=69d2a5b42084> [<https://perma.cc/AUK9-GELF>].

158. Britni Danielle, *Kanye West Can’t Retire From Music Even If He Wanted To*, ESSENCE (Oct. 23, 2020), <https://www.essence.com/entertainment/kanye-west-emi-cant-retire/> [<https://perma.cc/C7SQ-3MU3>].

159. Kessler, *supra* note 149, at 528.

tying up her career.<sup>160</sup> This is a relatively common problem for artists. Another example includes Halsey—who states that even after selling 165 million records, she cannot convince her record company to release a single that she particularly likes.<sup>161</sup>

A corollary to not releasing work is to not support the activities of the artist. The value of having a record company and their value-add is the support they give during the nurturing of a project. This support, however, is arbitrary in nature. For example, in their suit to get out of their record contract, the *Backstreet Boys* alleged that their record company gave them no support for one of their albums in terms of song selection or choice of producers and that their “artistic suggestions were outright refused.”<sup>162</sup>

Beyonce and Jay-Z started a competing music service. Kanye released his contracts and Taylor Swift, one of the world’s largest recording stars of the past several years, complains about her treatment by her record company in a worldwide way.<sup>163</sup> And she proceeds to protest not only her treatment but the lack of control over her creative work. She has a lot of money, but even being one of the wealthiest multi-millionaires in music does not help her when her recordings are sold. These are example that there is stress between the record industry establishment and the stars that make the establishment their money.

### E. Age

Child stars are particularly vulnerable to being taken advantage of financially. One of the most famous child stars who was taken advantage of by his parents was Jackie Coogan, a very early movie star. He appeared in many Charlie Chaplin films and the 1922 blockbuster “*Oliver Twist*.”<sup>164</sup> As an

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160. JoJo as told to Dee Lockett, *JoJo Spent Nearly a Decade Fighting Her Label and Won. Here’s What She Learned, in Her Own Words*, VULTURE (Nov. 2, 2015), <https://www.vulture.com/2015/10/jojo-fighting-the-major-label-man-in-her-own-words.html> [https://perma.cc/HS6V-57WK].

161. Thania Garcia, *Halsey Claims Label ‘Won’t Let Me’ Release New Song ‘Unless They Can Fake a Viral Moment on TikTok,’* VARIETY (May 22, 2022, 10:51 AM), <https://variety.com/2022/music/news/halsey-label-new-song-viral-tiktok-1235274753/> [https://perma.cc/WHP3-SBWQ].

162. Joe Dangelo, *Backstreet Boys Sue For \$75 Million, Release from Contract*, MTV NEWS (Nov. 26, 2002, 8:28 PM), <https://www.mtv.com/news/my7tp2/backstreet-boys-sue-for-75-million-release-from-contract> [https://perma.cc/M7MH-SPKS].

163. Constance Grady, *Taylor Swift’s feud with her old record label has entered a new and messy public phase*, VOX (Nov. 15, 2019, 11:30 AM), <https://www.vox.com/culture/2019/11/15/20966470/taylor-swift-scooter-braun-scott-borchetta> [https://perma.cc/U4JL-H3TK].

164. Brian Warner, *Imagine Earning \$70 Million As A Child Actor, Then Finding Out The Money Had Been Completely Squandered . . . By Your Parents*, CELEBRITY NET WORTH (Apr. 11, 2019), <https://www.celebritynetworth.com/arti->

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adult, Coogan brought suit against his mother and stepfather for withholding funds from him.<sup>165</sup> The ultimate result was that California's child labor laws were changed because of Coogan, and the Coogan Law "requires that [fifteen percent] of all minors' earnings must be set aside in a blocked trust account commonly known as a Coogan Account."<sup>166</sup>

Some other child stars who alleged their parents took advantage of them financially include Macaulay Calkin, who sued his parents for emancipation at sixteen, and Gary Coleman who sued his parents for misappropriating his money,<sup>167</sup> as did Mischa Barton, a former star in the O.C.<sup>168</sup> Leeann Rimes also sued her parents for taking her money.<sup>169</sup>

Coogan Accounts are required in the states of California,<sup>170</sup> New York, Illinois,<sup>171</sup> Louisiana,<sup>172</sup> Pennsylvania,<sup>173</sup> and New Mexico.<sup>174</sup> However, there is no specific Coogan Law for child social media stars. Although child social media stars appear to be protected in California, there was a measure in 2018 to clarify the child labor law; no law outlines protections for minors earning income in social media.<sup>175</sup> California has added provisions for social media

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cles/entertainment-articles/imagine-earning-70-million-child-actor-finding-money-completely-squandered-parents/ [https://perma.cc/UQB4-NR4Z].

165. *Jackie Coogan sues mother*, PRESCOTT EVENING COURIER (April 12, 1938).
166. Bryn Sandberg, *When Young Stars Sue Their Parents: Whose Money Is It, Anyway?*, THE HOLLYWOOD REP. (Aug. 13, 2018, 6:00 PM), <https://www.hollywoodreporter.com/lifestyle/lifestyle-news/young-stars-sue-parents-money-is-it-1132846/> [https://perma.cc/LMP7-E6PP]; *Coogan Law*, SAG AFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [https://perma.cc/CF2Y-MYYE].
167. Sandberg, *supra* note 166; *Coogan Law*, *supra* note 166.
168. Sandberg, *supra* note 166; *Coogan Law*, *supra* note 166.
169. Stef McDonald, *Rimes Sues Dad, Manager*, PEOPLE (Sept. 18, 1998, 12:00 AM), <https://people.com/celebrity/rimes-sues-dad-manager/> [https://perma.cc/E2EC-WENX].
170. CAL. FAM. CODE § 6752 (West 2020).
171. SAGAFTRA, <https://www.sagaftra.org/membership-benefits/young-performers/coogan-law> [https://perma.cc/D6Y4-NHAB].
172. *Id.*
173. Linda Stein, *New Pennsylvania law affects child actors*, THE REPORTER (Oct. 23, 2012, 3:52 PM), <https://www.thereporteronline.com/2012/10/23/new-pennsylvania-law-affects-child-actors/> [https://perma.cc/N3NG-WVJN].
174. SAGAFTRA, *supra* note 171.
175. Harper Lambert, *Why Child Social Media Stars Need a Coogan Law to Protect Them From Parents*, THE HOLLYWOOD REP. (Aug. 20, 2019, 6:00 AM), <https://www.hollywoodreporter.com/business/digital/why-child-social-media-stars-need-a-coogan-law-protect-parents-1230968/> [https://perma.cc/49PP-DLSN].

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advertising.<sup>176</sup> There is a non-profit in California devoted to protecting child performers.<sup>177</sup>

Yet another problem, as Nikki Breeland notes, is that many contracts are negotiated and signed when the stars are very young.<sup>178</sup> *Ke\$ha* was 18 when her contract was signed; Britney Spears was 17, and JoJo was 12.<sup>179</sup> Age as a consideration of sophistication, even if a parent or guardian signs, is insufficient for a long-term contract. If actual knowledge and sophisticated business judgment cannot be accurately imputed, should the contracts be of a term-limited to foster periodic renegotiation?

#### F. Race, Gender, Identity, And Artist Contracts

Race, gender, and identity have all been factors in the unfairness of entertainment contracts. For example, record companies have given lesser royalties to artists who were not white. One author found that record companies paid black performers, including Little Richard, a flat fee instead of the usual royalty for the use of their songs in the 1950s.<sup>180</sup> Racism, sexism, homophobia, and other forms of discrimination are legendary in the entertainment industry. The ramifications of past discrimination linger, and the current contractual practices help preserve the ability to discriminate.

Motown was founded because Black artists could not find record deals.<sup>181</sup> As Gilbert Cruz, a biographer of Motown, said: “Arriving at the height of the civil rights movement, Motown was a black-owned, black-centered business that gave white America something they just could not get enough of—joyous, sad, romantic, mad, groovin’, movin’ music.”<sup>182</sup>

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176. CAL. LAB. CODE § 1310 (West 2019).

177. BIZPARENTZ FOUND., <https://www.bizparentz.org> [<https://perma.cc/98F7-MPE2>].

178. See generally Nikki R. Breeland, “*All the Truth I Could Tell*”: A Discussion of Title VII’s Potential Impact on Systemic Entertainment Industry Victimization, 25 UCLA’S WOMEN’S L.J. 135 (Fall 2018).

179. *Id.*

180. Roger Schlueter, *White singers paid the fees, but black singers didn’t get the money*, BELLEVUE NEWS-DEMOCRAT (Feb. 23, 2017, 9:00 AM), <https://www.bnd.com/living/liv-columns-blogs/answer-man/article134070984.html>.

181. See Gilbert Cruz, *A Brief History of Motown*, TIME MAG. (Jan. 12, 2009), <http://content.time.com/time/arts/article/0,8599,1870975,00.html> [<https://perma.cc/54N2-WKNX>].

182. *Id.*

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It is also a very short journey back in history, 25 years,<sup>183</sup> to when Ellen DeGeneres lost a show, her sitcom *Ellen* because she came out<sup>184</sup> as gay.<sup>185</sup> Eventually, she got another television show, but it is only a few years ago that she was able to make that particular stride forward on behalf of the LGBTQIA+ community.<sup>186</sup>

Racism, sexism, homophobia, and more are still alive in industries where entertainment workers are of so many different identities, races, and ethnicities. Direct damage continues to be seen across the spectrum of identity and includes the current issues over the lack of roles for the Asian community and the types of roles that are available; damage is also in the fact that Spanish-language programming is still balkanized by xenophobic media management and assigned their own channels, of which language does not cross barriers. Other examples can be seen in the gender discrimination in paychecks and the need for people to exercise their bargaining power, gather together as informal negotiating groups, stand up for each other when pay and working condition discrepancies are discovered, and disclose their victories and losses against unfairness.<sup>187</sup> It can be seen each year in the protests that come forward, such as #oscarssowwhite in 2015.<sup>188</sup>

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183. Christina Dugan Ramirez, *Ellen DeGeneres' Iconic 'Coming-Out' Episode Aired 25 Years Ago Today: Why It Was So Groundbreaking*, PEOPLE (Apr. 30, 2022, 9:00 AM), <https://people.com/tv/ellen-degeneres-iconic-coming-out-episode-25-year-anniversary/> [<https://perma.cc/6NTH-99JR>].

184. See Sara Kettler, *How Ellen DeGeneres' Historic Coming-Out Episode Changed Television*, BIOGRAPHY (Apr. 14, 2020), <https://www.biography.com/news/ellen-degeneres-sitcom-coming-out-episode> [<https://perma.cc/N35N-Z2GQ>]; Jennifer Reed, *Yep, They Won: The Ellen Show and the Loss of Cultural Space*, IOWA J. OF CULTURAL STUD. 1, 93 (2002).

185. Claudia Willen, *Ellen DeGeneres reflects on the 25-year anniversary of her coming-out sitcom episode: 'For exactly 3 years, I lost my career,'* INSIDER (Apr. 29, 2022, 4:12 PM), <https://www.insider.com/ellen-degeneres-celebrates-25-year-anniversary-coming-out-episode-2022-4> [<https://perma.cc/7NLX-6JWP>].

186. *Id.*

187. See Kimberly Wilson, *Chadwick Boseman Took A Pay Cut To Get '21 Bridges' Costar Sienna Miller Paid Her Worth*, ESSENCE (Dec. 6, 2020), <https://www.essence.com/celebrity/chadwick-boseman-sienna-miller-21-bridges-movie-pay-cut/> [<https://perma.cc/84KL-5NTW>]; Alex Needham & Rory Carroll, *Patricia Arquette uses Oscars speech to call for equal pay for women*, THE GUARDIAN (Feb. 22, 2015, 9:51 PM), <https://www.theguardian.com/film/2015/feb/22/patricia-arquette-oscars-speech-equal-pay-women> [<https://perma.cc/ZK8X-J7T4>].

188. Reggie Ugwu, *The Hashtag That Changed the Oscars: An Oral History*, N.Y. TIMES (Feb. 6, 2020), <https://www.nytimes.com/2020/02/06/movies/oscarssowwhite-history.html> [<https://perma.cc/5BCR-FJWB>].

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Some of the practical ways to enhance fairness include contracts with termination rights similar to those provided by the Copyright Act, more frequent demand for and use of “most favored nations” clauses for compensation so a group of actors is paid similarly for similar work, and fewer non-disclosures so that artists voluntarily share their data. Another method includes imposing fiduciary duties on those in close relationships with the artist—such as agents, managers, and family members. This would motivate (and legally require) the parties to act in the best interests of the artist. In addition, there should be statutory standards present to influence court review of these relationships.

### G. The Possibly “Evil” Agent, Manager, Lawyer, Or Family Member

Sometimes those closest to artists—agents, managers, and even family members—overreach. Family members, for example, can be some of the best and most trusted people who look out for an artist’s interests. In some ways, there is no protecting a person from their own family member in business; however, for child stars, the contracts need to be reviewed by courts.

Amber Tamblyn discussed her situation growing up as a child actor from age ten and onward.<sup>189</sup> She explained that she felt loved and supported, but also felt like she was supporting everyone.<sup>190</sup> Every part of her life was subject to comment by others, including her weight, and she felt that money would affect even her family’s advice to her.<sup>191</sup> Even in the best of circumstances, control of one’s fortune, body, and autonomy is multi-faceted, and overreach is common in the world of entertainment.

Conflicts of interest can also exist in other aspects of the media business. While it might seem to be good to hire an experienced entertainment law attorney, *Billboard* reported on the conflicts in some relationships. An ethical attorney always checks for conflicts, but not all potential issues are a conflict of interest that would prevent representation, and even actual potential conflicts can be waived by the client.<sup>192</sup> The *Billboard* reporting involved music managers and executives who referred music clients to their own attorney, and that overall, it is the connections of the (in this case) music industry lawyers that make them seem more valuable to the clients, reporting that

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189. Amber Tamblyn, *Amber Tamblyn: Britney Spears’s Raw Anger, and Mine*, N.Y. TIMES (June 26, 2021), <https://www.nytimes.com/2021/06/26/opinion/britney-spears-amber-tamblyn.html> [<https://perma.cc/KU4M-D9V4>].

190. *Id.*

191. *Id.*

192. MODEL CODE OF PRO. CONDUCT R. 1.7(b) (AM. BAR ASS’N 2020), (a client may waive a conflict of interest if (1) The lawyer reasonably believes that they will be able to provide competent and diligent representation; (2) the representation is not prohibited by law; and (3) the representation does not involve representation one client against another in the same litigation or other proceeding).

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“(a)n ethical conflict, many lawyers say, makes them more attractive to clients because of their intimate connections.”<sup>193</sup> The regularity and pervasiveness of accepting conflicts as a routine matter of fact is yet another indication of an industry perhaps not providing protections to vulnerable entry-level artists. When combined with long-term contracts that result from negotiations during nascent careers, nothing is necessarily impermissible nor wrong and permissions may have been given, but rather, it does seem less surprising when artists are unhappy with their deals later in their careers.

#### H. Information Asymmetry In Contracts

Media companies typically have extensive information—information unknown and inaccessible to new artists—that can be used as negotiation leverage. Companies know about the marketplace, the details about their prior success (or lack thereof) with similar acts, and the likelihood the series might be testing well enough to get renewed; they have access to their own focus group results and marketplace data.<sup>194</sup> They have spent vast sums on being informed on the world of entertainment, and they have years of contract drafting experience, successful and unsuccessful, to base their decisions.<sup>195</sup> The artist usually has none to very little of that research and the company is not about to tell the artist what others make, where their negotiating positions might be, or where an artist might make a request during contract negotiations that are likely to be granted in their favor.<sup>196</sup>

#### I. 360 Deals—Contracts That Take Advantage Of Everything

With revenues falling, especially from the steep decline in the sale of physical media (CDs and DVDs), many companies have resorted to engaging in “360 deals.”<sup>197</sup> In a 360 deal, the artist is signed to a contract that not only has them sharing revenues and royalties on the basic intellectual property, usually, records, but also on as many other revenue streams as the company can put into a contract.<sup>198</sup> These forms of “ancillary income” can include related items like the merchandise associated with an artist to other parts of

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193. Steve Knopper, *Why Music Executives Seek Lawyers With Conflicts Of Interest: 'It's a Very Incestuous Business,'* BILLBOARD, (Oct. 19, 2018), <https://www.billboard.com/pro/why-music-executives-see-lawyers-conflicts-interest/> [<https://perma.cc/7VCY-T75A>].

194. See generally Maya Bacache-Beauvallet, Marc Bourreau, & François Moreau, *Information asymmetry and 360-Degree Contracts in the Recorded Music Industry*, 156 *Revue d'Economie Industrielle*, 57 (4e trimestre 2016) (Fr.).

195. *Id.*

196. *Id.*

197. Lee Marshall, *The 360 Deal and the 'New' Music Industry*, 16 *EUR. J. OF CULTURAL STUD.* 77 (2012).

198. See Kessler, *supra* note 149.

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their brand, including fashion lines, television shows,<sup>199</sup> touring, merchandising, endorsements, and songwriting.<sup>200</sup> If a regular entertainment contract is usually unfavorable to the artist, a 360 contract can be even more unfavorable.

The 360 deal, also called an “equity deal” or “multiple rights deal” gives the record company rights to almost everything.<sup>201</sup> The first 360 deal identified by Bacache-Beauvallet, Bourreau, and Morea was British pop star Robbie Williams, and an early example was when Madonna signed with Live Nation for \$120 million.<sup>202</sup> The authors note that “[a]rtists suffer from an information asymmetry on the actual revenue their recorded music generates, allowing their record labels to increase their bargaining power in terms of income-sharing.”<sup>203</sup>

The nature of a 360 deal is one that an intellectual property attorney would be highly skeptical of; reasons to do a 360 deal might be that the artist is of such senior stature that their body of work is more-or-less fixed with no more significant works expected, or that the artist is very young and does not know what they are giving away. The empirical research by Bacache-Beauvallet, Bourreau, and Morea establishes that paradigm. In a survey of four thousand French musicians and a response rate of 18% for an n=720,<sup>204</sup> they found that if a musician ever had a regular recording contract, they were little interested in a 360 deal.<sup>205</sup> If they were under contract and had live music activity, only 30.5% were interested in sharing their live revenue with their record company.<sup>206</sup> Only those who had never had a contract wanted one so bad that they would go for a 360 deal by 53.6%, still not a convincing majority. If this shows anything, it seems like those musicians with actual knowledge of how recording contracts work were not likely to go for a 360 contract.<sup>207</sup>

Megan Thee Stallion recently sued her record label to get out of a contract that she claimed was “not only entirely unconscionable, but ridiculously so,”<sup>208</sup> the story in her own words is often heard:

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199. *Id.*

200. *Id.* at 535.

201. Bacache-Beauvallet et al., *supra* note 194.

202. *Id.* at 58.

203. *Id.* at 60.

204. *Id.* at 67.

205. *Id.* at 72.

206. Bacache-Beauvallet et. al., *supra* note 194, at 72.

207. *Id.* at 73.

208. Charles Holmes, *Why Megan Thee Stallion Sued Her Own Record Label*, ROLLING STONE, (Mar. 5, 2020), <https://www.rollingstone.com/pro/features/why-megan-thee-stallion-sued-her-own-label-962233/> [<https://perma.cc/SC3F-5JDM>].



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When I signed, I didn't really know what was in my contract. I was young. I think I was like 20, and I ain't know everything that was in my contract. So when I got with Roc Nation,"—Megan announced that she was signed to a management deal with Roc Nation in September 2019—"I got management, real management. I got real lawyers. They was like, 'Do you know that this is in your contract?' And I was like, 'Oh, damn, that's crazy—no, I didn't know.'<sup>209</sup>

Her contract was a 360 deal that provided for the record company to take sixty percent of her performing royalties, fifty percent of her publishing royalties, and thirty percent "of almost all of Megan's sources of income, including merchandising, sponsorships, endorsements, and every conceivable version of a live performance: concerts, clubs shows, hosting, and tours."<sup>210</sup> It also included all other media "such as motion pictures, television, non-fiction books, magazines, video games, and more."<sup>211</sup> In the ongoing lawsuit, the record company counters that they are giving Megan [forty percent] of the profits; each side is countering via social media *Twitter*, and Megan Thee Stallion's demand is at \$1 million.<sup>212</sup> In addition to the question of possible overreaching contractual clauses on a contract signed at a very young age, another of the contract clauses in the contest is "what is the definition of an album?" If one of her works is found to be an album, then her recording obligation is complete.<sup>213</sup>

Courts take into consideration the age and experience of the contracting parties. In addition to the bright line created by the age of majority, typically eighteen, those who are older and more experienced might have a harder time proving they were taken advantage of, a good sign that some areas of interpretation are working well. In *Batfilm Productions, Inc. v. Warner Bros. Inc.*,<sup>214</sup> two experienced film executives received \$300,000 for bringing *Batman* to Warner Bros. plus another \$100,000 in deferred compensation plus an additional \$700,000 for two additional *Batman* movies. The executives sued for "net profits" from the movies attempting to have Warner Bros. "net profits" clause declared unconscionable.<sup>215</sup> The court in this case held that unconscionability was going to need a higher level of proof than the two executives

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209. *Id.*

210. *Id.*

211. *Id.*

212. Jaime Burton, *Megan Thee Stallion Blasts Music Exec J Prince After He Called Her Out*, NEWSWEEK, (Aug. 24, 2022), <https://www.newsweek.com/megan-thee-stallion-blasts-music-executive-j-prince-1501-certified-label-called-her-out-1736370> [<https://perma.cc/GQ6Q-8LYX>].

213. Garcia, *supra* note 161.

214. *Id.*

215. *Id.* at 12.

would be able to supply. They were both experienced top executives in the film industry, with one of them the former general counsel of a major motion picture company, and they “knew all the tricks of the trade.”<sup>216</sup> One of them “knew inside and out how these contracts work, what they mean, and how they are negotiated.”<sup>217</sup>

This case is interesting because it recounts that the private law of contracts is usually just that—a private agreement and that “courts do not refuse to enforce contracts or remake contracts for the parties because the court or the jury thinks that the contract is unfair.”<sup>218</sup> The court recounted that to be unconscionable, a contract must “shock the conscious” and two very experienced media executives with legal experience knew that net profits clauses often do not yield any money.<sup>219</sup> A *Harry Potter* movie did not break into a “profit” for the purpose of the applicable net profits clauses,<sup>220</sup> and the *Star Wars* movie, *Return of the Jedi*, also did not turn a profit under its clause.<sup>221</sup> It seems that “net profits = no profits.”<sup>222</sup>

## J. Other Concerns—Mental Health

The length and terms of a contract can be detrimental to mental health.<sup>223</sup> Relationships in the arts are human and many times, they go astray.

216. *Id.* at 4.

217. *Batfilm Prods.v. Warner Bros.*, 1994 Cal. App. LEXIS 1333, at \*4.

218. *Id.*

219. See generally Victor P. Goldberg, *The Net Profits Puzzle*, 97 COLUM L. R. 524 (1997); Neal Robin, *Hit Losers: The Good (Faith) Fight for Net-Profit Payments from Blockbuster Hollywood Productions*, 4 J. OF LAW, TECH. AND THE INTERNET (2013).

220. Mike Fleming Jr., *STUDIO SHAME! Even Harry Potter Pic Loses Money Because Of Warner Bros’ Phony Baloney Net Profit Accounting*, DEADLINE, (July 6, 2010) <https://deadline.com/2010/07/studio-shame-even-harry-potter-pic-loses-money-because-of-warner-bros-phony-baloney-accounting-51886/> [https://perma.cc/D9W6-ZQ2F].

221. Peter Sciretta, *LucasFilm Tells Darth Vader that Return of the Jedi Hasn’t Made a Profit!?*, SLASH FILM (Apr. 5, 2009) <https://www.slashfilm.com/503174/lucasfilm-tells-darth-vader-that-return-of-the-jedi-hasnt-made-a-profit/> [https://perma.cc/2EGS-H3GB].

222. See generally Goldberg, *supra* note 219; Robin, *supra* note 219.

223. While this article is looking at the lifecycle and permutations of artist abuse arising from their contracts, terms of employment, and over-reaching by those who are close to the artist, there is also much recent scholarship on reforming the legal conservatorship process itself. See Hannah Shotwell, *More Than #FreeBritney: Remedying Constitutional Violations in Guardianship For People with Intellectual Disabilities*, 52 N.M. L. REV. 513 (Summer 2022); Lisa Zammiello, *Don’t you Know That Your Law is Toxic? Britney Spears and Abusive Guardianship: A Revisionary Approach to the Uniform Probate Code, and*

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There are many bad actors in the media<sup>224</sup> and being tied together with those bad actors unwillingly can lead to damaging distress. For example, *Ke\$ha* alleged that the head of her record label, Lukasz “Dr. Luke” Gottwald sexually assaulted her and she could not get out of the contract to continue working for that record label.<sup>225</sup> While eventually, a court case ruled that there was no sexual assault,<sup>226</sup> the human dynamics of having an unbreakable personal services contract can be untenable.<sup>227</sup> Sometimes people can no longer work together, and there needs to be reasonable a way out.<sup>228</sup> Britney Spears called her conservatorship “abusive.”<sup>229</sup> Alyson Stoner, a child star known for work on the Disney channel, in music videos, and in major movies, wrote about the working abuse of children, the stresses, and manifestations of trouble, including eating disorders.<sup>230</sup>

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*Texas Estates Code to Ensure Equitable Outcomes*, 13 TEX. TECH. EST. PLAN. CMTY. PROP. L.J. 587 (Spring 2021); Stephany Rohleder, *Free Britney: How a Pop Culture Icon Brought to Light Guardianship and Conservatorship Inequalities and How Kansas Statues Better Prevent Against Them*, 70 U. KAN. L. REV. 791 (2022).

224. Flemming Jr., *supra* note 220.

225. Steve Knopper, *Kesha, Dr. Luke Case highlights Hidden Side of Record Contracts*, ROLLING STONE (Feb. 25, 2016), <https://www.rollingstone.com/music/music-news/kesha-dr-luke-case-highlights-hidden-side-of-record-contracts-113491/> [<https://perma.cc/TR8N-G3M5>].

226. *Id.*

227. *See generally* Breeland, *supra* note 178 (exploring how sexually abused entertainers can become stuck in contracts).

228. The judge in her case would not let her out of her recording contract. Molly Redden, *Judge Dismisses Kesha’s Sexual Assault Case Against Dr Luke*, THE GUARDIAN (Apr. 6, 2016), <https://www.theguardian.com/us-news/2016/apr/06/judge-dismisses-keshas-sexual-assault-case-against-producer-dr-luke> [<https://perma.cc/EYP5-VD6C>].

229. Liz Day, Samantha Stark & Joe Coscarelli, *Company Set to Manage Britney Spears’s Estate Asked to Withdraw*, N.Y. TIMES (July 1, 2021, updated Nov. 12, 2021), <https://www.nytimes.com/2021/07/01/arts/music/britney-spears-bes-semer-trust-conservatorship.html#:~:text=the%20main%20story-,Company%20Set%20to%20Manage%20Britney%20Spears’s%20Estate%20Asks%20to%20Withdraw,conservatorship%20that%20governs%20her%20life.> [<https://perma.cc/X7Q7-W5R7>].

230. Alyson Stoner, *Alyson Stoner Pens Eye-Opening Op-Ed on ‘Harrowing’ Childhood Stardom: ‘Revisit the Script,’* PEOPLE (Apr. 7, 2021), <https://people.com/music/alyson-stoner-pens-op-ed-on-childhood-stardom-labor/> [<https://perma.cc/8NRZ-5AQ4>].

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## V. THE DEFENSES—ARTISTS’ CURRENT RESPONSES, SELF-HELP, AND PUBLIC ATTENTION

### A. Statutory Help—The Right Of Reversion

The Copyright Act now provides for a “right of reversion.” The original creator of a work can reclaim their ownership of the copyright after thirty-five years through a termination proceeding.<sup>231</sup> There are many exceptions, and these exceptions are a broad swath through media intellectual property: (1) work made for hire; (2) grants by will; (3) grants made by persons other than the authors; and (4) derivative works.<sup>232</sup> The original author, or those taking under them, can file a notice and reclaim the copyright. Similarly, it is common in the movie industry for a screenwriter to include a “right of reversion” or “turnaround” clause in their contracts, under which they can recover their intellectual property in just a few years if the producer fails to make the movie.<sup>233</sup>

The termination clause in contract law shifts the power to the artist in the later years of copyright. When an artist can reclaim the entire copyright beginning with notice in a five-year window in year thirty-five or after, the copyright owner needs to be ready to renegotiate. It is not that the copyright will change hands, but rather whether the artist will indeed reclaim it or whether a deal can be struck. Copyrights tend to be most valuable in the early years after the release of new work.<sup>234</sup> And intellectual property, including movies, songs, and plays, tends to have what is called a “long tail,” meaning that if the work is successful, it is likely to produce income for many years. The termination clause in the copyright act tends to go against a lot of what was thought as “sacred” in the realm of entertainment contracts, including the right to contract and the right to reap the rewards of a good choice of an intellectual creative product to back. Record companies argue that they invest in many artists who are not successful for every artist that is successful. How can one reconcile that with the termination clause? Additionally, Congress has implied with the length of copyright, usually being the lifetime of the creator plus seventy years after death, or in other cases between ninety-five and 120 years,<sup>235</sup> that the work should benefit those who invested in it and

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231. *Id.*

232. *Id.*

233. Michael R. Fuller, *Turnaround for Writers - Not Quite, but Close: The Writer’s Right to Reacquire Theatrical Literary Material under the WGA Basic Agreement*, 18 *LOY. OF L.A. ENT. L. J.* 241 (1998).

234. Leora Kornfeld, *The Long Tail in 2018: Niches Meet Streaming and Social Media*, *CAN. MEDIA FUND* (May 10, 2018), <https://cmf-fmc.ca/now-next/articles/the-long-tail-in-2018-niches-meet-streaming-and-social-media/> [https://perma.cc/8Q7G-6GEJ].

235. 17 U.S.C. § 302 (2020).

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nurtured it for many years. The change in the copyright law has forcefully abbreviated that expectation.

While disadvantaging existing contractual rights for the media companies, it creates a renegotiation power for the artists. Those properties that are successful are likely to be retrieved by the creators. Some visible terminations include the disco songs of the *Village People*<sup>236</sup> and the screenplay for the *Friday the 13th* movie.<sup>237</sup>

### B. The Seven-Year Rule

The seven-year rule exists in California and applies to “personal services contracts” which include many artist contracts.<sup>238</sup> However, studios attempted to circumvent the rule by artifices that would effectively extend the contract period even beyond seven years.<sup>239</sup> In 1944, the California Supreme Court ruled that movie studios could not extend the seven-year rule by extending the contracts through periods where they suspended the contract.<sup>240</sup> The “suspension/extension” practice could effectively double the term of a contract.<sup>241</sup> Later actions included the record industry claiming that it was special because recoding contracts were not in terms of years, but rather in terms of the number of albums delivered. And the California legislature made way for such contracts based on record delivery and also provided for damages for undelivered records.<sup>242</sup> So the protection of the seven-year rule is porous.

Under a recent interpretation, it is permissible for an employee to have separate overlapping contracts whose aggregate term may exceed seven years. It was deemed desirable for an employee to be able to count on continuity of employment. The court said that the extension of a single contract

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236. Victor Willis, former lead singer for the Village People used the termination rights provision of the Copyright Act to regain control of the song “YMCA.” See Larry Rohter, *Copyright Victory, 35 Years Later*, N.Y. TIMES (Sept. 10, 2013), <https://www.nytimes.com/2013/09/11/arts/music/a-copyright-victory-35-years-later.html> [<https://perma.cc/4Q9H-XG82>].

237. Eriq Gardner, *‘Friday the 13th’ Screenwriter Wins Big Appeal Over Copyright Termination*, THE HOLLYWOOD REP. (Sept. 21, 2021), <https://www.hollywoodreporter.com/business/business-news/friday-the-13th-copyright-termination-appeal-1235023236/> [<https://perma.cc/PA9Q-JWXY>]; see also *Horror Inc. v. Miller*, 15 F.4th 232 (2d Cir. 2021).

238. See generally, Kathryn Rosenberg, *Restoring the Seven Year Rule in the Music Industry*, 26 FORDHAM IP, MEDIA, AND ENT. L.J. 275 (2015).

239. *Id.* at 281.

240. *De Havilland v. Warner Bros.*, 153 P.2d. 983 (Cal. Dist. Ct. App. 1944) as cited in John M. Broderick, *Warner Bros. v. Nelson: A Prelude to the De Havilland Law*, 41 LOY. L.A. ENT. L. REV. (2020/21).

241. *Id.*

242. See Rosenberg, *supra* note 238.

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beyond seven years was not permissible under the California statute.<sup>243</sup> This new interpretation might poke another hole in the protection of the seven-year rule.

### C. Self-Help

Self-help is a recognized legal procedure where a person “seeks redress outside of the regular legal process, under which one takes matters into one’s own hands and uses lawful means in an attempt to protect or restore a legal right.”<sup>244</sup> Self-help has been an effective practice and, at times, is the fastest and most effective way of changing the dialogue and earning money.

Prince and Justin Timberlake both used self-help methods to better their situations. Prince changed his name to the unpronounceable symbol, appeared on television with the word “slave” written on his face, and then proceeded to finish off his contract with Warner Bros. by releasing six albums in record time in a move designed to complete his contract.<sup>245</sup> Justin Timberlake was planning on nullifying his contract when he turned 18.<sup>246</sup> A child star has the opportunity to avoid contractual responsibilities upon the attainment of the age of majority.<sup>247</sup> A child, called an “infant” in contract law, can disaffirm a contract. This process, however, is not always effective. The record companies, like anyone else who contracts with a minor, often have a parent, guardian, or another adult of capacity sign the contract in addition to the minor.<sup>248</sup> However, in the case of *Scott Eden Management v. Kavovit*,<sup>249</sup> the court worked equity to pay the management firm through the obligation of the parent after a child actor decided to disaffirm a contract. Additionally, California has a statute that permits special court supervision of minors’ contracts in the entertainment industry, and contracts that are under court super-

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243. *Id.*

244. *Legal Information Institute*, CORNELL (Aug. 2021), <https://www.law.cornell.edu/wex/self-help> [<https://perma.cc/PJM7-V9EZ>].

245. Fraser McAlpine, *Six Dramatic Ways Pop Stars Tried to Get out of Their Record Contract*, BBC.COM (Dec. 9, 2017), <https://www.bbc.co.uk/music/articles/68196fe7-d2da-423f-b1de-7b23f4f35a39> [<https://perma.cc/8FQG-UTLZ>].

246. Leena Tailor, *As \*NSYNC’s ‘No Strings Attached’ Turns 20, Execs and Collaborators Look Back*, VARIETY (Mar. 24, 2020), <https://variety.com/2020/music/news/nsync-no-strings-executives-songwriters-20th-anniversary-1203542809/> [<https://perma.cc/F3QQ-6UW8>].

247. RESTATEMENT (SECOND) OF CONTS. §12 (AM. L. INST. 1981).

248. UPCOUNSEL, *Contracts Signed by Minors: Everything You Need to Know*, <https://www.upcounsel.com/contracts-signed-by-minors#:~:text=IF%20a%20minor%20agrees%20to,considered%20valid%20and%20legally%20binding.> [<https://perma.cc/VM97-UALT>].

249. *Scott Eden Mgmt. v. Kavovit*, 563 N.Y.S.2d 1001 (Sup. Ct. 1990).

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vision might be restricted from disaffirmation.<sup>250</sup> Therefore, the strategy of disaffirming a contract when an artist reaches the age of adulthood works only in limited circumstances and when the other party to the contract is reasonably sophisticated, it is unlikely to be a fully successful process.

Many stars, including Kanye West, Prince, Madonna, Eminem, Jay-Z, The Beatles, and the Rolling Stones, started their own record labels.<sup>251</sup> Madonna started Maverick Records;<sup>252</sup> Kanye West started GOOD Music;<sup>253</sup> Prince started NPG Records;<sup>254</sup> Eminem started Shady Records; Jay-Z started Roc Nation records.<sup>255</sup> What does starting their own record label do for an artist? It often means there is a different split of or use of resources. They can also consider signing distribution-only types of deals, and finally, they can sign new artists themselves. Some people in the movie industry are interested in making their own movies so they have the ultimate power in creative control.

It is an attribute of the bankruptcy process that during bankruptcy, a contract can usually be avoided with the approval of the bankruptcy court.<sup>256</sup> One article lists six ways pop stars tried to get out of their record contract, including Tom Petty filing for bankruptcy.<sup>257</sup> Toni Braxton filed for bankruptcy twice. ABC News reported that: “Despite \$170 million in worldwide sales, from hits like “Breathe Again” and “Another Sad Love Song,” Braxton said she received only a \$1,972 royalty check from her first recording contract.”<sup>258</sup>

Sometimes stars will try to finish the contract—if it was for six albums and they have turned in five, how about gathering up lower-quality leftover tracks and putting together another album? The danger is that the record companies usually have a clause in the contract that the work must be “commercially acceptable,”<sup>259</sup> but that does not mean an artist cannot try to turn in

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250. CAL. FAM. CODE § 6751 (Deering 2022).

251. Rose Wythe, *20 Musicians Who Started Their Own Record Labels*, iHEART RADIO.COM (Mar. 23, 2018), <https://www.iheart.com/content/2018-03-23-20-musicians-who-started-their-own-record-labels/> [https://perma.cc/U5VY-S2RG].

252. David Brown, *Madonna’s New Maverick Label*, ENTERTAINMENT (1993) <https://ew.com/article/1993/08/06/madonnas-new-maverick-label/> [https://perma.cc/9TLM-C7ML].

253. Wythe, *supra* note 251.

254. *Id.*

255. *Id.*

256. 11 U.S.C.S. § 365.

257. McAlpine, *supra* note 245.

258. *Id.*

259. Johnetta Paye *Dissecting a Music Contract: Will ‘Commercially Acceptable’ Songs Trap the Artists?* JPAYE (Nov. 21, 2016), <http://jpayeinbrief.com/2016/>

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work and see if the record company accepts it.<sup>260</sup> The Rolling Stones and Van Morrison both allegedly attempted to fulfill their contracts with bad music.<sup>261</sup>

Some artists are taking a truly independent approach and not signing with a label at all. Why sign with a label if you are going to lose almost all ownership interest in your creative work? Chance the Rapper won a Grammy without selling a physical copy of his recording, remaining entirely online.<sup>262</sup> Other actors who have gone the independent online distribution route include Nine Inch Nails and Radiohead.<sup>263</sup> Independent distribution companies are facilitating entry to digital streaming services like Spotify and iTunes<sup>264</sup> Even the streaming services have been upended to some extent by a competitive streamer named Tidal, founded by Jay-Z and Beyonce.

#### D. Good Negotiating—The *Friends* Contracts

Sometimes, a good strategy is needed to gain proper and equitable working conditions and equal pay. Many television shows have removed or replaced actors who have attempted to negotiate contracts that were not to the liking of the producers.<sup>265</sup> The stars of *Friends*, Jennifer Aniston, Courtney Cox, Lisa Kudrow, Matt LeBlanc, Matthew Perry, and David Schwimmer, started the first season getting paid \$22,500 per episode.<sup>266</sup> The following season, each cast member made around \$40,000 per episode, but

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11/21/commercially-acceptable-entertainment-contract/ [https://perma.cc/AL7B-L3ZF].

260. *Id.*

261. McAlpine, *supra* note 245.

262. *Id.*

263. Terrence Russell, *NIN Joins Radiohead in Shunning the Record Industry*, WIRED (Oct. 9, 2007), <https://www.wired.com/2007/10/nine-inch-nails/> [https://perma.cc/K3FY-XKCA].

264. Amy X. Wang, *An Indie Music Expert Explains Why Artists Are Turning Away from Record Deals*, ROLLING STONE MAG., (Nov 1, 2018), <https://www.rollingstone.com/pro/news/ditto-music-lee-parsons-interview-749510/> [perma.cc/GP8A-HABW].

265. *See generally* Rachael Chang, *Suzanne Somers Was Fired from ‘Three’s Company’ for Asking for Equal Pay*, BIOGRAPHY (Aug. 20, 2020), <https://www.biography.com/news/suzanne-somers-threes-company-equal-pay> [https://perma.cc/HT4R-UU2V]; Daniel Holloway, *Daniel Dae Kim, Grace Park Exit ‘Hawaii Five-O,’* VARIETY, (June 30, 2017), <https://variety.com/2017/tv/news/daniel-dae-kim-grace-park-hawaii-five-0-1202484329/> [https://perma.cc/R5YE-2D9L].

266. Dawn Chmielewski, *How ‘Friends’ Generated More than \$1.4 Billion for Its Stars and Creators*, FORBES (Mar. 28, 2021), <https://www.forbes.com/sites/dawnchmielewski/2021/05/28/how-friends-generated-more-than-14-billion-for-its-stars-and-creators/?sh=56fc4c163db7> [https://perma.cc/36GF-Q9M3].



the pay varied among the cast. So the actors gathered together and negotiated as a bloc for equal pay.<sup>267</sup> The group-negotiating tactic worked so well that for the last two seasons, the cast made \$1 million each per episode, and “[a]ccording to a 2015 report made by *USA Today*, the *Friends* cast still makes around \$20 million a year each.”<sup>268</sup> *Forbes* estimates that each of the *Friends* stars has earned \$136 million since the show debuted in 1994 and ended in 2004.<sup>269</sup> The cast joining together in an informal bargaining unit created enough leverage to keep the stars well-compensated for years after their show ended.<sup>270</sup>

Self-help and artists walking out on their contracts have been covered by Kevin Yeam in his work on remedies for such actions.<sup>271</sup> He states that refusal to perform or deliver in the entertainment world has three basic remedies: (1) injunction; (2) contract damages; or (3) tortious breach of contract damages.<sup>272</sup> The difficulties for the media company to enforce a contract are difficult, contract damages can be too speculative<sup>273</sup> and it can be difficult to enforce a personal services contract.<sup>274</sup> The enforcement mechanisms include suing for damages; however, damages, or “the benefit of the bargain” are speculative. Who can accurately say how many tickets or books would be sold? Or what might be “sufficient effort” by a celebrity?<sup>275</sup> Therefore, courts have been more comfortable with the equitable remedies of paying for the expenses or other identifiable and clear damages.<sup>276</sup> Yeam argues for the proposition of damages for “tortious interference for breach of contract.”<sup>277</sup> He states that those damages are available where the breach of contract is willful, egregious, oppressive, or coercive conduct.<sup>278</sup> He covers the many plaintiffs’ remedies available for a breach of contract, including refusal to perform

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267. Kara Hedash, *Friends: How Much the Cast Still Gets Paid*, SCREENRANT (Aug. 29, 2020), <https://screenrant.com/friends-cast-paid-how-much-2020-updates/> [<https://perma.cc/3CEQ-5AKV>].

268. *Id.*

269. *See* Chmielewski, *supra* note 266.

270. *Id.*

271. Kevin W. Yeam, *New Remedial Developments in the Enforcement of Personal Service Contracts for the Entertainment and Sports Industries: The Rise of Tortious Bad Faith Breach of Contract and the Fall of the Speculative Damage Defense*, 7 LOY. ENT. L.J. 27, 28 (1987).

272. *Id.*

273. *Id.* at n.1.

274. *Id.* at n. 2.

275. *Goldberg v. Paris Hilton*, No. 08-22261-CIV-MORE, 2009 U.S. Dist. LEXIS 80530, at\* 3 (S.D. Fla. Aug. 17, 2009).

276. *Elvin Associates v. Franklin*, 735 F.Supp. 1177 (S.D.N.Y. 1990).

277. Yeam, *supra* note 271, at 36.

278. *Id.* at 36–7.

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to gain a negotiating advantage. But the big media and producing companies, already taking hits to their reputation for things like not paying royalties, overreaching contracts, bad behavior by their management,<sup>279</sup> or otherwise taking advantage of their artists, are not likely to find a friendly reception to adding this further method of suing the artist.<sup>280</sup>

The companies have attempted to enforce performance contracts— contracts for personal services emphasize particular and unique services.<sup>281</sup> However, bankruptcy is a difficult path. The recording agreements tend to exceed some bankruptcy limits under Chapter 13<sup>282</sup> and Chapter 11<sup>283</sup> requires a reaffirming of the contracts.<sup>284</sup> Therefore, only Chapter 7, complete liquidation, is favorable to the artists.<sup>285</sup> The contract rejection principles, especially as they apply to non-compete clauses, have led to a claim on a violation of the right against involuntary servitude.<sup>286</sup>

### E. The Sales Of Music Catalogues—A Defensive Move

A recent move by very successful artists is to sell their entire catalog—to a good portion of their music catalog—to a major music company.<sup>287</sup> This move monetizes the stream of future royalties for the artist so they can make investments elsewhere, presumably diversify their risks, and create an endowment of cash flow that is not subject to a possible decline in their fortunes.<sup>288</sup> This move transfers all ownership in an irrevocable form to the new company and monetizes the entire set of products. It is best if these catalogs are sold after the termination rights expire, as there is a five-year window for termination by not only the author, but also the author's heirs,<sup>289</sup> so this strat-

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279. See generally Rick Morris, *Media Moguls Risking It All: Contract Clauses in the Entertainment Business in the Age of #MeToo*, 9 ARIZ. ST. SPORTS AND ENT. L.J. 1 (2019) (examining how the entertainment management behaves badly and the damages it causes artists, both directly and collaterally).

280. *Id.*

281. *De Haviland v. Warner Bros. Pictures, Inc.*, 67 Cal. App. 2d 225, 229 (Cal. Ct. App. 1944).

282. Brewer, *supra* note 40, at 586; see 11 U.S.C. § 109 (explaining debtor eligibility requirements).

283. See generally 11 U.S.C. § 1101.

284. Brewer, *supra* note 40, at 586–87.

285. Brewer, *supra* note 40, at 587.

286. *Id.* at 592.

287. Tim Ingham & Amy X. Wang, *Why Superstar Artists Are Clamoring to Sell Their Music Rights*, ROLLING STONE (Jan. 15, 2021), <https://www.rollingstone.com/pro/features/famous-musicians-selling-catalog-music-rights-1114580/> [<https://perma.cc/6Y8S-7ASE>].

288. *Id.*

289. 17 U.S.C. § 203.

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egy is best used by senior stars,<sup>290</sup> but contracts can be strategized to account for changes in circumstances, so even younger stars are selling their catalogs to make money while the money-making is good; or, like Taylor Swift, Scooter Braun sold the catalog of her songs that he owned.<sup>291</sup>

#### F. Publicizing The Issues In The Industry

Perhaps most interesting in contract law has been the release of several recording contracts and his own recommendations by one of the world's most accomplished music stars. On September 20, 2020, Kanye West used the social media service *Twitter* to “tweet out” his suggestions for reforming recording contracts.<sup>292</sup> Some of the most important suggestions include: (1) the artist would own the copyright in the recording and the songs and leases them to the record label on on-year deals; (2) the record label is a service provider who receives a share of the income for a limited term—he suggests a split of 80/20 in the artist's favor (3) lawyers provide plain English contracts; (4) no more blanket licenses—he advocates for transparency in what the break-up with the record company would look like and what shares the artist would receive; (5) artists not sign agreements with advances, which he states are just loans—he states that record companies need to “buy in to” the artist, not loan to the artist; and (7) full transparency and full details to be available to the artists in the portals.<sup>293</sup>

These suggestions are interesting because they would clearly favor the artist and transform the balance of power in the recording industry. What is most interesting is that in present times, a balance similar to this can and has been struck in self-publishing mode. No longer are artists beholden to the record company for the provision of large amounts of specialized equipment run by technical experts called a “recording studio.” No longer does an artist absolutely require the record company's advantages of scale, including their marketing machinery to publicize their product,<sup>294</sup> their promotions people to do the footwork to get “airplay” for a song,<sup>295</sup> or their own “Colonel

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290. Stevie Nicks, Bob Dylan, and Shakira have recently sold their catalogue. *See* Ingham & Wang, *supra* note 287.

291. *Id.*

292. For first tweet in thread, *see* Kanye West (@kanyewest), TWITTER.COM (Sep. 20, 2020, 12:26 PM), <https://twitter.com/kanyewest/status/1307732998889013248> [<https://perma.cc/SW4V-5DXX>].

293. Summarized from a portion of the collected tweets of @kanyewest on September 20, 2020.

294. *See, e.g.*, Elias Leight, *TikTok Curators Are Helping Songs Go Viral — and Labels Are Writing Checks*, BILLBOARD BULL., Aug. 12, 2022, at 1, 5.

295. *Id.*

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Parker”<sup>296</sup> to book their performances. The large record companies still provide those services to the artists who sign with them, and in many cases, the artist benefits from these large and well-established music-machine pipelines.

Other paths now exist for the making and distribution of music, including online distributors such as YouTube or TikTok.<sup>297</sup> A then-unknown performer from Korea named Psy was one of the first viral stars making between \$800,000 and \$2 million on his YouTube hit song *Gangnam Style* which received more than a billion views.<sup>298</sup> Similarly, Justin Bieber’s career was launched on YouTube.<sup>299</sup> Other viral hits include Robin Thicke’s *Blurred Lines*, Baauer’s *Harlem Shake*, Miley Cyrus’s *We Can’t Stop*, and Pink’s *Just Give Me a Reason*.<sup>300</sup>

One author suggested that Actors’ contracts be made public similar to athletes’.<sup>301</sup> While sports and entertainment are two different industries, both provide national pastimes for their audiences. In sports, the structure of the league rules often makes contact information available. That practice provides closer equality of access to the information needed to determine market value and helps to resolve the information asymmetry problem.<sup>302</sup> And it also helps make visible gender or other inequities.

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296. See Melinda Newman, *Documentary on Elvis Presley’s Riveting ‘68 Comeback Special’ Coming From Program’s Director Steve Binder: Exclusive*, BILLBOARD BULL. (Aug. 12, 2022), <https://www.billboard.com/culture/tv-film/elvis-68-comeback-special-documentary-coming-1235125959/> [https://perma.cc/RK8R-EWE9].

297. See PABLO BOCZKOWSKI, *ABUNDANCE: ON THE EXPERIENCE OF LIVING IN A WORLD OF INFORMATION PLENTY* 130 (Oxford Univ. Press 2021) (studying the world of multiple screens and multiple sources of media changing the industry).

298. Steve Knopper, *Seven Ways Musicians Make Money Off of YouTube*, ROLLING STONE (Sept. 19, 2013), <https://www.rollingstone.com/music/music-news/seven-ways-musicians-make-money-off-youtube-192629/> [perma.cc/A5QZ-K5VQ].

299. Gail Mitchell, *Usher Introduces Teen Singer Justin Bieber*, BILLBOARD (Apr. 28, 2009), <https://www.billboard.com/music/music-news/usher-introduces-teen-singer-justin-bieber-268791/> [perma.cc/ZS9U-YZRT].

300. *Id.*

301. Kevin Lincoln, Josef Adalian, and Kyle Buchanan, *Should Actors’ Contract Negotiations Be Public Like Athletes?*, VULTURE (July 14, 2017), <https://www.vulture.com/2017/07/should-actor-contract-negotiations-be-public-like-athletes.html> [perma.cc/A72E-B3KA].

302. *Id.*

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## VI. RECOMMENDATIONS FOR FUTURE NEGOTIATIONS AND JUDICIAL INTERPRETATION

### A. Keep The Copyright, License The Product

In most transactions involving intellectual property, the creator, owner, or inventor keeps the title to the intellectual property. In the area of music, the record company typically requires the work to be “work-made-for-hire” or takes an assignment of copyright and is then responsible for distributing the royalties in accordance with the written contracts. In Kanye West’s contract with *Roc-A-Fella* records, the record company did both.<sup>303</sup>

Similarly, for movies, the work-made-for-hire provision of the Copyright Act is particularly powerful. However, not everything in a movie might be subject to work-made-for-hire. The standards for work-made-for-hire motion pictures are fairly high.<sup>304</sup> First, the work-made-for-hire relationship needs to be established at the beginning, in writing. That helps establish a clear relationship so no one will be surprised by the relationship and the ownership of the IP. Work made-for-hire is a highly desirable doctrine for management and producers to use. It greatly simplifies the registration and enduring management of intellectual property and any royalties which might need to be paid to others. Even so, many things in a movie might be subject to separate copyright and the use will be licensed. For example, a popular song in a movie is pre-existing and the copyright does not transfer. Rather, the song is licensed through a “synchronization license.”<sup>305</sup> Even scenery

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303. Contract between Kanye West and Roc-A-Fella Records (Apr. 13, 2005), Section 5 “Rights” (1)(a): “(a) All Master Recordings recorded during the Term which embody the performances of Artist, from the inception of the recording thereof, all artwork created for use on or in connection with Phonograph Records or other derivatives of such Master Recordings including, without limitation, for use in advertising and Artist Websites (“Artwork”) and including, without limitation, Mobile Materials shall be deemed “works made for hire” for RAF. All such Master Recordings, from the inception of the recording thereof, and all Phonograph Records and other reproductions made therefrom, together with the performances embodied therein, and all Artwork, and all copyrights therein and thereto, and all renewals and extensions thereof, shall be entirely RAFs property, free of any claims whatsoever by Grantor, Artist, or any other Person, throughout the world and in perpetuity. Accordingly, RAF shall have the exclusive right to obtain registration of copyright (and all renewals and extensions) in those Master Recordings and in all Artwork and Mobile Materials, in RAF’s name, as the owner and author thereof.”

304. Anna Haring Hocking, *The Bounds of the Work for Hire Doctrine*, NORTH BAY BUS. J. (Legal and Accounting Guide ed., 2018) (“The work for hire doctrine, while providing an enormous benefit to employers and parties who commission works by creating statutory “authorship” and hence copyright ownership, is not, as many believe, a simple ticket to ownership of all copyright rights.”).

305. *Id.*

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such as a quilt<sup>306</sup> seen in the background of a scene might need to be licensed, as might a tattoo on a character.<sup>307</sup>

On the other hand, the new right of Copyright termination can also be used to create havoc. Kanye West's suggestion that artists keep their copyright, a long-practiced procedure in some areas of entertainment but not others, is one that this author supports as a practical incremental practice that should be helpful to the artist, but also while providing new advantages to the record companies and video/film companies.

Keeping the copyright and licensing the product has the value to the companies of actually protecting them from the newly available practice of contract termination.<sup>308</sup> Because artists can terminate a copyright after 35 years,<sup>309</sup> they now have extraordinary power over those who may take the copyright, such as record companies and television and movie producers.<sup>310</sup> If an artist terminates the copyright, the producer no longer has a right to make derivative works, including sequels, or to authorize new merchandise based on the copyright, or many other things. The existing product survives, but it becomes much less valuable if no exploitations are not possible. And Congress included an interesting clause, the right of termination cannot be contracted away,<sup>311</sup> so what is really important is whether the artist is happy with the deal they had for the years before and during their five-year termination window. If they were not particularly happy, the current copyright holder is likely to see a termination notice.

What a license permits over the transfer of copyright is for the negotiation for every possible option to be included in the license, which is not subject to the termination clause of the copyright act. The producer is then

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306. Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70, 72 (2d Cir. 1997).

307. Noam Cohen, *On Tyson's Face, It's Art. On Film, a Legal Issue*, N.Y. TIMES (May 20, 2011), <https://www.nytimes.com/2011/05/21/business/media/21tattoo.html> [perma.cc/Q7UM-V33Z].

308. See *Notices of Termination*, COPYRIGHT.GOV, <https://www.copyright.gov/recording/termination.html> [perma.cc/7T6U-T658].

309. 17 U.S.C. §203(a)(3).

310. As mentioned, *supra*, artists keeping their copyright is common in live theatre.

311. Nancy Dillon, *Mary Bono Asks Court to Dismiss Cher's 'Groundless' \$1 Million Royalties Lawsuit*, ROLLING STONE (Dec. 9, 2021), <https://www.rollingstone.com/music/music-news/mary-bono-cher-million-dollar-royalties-lawsuit-1269196/> [https://perma.cc/9DPT-HYRF]. The fact that the right cannot be contracted away, but that it survives contract and even the death of the creative artist is already being tested in a lawsuit between the famous singer, *Cher*, against the estate of Sonny Bono, her ex-husband, who passed away after contracting for *Cher* to receive 50% of the royalties. Sony Bono's widow alleges that even though the contract of divorce split the royalties, that the subsequent application of the Copyright Termination clause means that she can reclaim the royalties on such songs as *I Got You Babe*.

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pre-licensed for as many sequels as they may want.<sup>312</sup> It is also a bit fraught with danger because the copyright holder can license more uses that might diminish the marketplace for their product, but as the drafting of the license clauses develops, non-compete clauses will become a part of the license. While it is a bit unusual for sequels to be produced thirty-five years or more past a copyright, there are often fortieth or fiftieth-anniversary editions, fortieth or fiftieth reunions, or even straight-up sequels. The movie *Star Wars* was released on May 25, 1977,<sup>313</sup> it has been forty-five years since then, can we imagine another *Star Wars* movie being released in the future?

What a license does not protect against is future technology developments; however, modern contract drafting techniques consider technology protection clauses.<sup>314</sup> And nothing says a producer cannot go back to the original copyright holder and negotiate new rights if needed.

Keeping the copyright and licensing the material is common in many other venues of intellectual property. For example, in the case of the sale of a book for use as the underlying concept for a movie or television show, the writer typically keeps the copyright and licenses the material to the publisher, who has rights throughout the term of the copyright. And after the term of the copyright, the material presumably falls into the public domain and is more generally usable. The book author can then license additional usages of the book for other projects, such as a live stage play. This is also done for Broadway theatrical productions. Broadway theatre produces some of the most complex intellectual property requiring contributions from many creative professionals. However, the creative team keeps its copyright and licenses its work to the producer. A good example is the standard union-approved contract for Directors and Choreographers. The provisions of the union contract under which the Broadway shows are produced provide for a license, not ownership.<sup>315</sup>

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312. *Id.*

313. The Editors of Encyclopedia Britannica, *Star Wars*, BRITANNICA (July 27, 2022), <https://www.britannica.com/topic/Star-Wars-film-series> [perma.cc/P88S-KPA8].

314. *E.g.*, *Protection of Technology Sample Clauses*, LAW INSIDER, (last visited Sep. 24, 2022), <https://www.lawinsider.com/clause/protection-of-technology> [perma.cc/X9P6-2J3L].

315. SSDC Agreement 2015-2019, Section XVIII. “Property Rights,” pg 51: “In order to facilitate the Director’s and/or Choreographer’s ability to prevent the unauthorized re-creation of direction and/or choreography, the Producer and the Director and/or Choreographer agree that, as between themselves, all rights in and to the Direction and Choreography created by the Director and/or Choreographer in the course of the rendition of his/her services shall be, upon its creation, and will remain the sole and exclusive property of the Director and/or Choreographer respectively; it being understood, however, that the Producer and its licensee(s) shall have a perpetual and irrevocable license to use such direction and/or choreography in any stage production of the play for which the

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Even being dead does not prohibit a star from continuing to make money. Many copyrights outlast the life of the creator.<sup>316</sup> And Elvis<sup>317</sup> and Michael Jackson<sup>318</sup> both made more money after they died than during their lifetime.<sup>319</sup> Stan Lee, who passed away in 2018, “signed” a new deal through his representatives, with Marvel Entertainment for a 20-year term to use his name, image, and likeness in their products, including movies, theme parks, and merchandising.<sup>320</sup>

### **B. Making Each Party Responsible for Respective Expenses**

Another area of potential negotiation strategies is the “advance.” Advances are money given to the artist or held in an account for the artist to spend on things like recording the records, and often, living expenses. As shown above, the advances can be held against the artist via the process of recoupment for years and keep the artist from receiving any royalties. This is unlike almost any other industry. In most industries, a company puts forth research and development costs and is repaid from the proceeds of sales. Artists should begin to reject recoupment clauses in contract negotiations. And to be competitive, record companies should offer to front the costs for recording. As a practical matter, because the recording company needs to recover its investments from this and other artists, the overhead might lead to a different split of the royalties. But it also is likely to achieve lower costs of production/recording.

### **C. Shorter Terms For The Contracts, Possible Reverse Options**

The multi-year contracts tend to take advantage of the artist and there is no need for those types of contracts. Perhaps shorter terms would help the

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Director and/or Choreographer is entitled to receive a payment under an applicable SOC minimum basic agreement. Any additional use or license of the direction and/or choreography by the Producer shall be subject to further agreement between the Producer and the Director and/or Choreographer.”

316. See 17 U.S.C. § 302(a).

317. See Hilburn, *supra* note 79.

318. Emma Parry, *BEAT THAT Michael Jackson’s estate has made \$2B in 13 years since his death – despite being homeless in some of his final months*, THE U.S. SUN (July 4, 2022), <https://www.the-sun.com/entertainment/5666942/michael-jacksons-estate-made-2b-death-homeless/> [perma.cc/L948-WV5S].

319. See generally Abigail Freeman, *The Highest-Paid Dead Celebrities of 2021*, FORBES (Oct. 30, 2021), <https://www.forbes.com/sites/abigailfreeman/2021/10/30/the-highest-paid-dead-celebrities-2021/?sh=5253e55b3839> [https://perma.cc/E5ME-LV3Z].

320. Borys Kit, *Stan Lee Returns to Marvel Studios With Genius Brands, POW! Entertainment Licensing Deal (Exclusive)*, THE HOLLYWOOD REP. (May 18, 2022), <https://www.hollywoodreporter.com/movies/movie-news/stan-lee-marvel-studios-licensing-deal-1235149039/> [perma.cc/HWB2-KQX8].



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artists receive greater value. The record industry often negotiates for six albums across renewable periods at the exclusive option of the record company that can last seven years or more. Contrast that with the television industry, where the contracts are typically renewable for three years. Why not the shorter terms? Whether it might be a more universal, nationwide, and firmly enforceable seven years, or whether something even shorter might be appropriate, the ability to renegotiate entertainment contracts to match marketplace circumstances has proven to be important.

#### D. Judicial Reality Checks

Should any other celebrity talent end up in a conservatorship, a different mechanism needs to be set up than the one that held Britney Spears in a state of potential “involuntary servitude” for years. And the same principle might apply to the contracts of minors and to challenges on the term extensions of contracts. A single judge placed in charge of these complex matters can lead to an appearance of hopelessness. Why should someone who is supposedly disabled be required to work? Why would a judge approve a multi-year, multi-million-dollar contract for the services and labor of the putatively disabled? Should a special master be appointed? We use additional help to understand complex legal, financial, and social issues in everything from bankruptcy to tort cases. Perhaps more practically, should the judge on a conservatorship case be rotated every three or four years? That might be a very routine solution that does not diminish anyone’s prior work but will create a more transparent image of the process.

If not rotating judges, how about permitting the conservatee or minor to address the judge periodically? How about permitting a periodic appeal by the conservatee or minor so they can have their issues reviewed? Some variation of these suggestions would go a long way toward enhancing the reliability and reputation of the process. Something needs to be done and in 2021, two Representatives introduced the “Free Britney Act” in Congress.<sup>321</sup> This would protect people in conservatorships using a four-pronged approach: (1) it would allow such people to petition for the public, rather than private, conservatorship; (2) assign an independent caseworker to any conservatorship; (3) make caseworkers disclose their financials to prevent a conflict of interest; and (4) require states to submit reports each year on “the state of guardianship and conservatorship.”<sup>322</sup> Representative Charlie Crist (D-Fl) said “[a]busive conservatorships can be an unending nightmare, and tragi-

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321. *Id.*; H.R. 4545, 117th (Cong. 1st Sess. (July 20, 2021) (The act was titled the Freedom and Right to Emancipate from Exploitation, or FREE Act).

322. Bailey Aldridge, *Bipartisan ‘Free Britney Act’ Introduced in Congress, Here’s What It Would Do*, McCLATCHYDC, (July 20, 2021). The act was titled the Freedom and Right to Emancipate from Exploitation, or FREE Act, HR 4545, 117 Cong. 1st Sess. (July 20, 2021).

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cally we don't know how many people are being held captive against their will under the broken guardianship system."<sup>323</sup>

## VII. CONCLUSION

Britney Spears, Prince, TLC, Toni Braxton, the Backstreet Boys, NSYNC, the cast of *Friends*, and many others have been taken advantage of, had their mental health compromised, and filed bankruptcy due to the personal services contracts in the entertainment industry. In no other industry is the reward so desirable yet also controlled so thoroughly by third parties with the ultimate decisions being isolated from regulation by the law. Even artists who are financially sophisticated and well-resourced can be taken advantage of. Sometimes bad actors are corporations, and sometimes they are the close managers, agents, and even family members trusted by an artist. Courts can help protect the artist and sometimes, but the courts sometimes seem to exacerbate the problems and prolong the misery. Congress and state governments have passed some legislation that has both helped, but some of which has also been corrupted against the artists. As suggested, in the end, it will take further reform of the practices in the business of entertainment and media to stop "artist abuse."

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323. *Id.*