

SCRATCHING THE SEVEN-YEAR ITCH: A CALL TO REFORM CALIFORNIA LABOR CODE SECTION 2855(B)[♦]

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INTRODUCTION

“I’ve never heard of a label that doesn’t screw the artist . . . that’s the business model, is screwing the artist.”¹

While the landscape of music has changed with the digitalization of the industry, and with advents such as YouTube,² Spotify,³ and other music streaming services changing the way consumers access music, record labels still remain crucial to the success of emerging artists.⁴ Record labels offer a deal seemingly too good to pass up: promotion and marketing to mass audiences, large-scale distribution abilities, and the capability to invest large amounts of capital into the careers of upcoming artists.⁵ Major label domination of the music industry is not a new phenomenon by any means, but in recent years, the number of major labels occupying the lion’s share of the market has only decreased.⁶ In 2011, amid billions of dollars of debt, EMI announced the sale of its recorded music operations to Universal Music Group and the sale of its music publishing operations to Sony/ATV Music Publishing.⁷ And then there were three. By 2014, approximately sixty-four percent of the labels’ market share remained in the hands of three major labels: Universal Music Group, Sony Music, and Warner Music Group.⁸

This overwhelming control of the industry allows “The Big Three” to standardize recording contract terms, featuring clauses and provisions that are largely non-negotiable.⁹ California remains the epicenter of the entertainment industry, with the vast majority of recording agreements governed by California law¹⁰. To address the fact that many service industries are based in California, including the film and television industries, the California legislature enacted California Labor Code section 2855. This statute limits personal service contracts, meaning those contracts that “render service of a special, unique, unusual,

¹ ARTIFACT (Sisyphus Corporation 2012).

² YOUTUBE, <https://www.youtube.com> (last visited Oct. 6, 2015).

³ SPOTIFY, <https://www.spotify.com/us> (last visited Oct. 6, 2015).

⁴ Tracy C. Gardner, Note, *Expanding the Rights of Recording Artists: An Argument to Repeal Section 2855(b) of the California Labor Code*, 72 BROOK. L. REV. 721, 721 (2007).

⁵ *Id.*

⁶ Dana Cimilluca & Max Colchester, *Universal, Sony Split Up EMI Group*, WALL ST. J. (Nov. 12, 2011), <http://www.wsj.com/articles/SB10001424052970204224604577031694160429400>.

⁷ *Id.*

⁸ Ed Christman, *Music in 2014: Taylor Takes the Year, Republic Records on Top, Streaming to the Rescue*, BILLBOARD (Jan. 9, 2015), <http://www.billboard.com/articles/business/6436399/nielsen-music-soundscan-2014-taylor-swift-republic-records-streaming?page=0%2C2>.

⁹ Gardner, *supra* note 4.

¹⁰ M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC 15 (10th ed. 2007).

extraordinary, or intellectual character,” to seven years from commencement.¹¹ A subsequent amendment, section 2855(b), which only applies to recording contracts, subjects an artist to damages on undelivered albums remaining on the contract if such right to terminate the agreement is exercised.¹² Record labels, with experience and knowledge of the time necessary to produce an album, and extensive expectations of marketing and promotional obligations, nevertheless continue to implement contracts dictating a number of albums that reasonably cannot, or should not, be produced within seven years. This creates a situation in which the artist is faced with the choice between forced labor, by remaining bound to an agreement past seven years from commencement, or if a contract is terminated, an uncertain amount of liability, as the statute lacks a definition of “damages”¹³—surely an unconscionable result. A revival of a past bill effort to allow the California legislature to review the statute in light of current economic circumstances and the industry status quo must occur to remedy these issues. Although repeated attempts to repeal section 2855(b) have failed, at minimum the legislature must step in to set forth a definition of “damages.” With a definition of “damages,” and therefore a means by which to estimate potential liability, artists will no longer face an

¹¹ The statute states, in relevant part:

(a) Except as otherwise provided in subdivision (b), a contract to render personal service . . . may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

(b) Notwithstanding subdivision (a):

(1) Any employee who is a party to a contract to render personal service in the production of phonorecords . . . may not invoke the provisions of subdivision (a) without first giving written notice to the employer . . . specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision (a).

(2) Any party to a contract described in paragraph (1) shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable period prescribed by law.

(3) If a party to a contract described in paragraph (1) is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action that, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.

CAL. LAB. CODE § 2855 (West 2007).

¹² *Id.*

¹³ *Id.*

uncertain amount of liability should they choose to terminate an agreement after seven years. The legislature must also implement a good faith requirement in the statute, encouraging artists to fulfill their contractual responsibilities. Damages should be eliminated with a finding of good faith, and damages should be limited to one undelivered album if there is a finding of bad faith.

This Note explores recording contracts, specifically those governed by California law. Section I will examine important standard recording contract terms and how those provisions operate in today's music industry. Section II will review California Labor Code Section 2855 and recent disputes brought under it, namely the lawsuit between EMI and 30 Seconds to Mars. Section III will offer a comparative analysis on the state on the music industry in 1985, at the time of the section 2855(b) amendment, and in 2015. Section IV will explore how, in the face of a changed landscape of music, the justifications put forth by the recording industry for an amendment of section 2855 no longer have a sound basis. This will include an explanation of the effect of 360 deals—which are quickly becoming standard—on these justifications. Lastly, Section V proposes a revival of previous efforts to have the California legislature review the application of the statute to recording contracts. Specifically, in the event that the legislature is still unwilling to repeal section 2855(b), the legislature must, in the alternative, provide a mechanism for measuring damages, as no guidance is currently provided by the statute and case law has not yet been established. By implementing these changes, artists would be safeguarded from the unfair effects that the statute as written effectively produces.

I. STANDARD RECORDING CONTRACT TERMS

In discussing section 2855 and the music industry, it is necessary to analyze typical provisions in a recording contract. Recording contracts necessarily represent the complexity of the music industry, normally averaging fifty to sixty pages in length.¹⁴ Arguably, the most important provision in a record contract, to both labels and musicians alike, is the provision setting forth the length of time the agreement remains in effect.

Unlike most contracts for services, recording contracts do not measure a term by a fixed-year amount. Rather, recording contracts generally set forth an initial fixed term, usually one year, followed by several option periods that the label can exercise to extend the

¹⁴ S.B. 1246, 2001-2002 Leg., Reg. Sess. (Ca. 2002), ftp://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1246_cfa_20020619_121321_sen_comm.html.

agreement.¹⁵

Normally, the label has a firm obligation to accept one album produced during the initial fixed term and the option to accept as many as seven to nine more albums.¹⁶ Even assuming the recording of one album per year, this option structure allows labels to potentially extend an agreement well past seven years from commencement, depending on the number of options in the agreement. In fact, factoring in extensive promotional activities such as touring, producing music videos, and television appearances,¹⁷ the time period between recording albums can regularly amount to at least two years.¹⁸ In effect, this potentially binds an artist to a contract for a minimum of fourteen years, and should the artist attempt to terminate after seven years, the record label can sue to recover damages on any albums left undelivered under the agreement as a result of section 2855(b).¹⁹

Under a standard recording contract, record labels also typically grant the artist an advance to record an album.²⁰ Once the album is released, the label then deducts a percentage of the profits from record sales.²¹ However, the balance of that calculation is not yet given to the artist.²² The label then deducts the original advance from record sale profits, along with miscellaneous expenses such as recording costs, a portion of the promotion costs, a portion of the video costs, and tour support.²³ With both physical and digital album sales on a steady decline,²⁴ this calculation often leaves the artist in debt to the label.²⁵ Any deficit on the part of the artist is then carried forward to the next album and so on, potentially leaving the artist in perpetual debt to the label with no prospect of surmounting the deficit.²⁶ Therefore, the record labels are first in line to recoup their costs, but the artists may continue to produce albums without payment if the profits do not

¹⁵ Matt Villmer, *5 Tips Every Artist Must Know Before Signing Their First Record Deal*, PERFORMER (June 3, 2015), <http://performermag.com/band-management/contracts-law/5-tips-every-recording-artist-must-know-before-signing-their-first-record-deal/>.

¹⁶ Gardner, *supra* note 4, at 734.

¹⁷ *Id.* at 739.

¹⁸ See First Amended Cross-Complaint, at ¶ 22, *Geffen Records, Inc. v. Love*, No. BC 223364 (Cal. Super. Ct. July 3, 2001) [hereinafter *Love Cross Complaint*] (stating that record labels often prefer and insist on a minimum two-year gap between album releases).

¹⁹ Cal. Lab. Code § 2855 (West 2007).

²⁰ ARTIFACT, *supra* note 1, at 31:00.

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ Christopher Morris, *Album Sales Continue Decline, Music Streaming Rises in 2014*, VARIETY (Jan. 6, 2015, 5:25 PM), <http://variety.com/2015/music/news/album-sales-continue-decline-music-streaming-rises-in-2014-1201394229> (“Total album sales (including CDs, cassettes, LPs and digital albums) slipped another 9% to 257 million, down from 289.4 million in 2013 (when an 8% decline was registered).”).

²⁵ ARTIFACT, *supra* note 1, at 31:52.

²⁶ *Id.*

outweigh the amount of the advance, because of the deduction of numerous additional costs.

While many other provisions in standard recording contracts may also produce onerous results for artists,²⁷ the length of the agreements and the financial mechanisms at play remain the important focus in discussing section 2855.

II. CALIFORNIA LABOR CODE SECTION 2855

A. *History of California Labor Code Section 2855*

In 1937, the California legislature enacted California Labor Code section 2855, codifying a streamlined version of a previous similar statute.²⁸ Shortly thereafter in 1944, the court in *De Haviland v. Warner Bros. Pictures, Inc.* set forth the lasting interpretation of section 2855.²⁹ In the *De Haviland* dispute, while Warner Brothers contended that the statute should be construed to establish the seven year time period in terms of actual service, the court rejected this reading in favor of limiting personal service contracts to seven calendar years from commencement.³⁰ Wary of the potential effects on the recording industry, in 1985, record labels led by the Recording Industry Association of America (RIAA),³¹ lobbied to extend section 2855's contractual limit to ten years.³² Although this proposal ultimately failed, RIAA continued to rally for an amendment, claiming it was necessary to safeguard the large investments made by record labels, and further arguing that record companies do not turn profits on an artist until after the fourth album.³³ RIAA argued that the statute as written would allow artists to walk away from a contract after seven years, regardless of whether the artist fulfilled the number of albums required, thereby

²⁷ See Omar Anorga, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 WHITTIER L. REV. 739 (2003) (in which Anorga also analyzes ownership, controlled composition, accounting and assignment provisions in standard recording contracts).

²⁸ Gregg B. Ramer, *United States: Personal Service With A Smile: A History Of California's "Seven-Year" Rule*, MONDAQ (Dec. 6, 2013), <http://www.mondaq.com/unitedstates/x/279512/employee+rights+labour+relations/Personal+Service+With+a+Smile+A+History+of+Californias+SevenYear+Rule>.

²⁹ *De Haviland v. Warner Bros. Pictures, Inc.*, 153 P.2d 983 (Cal. Ct. App. 1944) (in which Olivia De Haviland, a motion picture actress, sought to terminate her agreement with Warner Bros. after seven years. The agreement allowed Warner Bros. to suspend De Haviland for periods when she would fail to perform her services and allowed for an extension of the contract for a time equal to those suspension periods. The suspension periods totaled twenty-five weeks and Warner Bros. sought to bind De Haviland to the contract for those twenty-five weeks beyond seven years from the date of commencement).

³⁰ *Id.* at 985–6.

³¹ RIAA, <https://www.riaa.com> (last visited Oct. 6, 2015).

³² HARVARD LAW REVIEW, Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, 116 HARV. L. REV. 2632, 2636 (2003).

³³ *Id.*

severely injuring record companies.³⁴ Furthermore, RIAA cited artist negligence as a major cause of unfulfilled record production requirements.³⁵

RIAA's proposal ultimately became section 2855(b)³⁶—applicable only to personal service contracts requiring production of phonorecords.³⁷ Significantly, even though an artist may invoke the statute to terminate the recording agreement after seven years, section 2855(b)(3) allows record labels to sue to recover damages for the records or options remaining under the contract.³⁸ The creation of this subsection effectively violated the public policy reasons for enacting the section, namely, allowing employees the freedom to seek other employment opportunities and thus allowing them to optimize their welfare.³⁹

While RIAA and the recording industry successfully lobbied for an amendment, the fight against section 2855(b) continued. In 2001 and 2002, California Senator Kevin Murray convened hearings regarding recording contracts and auditing practices in the industry, during which he introduced Senate Bill 1246 (SB 1246), Senate Bill 2080 (SB 2080), and Senate Bill 1034 (SB 1034) to the California legislature.⁴⁰ SB 1034, which demanded accountability in the auditing of royalties,⁴¹ ultimately passed.⁴² SB 2080, which called for an outright repeal of section 2855(b),⁴³ stalled in the Senate Judiciary Committee.⁴⁴ However, SB 1246, which called for the legislature to review the application of section 2855 to recording contracts,⁴⁵ gained tremendous initial

³⁴ *Id.*

³⁵ Gardner, *supra* note 4.

³⁶ California Labor Code Section 2855 and Recording Artists' Contracts, *supra* note 32.

³⁷ CAL. LAB. CODE § 2855(b)(1) (West 2007). The statute defines phonorecords by reference to the definition contained in Section 101 of Title 17 of the United States Code, which defines phonorecords as:

[M]aterial objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term "phonorecords" includes the material object in which the sounds are first fixed.

17 U.S.C. § 101 (West 2010).

³⁸ *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 32.

³⁹ *Id.*

⁴⁰ Edna Gunderson, *Rights Issue Rocks the Music World*, USA TODAY (Sept. 16, 2002, 9:52 AM), http://usatoday30.usatoday.com/life/music/news/2002-09-15-artists-rights_x.htm.

⁴¹ S.B. 1034, 2003-2004 Assemb. Comm. on Arts, Ent. Sports, Tourism, and Internet Media (Ca. 2004), http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1001-1050/sb_1034_cfa_20040607_152304_asm_comm.html.

⁴² Gunderson, *supra* note 40.

⁴³ S.B. 2080, 2001-2002 Leg. (Ca. 2002), ftp://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_2051-2100/sb_2080_bill_20020222_introduced.html.

⁴⁴ *Business and Labor*, OFFICE OF SENATE FLOOR ANALYSES, <http://sfa.senate.ca.gov/businessandlabor7> (last visited Oct. 21, 2015).

⁴⁵ S.B. 1246, 2001-2002 Leg., Reg. Sess. (Ca. 2002), <ftp://www.leginfo.ca.gov/pub/01->

momentum, but Murray ultimately shelved the bill in late 2002.⁴⁶ Although negotiations between RIAA and recording artists' advocates had continued for a year before Murray ultimately pulled the bill, the two sides were unable to reach a compromise.⁴⁷ The Recording Artists' Coalition (RAC)⁴⁸ furiously advocated for artists, stating that although an artist may prevail in litigation with a record label, it is not feasible for an artist to abandon his or her career for the numerous years that winning a lawsuit may take.⁴⁹ The RIAA countered that the amendment ensures that an artist cannot simply sit out his agreement and refuse to deliver albums.⁵⁰ While the RIAA claimed to make concessions during the negotiations, such as a limit on damages on undelivered albums, the opposing sides could not reach a compromise,⁵¹ and the spotlight soon waned on the controversy.

B. *Recent Disputes Invoking Section 2855*

In 2008, section 2855 again became the center of a flurry of controversy amidst a thirty million dollar breach of contract lawsuit filed by EMI subsidiary, Virgin Records, against rock band 30 Seconds to Mars, fronted by Jared Leto.⁵² Nine years into their recording agreement, during which time they had produced two albums, 30 Seconds to Mars invoked section 2855 and exercised their termination right.⁵³ Amidst dire financial circumstances, multiple regime changes,⁵⁴ and a recent takeover by private equity firm Terra Firma,⁵⁵ EMI responded by filing a lawsuit against the band seeking thirty million dollars in damages for failure to deliver the remaining three of the five albums required under the agreement.⁵⁶ Faced with the impending lawsuit, frontman Jared Leto began filming a documentary entitled

02/bill/sen/sb_1201-1250/sb_1246_cfa_20020619_121321_sen_comm.html.

⁴⁶ Justin Oppelaar, *Music Bill Doesn't Play*, VARIETY (Aug. 15, 2002, 5:27 PM) <http://variety.com/2002/music/markets-festivals/music-bill-doesn-t-play-1117871305/>.

⁴⁷ *Id.*

⁴⁸ *Recording Artists' Coalition*, WIKIPEDIA, https://en.wikipedia.org/wiki/Recording_Artists%27_Coalition (last visited Oct. 21, 2015).

⁴⁹ S.B. 1246, 2001-2002 Leg., Reg. Sess. (Ca. 2002), ftp://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1201-1250/sb_1246_cfa_20020619_121321_sen_comm.html.

⁵⁰ *Id.*

⁵¹ Gunderson, *supra* note 40 (in which RIAA chief Hilary Rosen characterized the industry as "eager to craft a fair settlement" and saying that a limit on damages would "greatly clarify California's vague statute").

⁵² Hilary Lewis, *Artists Rip EMI For Firing Their Favorite Executives*, BUSINESS INSIDER (Aug. 18, 2008, 2:01 PM), <http://www.businessinsider.com/2008/8/artists-rip-emi-for-firing-their-favorite-executives>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ TERRA FIRMA, <https://www.terrafirma.com> (last visited Sept. 21, 2016); *Terra Firma Capital Partners*, WIKIPEDIA, https://en.wikipedia.org/wiki/Terra_Firma_Capital_Partners (last visited Nov. 2, 2015).

⁵⁶ Lewis, *supra* note 52.

Artifact, detailing the band's fight with EMI and the recording of their third album, *This Is War*.⁵⁷ What began as a behind the scenes look at the band's next album, quickly evolved into an outcry against corporate greed, with Leto speaking on behalf of recording artists everywhere stating, "... the lion's share of profits [are] going to the corporation. That's not right. Fairness should be shared."⁵⁸ The documentary also details the financial pressure the band faced with the prospect of the thirty million dollars in damages, the eventual 2009 settlement, and their subsequent re-signing with EMI.⁵⁹

Although the exact terms of the settlement were not confirmed,⁶⁰ the documentary shows the band struggling with the concept of giving up the fight against section 2855(b).⁶¹ The documentary also alludes that EMI had final cut approval of the documentary and had to consent to the use of all music contained therein.⁶² A poignant scene depicts Leto conversing with his legal team, incredulous that he must obtain permission from EMI to include a clip of him spontaneously playing a few chords at the piano.⁶³ The documentary also features a telling interview with OK Go frontman, Damian Kulash. When asked if EMI ever lied to the band, Kulash skirts the question, alluding that as part of his band's 2010 settlement with EMI,⁶⁴ he is not allowed to answer the question.⁶⁵ These two scenes serve to illustrate how much control EMI retained over the documentary product as part of the settlement agreement, and demonstrate the compromises artists are forced to make in order to settle a lawsuit with a major label.

The dispute between 30 Seconds to Mars and EMI is just the most recent example of a dispute. One notable past dispute is the 1999 controversy between Courtney Love and her band, Hole, and Geffen Records, a subsidiary of Universal Music Group.⁶⁶ When Love attempted to terminate her band's contract, Geffen sued for damages for

⁵⁷ Korina Lopez, *Jared Leto's 'Artifact' Declares 'War' on EMI*, USA TODAY (Apr. 25, 2014, 1:05 PM), <http://www.usatoday.com/story/life/music/2014/04/25/jared-letto-30-seconds-to-mars-documentary-artifact/8068619/>.

⁵⁸ *Id.*

⁵⁹ ARTIFACT, *supra* note 1.

⁶⁰ James Montgomery, *Exclusive: 30 Seconds To Mars Talk Settlement With EMI*, MTV NEWS (Apr. 29, 2009), <http://www.mtv.com/news/1610285/exclusive-30-seconds-to-mars-talk-settlement-with-emi/>.

⁶¹ ARTIFACT, *supra* note 1.

⁶² *Id.* at 1:15:30.

⁶³ *Id.*

⁶⁴ Amos Barshad, *OK Go's Damian Kulash Talks About the Band's Split With EMI*, VULTURE (Mar. 10, 2010, 2:15 PM), http://www.vulture.com/2010/03/ok_gos_damian_kulash_talks_abo.html.

⁶⁵ ARTIFACT, *supra* note 1, at 50:25 ("I'm seeking not to get sued [for] thirty million bucks so I can't tell you whether or not they lied, sorry. I mean, that's the only condition of our release, I gotta be a good boy.").

⁶⁶ *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 32.

five undelivered albums.⁶⁷ Love responded by questioning the constitutionality and applicability of 2855.⁶⁸ Love's lawsuit with Geffen ignited fervor within the music community to repeal section 2855(b), but the attention on the statute subsided once the parties reached a settlement.⁶⁹ As a result of Love's settlement and the recent 30 Seconds to Mars settlement, the amendment allowing record labels to sue for damages on undelivered albums has yet to be challenged before a court.⁷⁰

III. THE CHANGED FACE OF THE MUSIC INDUSTRY AND THE RESOUNDING INAPPLICABILITY OF SECTION 2855

Since the campaign for a section 2855 amendment in 1985, the economics of the music industry have been transformed by technology and vast changes in the way in which people consume music. The changed landscape of the music industry has caused section 2855(b) to operate in a wholly different industry than at the time of its amendment. Although the justifications for the amendment put forth by the recording industry may have been valid at the time, the economics and operation of the music industry have perhaps rendered some of the justifications suspect, if not inapplicable.

A. *Mo' Streaming, Mo' Problems: A Comparative Analysis of the Music Industry Then and Now*

It was 1985, and while the RIAA and record labels were lobbying to the California legislature for an amendment to section 2855,⁷¹ artists such as Madonna, Phil Collins, and Whitney Houston dominated the charts.⁷² "Like A Virgin" had just debuted a few months previously, quickly becoming the first of Madonna's twelve number-one hits on the Billboard Hot 100⁷³ that sparked a frenzy of fingerless glove and crucifix earring-wearing concertgoers at her immensely profitable The Virgin Tour.⁷⁴ During this time, a superstar artist like Madonna

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Katten Muchin Rosenman LLP, *Spotlight on Entertainment and Media Law* (2013), https://www.kattenlaw.com/files/48984_Spotlight_on_Entertainment_and_Media%20Law_Personal_Service_With_a%20Smile_A_History_of_Californias_Seven_Year_Rule.pdf.

⁷¹ *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 32.

⁷² *The Hot 100 - 1985 Archive*, BILLBOARD, <http://www.billboard.com/archive/charts/1985/hot-100> (last visited Oct. 19, 2015).

⁷³ *Like A Virgin (song)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Like_a_Virgin_\(song\)](https://en.wikipedia.org/wiki/Like_a_Virgin_(song)) (last visited Oct. 19, 2015).

⁷⁴ *The Virgin Tour*, WIKIPEDIA, https://en.wikipedia.org/wiki/The_Virgin_Tour (last visited Oct. 19, 2015) ("After its end, the Virgin Tour was reported to have grossed over \$5 million (\$10.96 million in 2015 dollars), with Billboard Boxscore reporting a gross of \$3.3 million (\$7.24 million in 2015 dollars).") (internal citations omitted).

averaged an album release every two to three years.⁷⁵ This time period also saw music superstars such as Madonna crossing over into film; Madonna appeared in two movies in 1985.⁷⁶ With the introduction of the compact disk (CD)⁷⁷ in late 1982,⁷⁸ the years surrounding the rally for an amendment saw enormous success for the music industry, with global CD sales reaching one hundred and forty million dollars in 1986, a year before the amendment was ultimately passed.⁷⁹ While record sales by 1986 had not yet reached the album sales achieved for the year of 2014,⁸⁰ the music industry demonstrated tremendous growth with record sales on a steady upswing.⁸¹ With such rapid growth and change in the industry, it is not difficult to see why the recording industry sought to protect its potential assets in the form of undelivered albums, by including a provision in section 2855 through which they could recover damages.

The climate of the music industry today is quite different than the one that record labels faced during the amendment campaign. In order for a consumer to buy their favorite new single in 1985, the consumer had to travel to a record store and buy the entire CD.⁸² However, digital downloads have entirely revolutionized this consumption. As early as late 1997 and early 1998, the tides of the music industry began to shift with the launches of mp3.com⁸³ and eMusic,⁸⁴ which was the first website to offer subscription-based downloadable mp3 files.⁸⁵ Shawn Fanning and his legacy of Napster soon followed in 1999,⁸⁶ with Apple establishing its iTunes Music Store⁸⁷ by 2003.⁸⁸ By this time, a consumer no longer had to pay for the entire CD in order to access one song.⁸⁹ A consumer could simply open up iTunes, click on a song, pay \$0.99 for the song, and immediately access the content.⁹⁰ The growth of

⁷⁵ The exception was the one-year period between Madonna's first and second albums.

⁷⁶ *Madonna (entertainer)*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Madonna_\(entertainer\)](https://en.wikipedia.org/wiki/Madonna_(entertainer)) (last visited Oct. 19, 2015).

⁷⁷ *Compact disk*, WIKIPEDIA, https://en.wikipedia.org/wiki/Compact_disc (last visited Oct. 20, 2015).

⁷⁸ Rob Beschizza, *Compact Disk is 25 Years Old*, WIRED (Aug. 16, 2007, 3:55 PM), <http://www.wired.com/2007/08/compact-disk-is/>.

⁷⁹ LEE MARSHALL, *THE INTERNATIONAL RECORDING INDUSTRIES* 62 (2013).

⁸⁰ Morris, *supra* note 24.

⁸¹ Marshall, *supra* note 79.

⁸² ARTIFACT, *supra* note 1.

⁸³ *MP3.com*, WIKIPEDIA, <https://en.wikipedia.org/wiki/MP3.com> (last visited Oct. 26, 2015).

⁸⁴ EMUSIC, <http://www.emusic.com/> (last visited Oct. 26, 2015).

⁸⁵ Andrew McCormick, *Revolution's Brief History of Digital Music*, MARKETING MAG. (Aug. 5, 2009), <http://www.marketingmagazine.co.uk/article/904234/revolutions-brief-history-digital-music>.

⁸⁶ *Napster*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Napster> (last visited Oct. 26, 2015).

⁸⁷ ITUNES, <http://www.apple.com/itunes/download/> (last visited Oct. 26, 2015).

⁸⁸ McCormick, *supra* note 85.

⁸⁹ ARTIFACT, *supra* note 1.

⁹⁰ ITUNES, *supra* note 87.

the digital download industry was rapid; digital downloads surpassed physical record sales by 2011.⁹¹ Digital downloads were therefore able to occupy a majority share of the market less than a decade after the launch of Apple's iTunes Store—a major digital download platform.⁹²

In addition to digital download platforms, music streaming and subscription-based platforms have also revolutionized the way in which consumers access music. After the demise of Napster, the music industry responded by establishing MusicNet, a subscription-based website that allowed access to approximately one million licensed songs.⁹³ However, the model failed because many artists refused to support MusicNet's wholly unfavorable royalty rates to artists.⁹⁴ The model allowed artists to receive only a fraction of a penny per play, while record companies took ninety-one percent of the profits.⁹⁵ Pandora Radio⁹⁶ soon followed in 2004, offering consumers the option to access the service for free with no advertisements, or for a monthly fee for uninterrupted streaming.⁹⁷ This model's intersection with copyright issues resulted in low profits and the payment of large royalties, to artists although in reality, artists still see little profit from the service.⁹⁸

With previous digital streaming models arguably failing, in 2011, the Swedish company Spotify⁹⁹ entered U.S. markets.¹⁰⁰ Rather than a personalized radio station on a subscription-based model like Pandora Radio,¹⁰¹ Spotify offers access to a vast library of music,¹⁰² either advertisement-free via a monthly subscription fee, or with advertisements at no fee.¹⁰³ The rise in prominence of Spotify in the U.S. occurred quickly, and by 2015, revenue from streaming services

⁹¹ Sam Gustin, *Digital Music Sales Finally Surpassed Physical Sales in 2011*, TIME (Jan. 6, 2012), <http://business.time.com/2012/01/06/digital-music-sales-finally-surpassed-physical-sales-in-2011/> (“In 2011, digital music sales climbed past physical sales to take a 50.3% market share of all music purchases.”).

⁹² *Id.* (“iTunes remains the market leader but faces increasing competition from upstarts like Rdio, Spotify and Pandora, which went public earlier this year.”).

⁹³ Andrew Evren, *Tracing the History of Music Streaming, and Why It's More Important Now Than Ever*, BIT OF NEWS (Jun. 17, 2015), <http://news.bitofnews.com/tracing-the-history-of-music-streaming-and-why-its-more-important-now-than-ever/>.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Pandora Radio*, WIKIPEDIA, https://en.wikipedia.org/wiki/Pandora_Radio (last visited Oct. 26, 2015).

⁹⁷ Evren, *supra* note 93.

⁹⁸ *Id.*

⁹⁹ *Spotify*, WIKIPEDIA, <https://en.wikipedia.org/wiki/Spotify> (last visited Oct. 26, 2015).

¹⁰⁰ Evren, *supra* note 93.

¹⁰¹ *Pandora Radio*, *supra* note 96.

¹⁰² John Seabrook, *Revenue Streams*, NEW YORKER (Nov. 24, 2014), <http://www.newyorker.com/magazine/2014/11/24/revenue-streams> (“The difference between Spotify and Internet radio services, like Pandora, is that Spotify is interactive. You can sample the complete catalogue of most artists' recordings.”).

¹⁰³ *Id.*

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such as Spotify surpassed physical CD sales revenue for the first time.¹⁰⁴

This rise of Spotify and other similar streaming platforms has significantly complicated the system by which artists receive payment. In a previous age when a consumer bought a CD at a record store for a significant dollar amount, dividing up royalties was much simpler. However, a system of a per-stream royalty rate complicates this calculation.¹⁰⁵ The average stream on Spotify equals between six-tenths and eight-tenths of a cent royalty rate.¹⁰⁶ Essentially, on average it would take 150 streams of a song to equal the price of a single song download.¹⁰⁷ In addition, streams from a free-user account are worth less than streams by a subscriber.¹⁰⁸ Although many albums see enormous royalty checks from streaming services such as Spotify, the artists are not necessarily seeing the fruits of this success.¹⁰⁹ Although Spotify renders lump payments and detailed data to record labels, the record labels choose how, or if, to share those with the artist.¹¹⁰

Artists have been vocal in expressing their distaste for Spotify's business model. Notably, in late 2014, superstar Taylor Swift pulled her entire catalogue from the service, citing devaluation of her work through low payouts.¹¹¹ Similarly, Prince also pulled his music from Spotify in mid-2015.¹¹² However, the streaming model seems to have established a firm place in the music industry, as Apple, Amazon, and Google have all established their own similar services.¹¹³ Jay-Z-backed Tidal also launched in early 2015,¹¹⁴ with Taylor Swift making her

¹⁰⁴ Michelle Geslani, *Streaming Music Services Made More Money Than CD Sales for the First Time Ever*, CONSEQUENCE OF SOUND (Mar. 19, 2015, 8:36 PM), <http://consequenceofsound.net/2015/03/streaming-music-services-made-more-money-than-cd-sales-for-the-first-time-ever/> (“In 2014, streaming services raked in \$1.87 billion, compared to CD sales which accounted for \$1.85 billion.”).

¹⁰⁵ Seabrook, *supra* note 102 (“Somehow, the billions of micro-payments parcelled out in the form of streams have to be reconciled with a royalty-payments system that is rooted in a century-old sales model. No economic infrastructure exists for that apples-to-oranges transformation.”).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* (“Month by month, Spotify pays the major labels lump sums for the entire market share of their catalogues. How the labels decide to parcel these payments out to their artists isn't transparent, because, while Spotify gives detailed data to the labels, the labels ultimately decide how to share that information with their artists.”).

¹¹¹ Jack Linshi, *Here's Why Taylor Swift Pulled Her Music From Spotify*, TIME (Nov. 3, 2014), <http://time.com/3554468/why-taylor-swift-spotify/>.

¹¹² Frank Pallotta, *Prince pulls all of his music from Spotify*, CNN (Jul. 2, 2015, 12:00PM ET), <http://money.cnn.com/2015/07/02/media/prince-spotify-streaming-music/>.

¹¹³ Madi Alexander & Ben Sisario, *Apple Music, Spotify and a Guide to Music Streaming Services*, N.Y. TIMES (April 5, 2016), <http://www.nytimes.com/interactive/2015/06/30/business/media/music-streaming-guide.html>.

¹¹⁴ Spencer Kornhaber, *The Great Lie of Apple Music*, THE ATLANTIC (Jun. 9, 2015), <http://www.theatlantic.com/entertainment/archive/2015/06/the-great-lie-of-apple-music/395393/>.

music available on the platform after pulling her catalogue from Spotify.¹¹⁵ She later chose a different streaming platform for the release of her “1989” album, which instead debuted on Apple Music.¹¹⁶ As of November 2015, Adele also took a stance on music streaming by withholding her long-awaited third album from Spotify and Apple Music.¹¹⁷

While music superstars have remained critical of music streaming services, there is no evidence of a slowdown in the development of these services. Notably, as of November 2015, YouTube also threw its hat into the music streaming service ring with the introduction of its

YouTube Music App, offering both a free tier and a subscription based tier for ten dollars a month, which boasts ad-free streaming, the ability to switch between video and audio-only, and offline listening.¹¹⁸

Although music streaming issues are a relatively new issue for the industry, piracy has for many years plagued, and continues to plague, the industry. While the record industry successfully litigated to force the shutdown of Napster in 2001,¹¹⁹ this was hardly a victory for the music business. Instead of consumers returning to record stores to buy music, consumers looked to other file-sharing platforms to access free music.¹²⁰ Kazaa¹²¹ and Limewire¹²² quickly filled the shoes of Napster, making it clear that piracy was here to stay. In 2003, Swedish-based platform The Pirate Bay also entered the market. Despite being embroiled in numerous legal disputes, The Pirate Bay continues to operate today.¹²³

While the industry continues to see a rise in music streaming, twenty million consumers in the United States still access music through file-sharing networks.¹²⁴ The intense focus on piracy that occurred during the years surrounding the rise of Napster seems to have waned and piracy has become an accepted part of the background

¹¹⁵ Ben Popper, *Taylor Swift ditched Spotify, but will stream to all 17,000 people on Jay Z's Tidal music service*, THE VERGE (March 25, 2015, 1:07 PM), <http://www.theverge.com/2015/3/25/8288847/taylor-swift-streaming-tidal-aspiro-jay-z>.

¹¹⁶ Chancellor Agard, *Taylor Swift's '1989' Album Is Coming To Apple Music, But Not Spotify Or Tidal*, INT'L BUSINESS TIMES (June 25, 2015, 12:49 PM), <http://www.ibtimes.com/taylor-swifts-1989-album-coming-apple-music-not-spotify-or-tidal-1983954>.

¹¹⁷ Ben Sisario, *Adele Is Said to Reject Streaming for '25'*, N.Y. TIMES (Nov. 19, 2015), <http://www.nytimes.com/2015/11/20/business/media/adele-music-album-25.html>.

¹¹⁸ Jillian D'Onfro, *YouTube launched a special music app to take on Spotify and Apple Music*, BUSINESS INSIDER (Nov. 12, 2015, 12:28PM), <http://www.businessinsider.com/youtube-music-app-2015-11>.

¹¹⁹ Stephen Witt, *The Man Who Broke The Music Business*, NEW YORKER (Apr. 27, 2015), <http://www.newyorker.com/magazine/2015/04/27/the-man-who-broke-the-music-business>.

¹²⁰ *Id.*

¹²¹ *Kazaa*, WIKIPEDIA (last visited Nov. 2, 2015), <https://en.wikipedia.org/wiki/Kazaa>.

¹²² *LimeWire*, WIKIPEDIA (last visited Nov. 2, 2015), <https://en.wikipedia.org/wiki/LimeWire>.

¹²³ *The Pirate Bay*, WIKIPEDIA (last visited Nov. 2, 2015), https://en.wikipedia.org/wiki/The_Pirate_Bay.

¹²⁴ Ryan Faughnder, *Music piracy is down but still very much in play*, L.A. TIMES (Jun. 28, 2015, 7:17 PM), <http://www.latimes.com/business/la-et-ct-state-of-stealing-music-20150620-story.html>.

against which royalty payments from streaming services are considered.¹²⁵ In fact, “stakeholders [of the music industry] now seem resigned to this marketplace condition and the perhaps irreversible impact it has had on the industry.”¹²⁶ Even Spotify has admitted that all music streaming services are competing with free music, as illegal downloads remain widespread.¹²⁷ The long-term effects of music streaming services have yet to be seen. However, it remains clear that music piracy has created a new generation of consumers that have grown up in an age where music is free,¹²⁸ and this changed mentality has had an irreversible and detrimental effect on the recording industry.

Although the future of the music industry remains uncertain, what is evident is that section 2855(b) operates in a wholly different atmosphere and industry today than during the time of the amendment campaign. A relatively straightforward system once existed where royalty payments from record sales were simply remitted to the artist. However, music streaming services have ushered in a complex web of new technology that must be reconciled with the antiquated sales-based royalty system. This transformation in the consumption of music, in conjunction with section 2855(b), produces a result in which an artist may receive literally pennies for royalties on streaming, and can also be subject to financial penalty in the form of damages when attempting to terminate a recording agreement. Considering this against the backdrop of tremendous music piracy, this presents even more unfair results where artists are struggling to have consumers pay for music at all, while being subject to outrageous damages when they try to exercise a valid legal right to terminate an agreement. While the record labels are not responsible for the changes in the music industry, this unfair result should not be perpetuated.

*B. Justify My Damages: How Concerns Put Forth by the
Recording Industry to Justify an Amendment No Longer Have
Sound Basis*

During the campaign for an amendment to section 2855, RIAA and record labels put forth numerous justifications for the amendment. These justifications included the need to safeguard large investments, not turning a profit until the fourth album, and artist negligence.¹²⁹ While these concerns may have been viable at the time, the music industry has changed enormously since then, perhaps rendering some of

¹²⁵ U.S. COPYRIGHT OFFICE, *Copyright and the Music Marketplace* 78 (Feb. 2015), <http://copyright.gov/policy/musiclicensingstudy/copyright-and-the-music-marketplace.pdf>.

¹²⁶ *Id.*

¹²⁷ *Id.* at 79.

¹²⁸ Faughnder, *supra* note 124.

¹²⁹ 116 HARV. L. REV., *supra* note 32.

those justifications without sound basis.

1. The Justification of Safeguarding Investment and Delayed Profits

The primary justification given by record labels for requiring an amendment providing for the possibility of damages was the large pre-production investment that labels put into artists through advances and artist development.¹³⁰ While this may have been a valid concern in 1985, the way in which labels discover artists and invest in them has changed substantially since then. The record labels' justification was based on the practice of labels, at the time, heavily focusing on artist development in order to ensure his or her long-term success.¹³¹ Since the development of a new artist could take time, labels argued that they would not turn a profit on the artist until the fourth album.¹³²

However, this strategy has undergone a transformation, with labels now often signing artists that have already, independently, amassed a significant following on social networks.¹³³ Artists are no longer waiting around for a label to discover them, and are instead taking career advancement into their own hands, with access to tools via the Internet to book tours, record music, and make music videos.¹³⁴ Rather than needing to invest time and effort to establish a following for the artist, the label effectively signs an artist that has independently developed itself.¹³⁵ In fact, in today's industry, a record label often demands that an artist has already developed a following and a buzz about them before signing him or her.¹³⁶ This has led to a more crowd-sourcing model of A&R, or talent scouting and artist development,¹³⁷ with fans often finding the artist for the record label.¹³⁸ Although it can be argued

¹³⁰ *Id.*

¹³¹ Gardner, *supra* note 4, at 747.

¹³² 116 HARV. L. REV., *supra* note 32.

¹³³ ARTIFACT, *supra* note 1, at 42:00.

¹³⁴ Steve Rennie, *Artist Development: Musicians Are Now in Control (Guest Post)*, BILLBOARD (Apr. 28, 2014, 9:00 AM EDT), <http://www.billboard.com/biz/articles/news/digital-and-mobile/6070011/artist-development-musicians-are-now-in-control-guest>.

¹³⁵ ARTIFACT, *supra* note 1, at 42:00 (“That’s not artist development, that’s . . . signing an artist that’s developed itself”).

¹³⁶ Heliene Lindvall, *Behind the music: Is the A&R era over?*, THE GUARDIAN (Jan. 27, 2011, 11:47 EST), <http://www.theguardian.com/music/musicblog/2011/jan/27/behind-music-industry-ar> (“These days, however, major labels increasingly demand that artists already have a ‘momentum’ going before they get involved.”).

¹³⁷ *Artists and Repertoire*, WIKIPEDIA (last visited Oct. 6, 2015), https://en.wikipedia.org/wiki/Artists_and_repertoire.

¹³⁸ Dan Rys, *The Changing Role of A&R and ‘The Dark Arts of Record Making’ at New Music Seminar*, BILLBOARD (Jun. 21, 2012 6:30 AM EDT), <http://www.billboard.com/biz/articles/news/1093004/the-changing-role-of-ar-and-the-dark-arts-of-record-making-at-new-music> (“In a lot of ways, A&R is more crowd-sourced now,” said Darius Van Arman, co-owner of indie triumvirate Dead Oceans/JagJaguwar/Secretly Canadian, which counts Bon Iver and Sharon van Etten amongst its success stories. “Artists are building their own audiences, so sometimes it’s okay to have the fans find an artist for you.”).

that more album options, and thus a longer term, in a recording contract incentivizes record labels to invest in nurturing the artist's career,¹³⁹ this rationale inherently assumes a need for nurturing. If an artist has already developed a following, a buzz, and music on his own, the need to nurture the artist, and thus, the justification for the section 2855 amendment provided by record labels, seems less convincing today. Without needing to develop an artist from the very beginning and to single handedly establish the artist's brand, the rationale that a label will not turn profit until the fourth album seems suspect. Additionally, it seems unlikely that a record label would continue to exercise its options up to the fourth album if an artist does not prove profitable after the second album.¹⁴⁰ A record label simply does not have the incentive to continue investing financially in an artist that has not produced profits for the label after two albums. At a minimum, the rationale may have had some sound basis at the time of the amendment but no longer does.

While record labels no longer devote the same amount of time, effort, and capital to artist development, labels do continue to issue advances to artists.¹⁴¹ However, while a label may invest in an artist financially by providing an advance, the label is still able to safeguard this investment by recouping the loss before the artist receives any profit, as well as carrying any unrecouped debt forward to the next album.¹⁴² Record labels safeguard their advance investment through the use of cross-collateralization clauses.¹⁴³ Cross collateralization allows a record label to take money from one revenue stream in order to pay unrecouped balances from another.¹⁴⁴ For example, if the profits from album sales do not amount to enough to cover the advance recoupment, the record label can recoup that balance from other revenue streams that it has access to or can carry the unrecouped balance forward.¹⁴⁵ In effect, this assures that the record label can recoup their pre-production investment from revenue streams in which they did not directly invest and any remaining unrecouped debt is then carried forward to the next album. Thus, an artist can remain in debt to the record label after the recording of the first album if other revenue streams are not sufficient to recoup the advance. This debt is then carried forward and deducted from any profits on the second album, along with the advance given to record

¹³⁹ Sara Karubian, *360° Deals: An Industry Reaction To The Devaluation of Recorded Music*, 18 S. CAL. INTERDISC. L.J. 395, 429 (2009).

¹⁴⁰ Kathryn Rosenberg, Note, *Restoring the Seven Year Rule in the Music Industry*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 275, 296 (2015).

¹⁴¹ ARTIFACT, *supra* note 1, at 31:00.

¹⁴² *Id.*

¹⁴³ Steve Gordon, *How to Avoid Getting Completely Screwed by a 360 Degree Deal...*, DIGITAL MUSIC NEWS (July 2, 2013), <http://www.digitalmusicnews.com/2013/07/02/threesixty/>.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

the second album. Clearly cross-collateralization clauses serve to benefit the record label alone by safeguarding their investment and, unsurprisingly, remain largely non-negotiable. Although RIAA premised its argument on the large investments record labels make, it is interesting to note that artists in industries such as literature and film also require similar investments before generation of profit, while still enjoying the full protection of the seven-year statute and without being subjected to possible damages.¹⁴⁶

Artists have not held back from expressing their outrage with this system of keeping the artist in debt, while the record label derives profit first. Notably, during Courtney Love's dispute with Universal, Love took to the Internet to detail the economics of the industry and explain the extent of the artist's profits, saying, "the band may as well be working at a 7-Eleven."¹⁴⁷ Love explained that, while a band may experience enormous commercial success, the artist does not derive any tangible benefits.¹⁴⁸ Notably, 30 Seconds to Mars' front man, Jared Leto, also alluded to the possibility that the band's issues with EMI perhaps began as an issue with finances and accounting, explaining that the band had not derived any profits, and, in fact, was millions of dollars in debt to the label,¹⁴⁹ even after achieving enormous success.¹⁵⁰

2. The New Wave of 360 Deals and Their Effect on Safeguarding Investment Justifications

While a band remaining millions of dollars in debt to their record label and not receiving any profits after achieving enormous commercial success may seem outrageous, 30 Seconds to Mars actually had a more artist-favorable contract than the new wave of standard recording contracts today.¹⁵¹ Even though 30 Seconds to Mars remained

¹⁴⁶ Connie Chang, *Can't Record Labels and Recording Artists All Just Get Along?: The Debate over California Labor Code S 2855 and Its Impact on the Music Industry*, 12 DEPAUL-LCA J. ART & ENT. L. & POL'Y 13, 19 (2002).

¹⁴⁷ Courtney Love, *Courtney Love does the math*, SALON (June 14, 2000, 3:02 PM EDT), http://www.salon.com/2000/06/14/love_7/.

¹⁴⁸ *Id.* ("Hearing yourself on the radio, selling records, getting new fans and being on TV is great, but now the band doesn't have enough money to pay the rent and nobody has any credit.")

¹⁴⁹ Mike Masnick, *EMI/Virgin Records Sues Platinum Selling Band For \$30 Million... Despite Not Paying Them A Dime In Royalties*, TECH DIRT (Aug. 21, 2008, 7:33 AM), <https://www.techdirt.com/articles/20080820/0204472040.shtml> ("If you think the fact that we have sold in excess of 2 million records and have never been paid a penny is pretty unbelievable, well, so do we. And the fact that EMI informed us that not only aren't they going to pay us AT ALL but that we are still 1.4 million dollars in debt to them is even crazier.")

¹⁵⁰ Andrew Williams, *Our legal battle was not about the money, says 30 Seconds To Mars's Jared Leto*, METRO (Nov. 12, 2013, 6:00 AM), <http://metro.co.uk/2013/11/12/our-legal-battle-was-not-about-the-money-says-30-seconds-to-marss-jared-letto-4182597/> ("The band's subsequent three albums, world tour and ten million sales prove Leto's music career is no vanity project....")

¹⁵¹ *Id.* ("[W]e don't have a 360 deal like some other artists, where the record company takes a piece of everything.") (internal quotations omitted).

in debt to its label as a result of album production and associated costs, and even though their contract may have allowed for cross-collateralization, their contract did not allow EMI to participate in all of the band's revenue streams, or what is commonly known as a 360 deal.¹⁵²

With album sales on the steady decline, labels have sought new ways to turn profit on artists.¹⁵³ 360 deals allow record labels to compensate for declining record sales by taking a percentage of the artist's ancillary rights.¹⁵⁴ Ancillary rights encompass earnings derived from such revenue streams as concert ticket sales, merchandising, and endorsement opportunities.¹⁵⁵ Notably, the revenue streams that labels participate in through 360 deals are not limited to revenue streams related to music.¹⁵⁶ Labels may also demand revenue from such avenues as appearances in movies and TV,¹⁵⁷ thereby allowing labels to derive income from opportunities that the label has not worked to secure for the artist, and, in fact, that the label was not involved in at all.¹⁵⁸ While the percentages taken vary from contract to contract, it is not unheard of for a record label to demand fifty percent of profits from streams such as merchandise.¹⁵⁹ Record labels can even demand profits from such far-removed revenue streams as an artist selling photographs of their new baby to a tabloid magazine.¹⁶⁰ In effect, 360 deals exploit the most viable revenue streams of the artist, thereby insuring that the artist will not only remain in debt to the label, but will not derive a commensurate

¹⁵² ARTIFACT, *supra* note 1, at 1:20:00 ("If 30 Seconds to Mars started today, they'd have an even worse deal than they originally signed 'cause they have what they call these 360 deals. They'd have to give away a piece of their merchandising and their touring to get their record deal.").

¹⁵³ *Id.* at 1:20:36 ("It's direct response to the fact that no one's selling 10 million records anymore. Even when you have a big hit, they aren't as big as they used to be. So if you're going to invest big money in making an artist famous, then you've got to find more ways to collect.").

¹⁵⁴ Tiffany Simmons-Rufus, Esq., "Double Edged Sword": *An Overview of the 360 Deal*, AMERICAN BAR ASSOCIATION (last visited October 3, 2015), http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/an_overview_of_the_360_deal.html.

¹⁵⁵ *Id.*

¹⁵⁶ Gordon, *supra* note 143 ("In fact, most 360 deals have catch-all phases giving the label a financial interest in everything else that the artist does in the entertainment business.").

¹⁵⁷ *Id.*

¹⁵⁸ Ian Brereton, *The Beginning of A New Age?: The Unconscionability of the "360-Degree" Deal*, 27 CARDOZO ARTS & ENT. L.J. 167, 194 (2009) ("As a whole, 360 deals confer major record labels a substantial financial interest in areas of artists' careers in which they are neither actively involved nor provide any services.").

¹⁵⁹ Gordon, *supra* note 143 ("In an interview about 360 deals with entertainment attorney Elliot Resnick... we referred to the splits in a form agreement that he supplied. The contract provided that the label's take for various streams was as follows: 50% Merch.... These above percentages are typical but the actual amounts vary from deal to deal.").

¹⁶⁰ ARTIFACT, *supra* note 1, at 1:20:47 (discussing entertainment lawyer Peter Paterno recalling a conversation with a record label in which the label stated it would participate in revenue from a client selling photos of their child to a tabloid magazine).

amount of profit from their other endeavors. These 360 deals produce even more onerous results for an artist when the deal also features a cross collateralization clause. Thus, a 360 deal with a cross collateralization clause would not only allow a record label to take a percentage of profits from all income streams, but also allow the application of profits from one stream to cover costs from another. In this way, these two mechanisms operating together allow a record label to safeguard financial investment in recording by exploiting more profitable revenue streams.

In effect, while the contracts at issue in recent disputes centering around section 2855 clearly feature unfair provisions, the new wave of 360 deals, which are quickly becoming industry standard, only serve to further exploit the artist financially. Whereas artists in previous disputes rallying against section 2855(b) had a strong argument that the statute imposed involuntary servitude, in which the artist either remained in the contract or was subject to legal action,¹⁶¹ those artists were still able to derive profits from ancillary revenue streams.¹⁶² So while the artists may have been effectively stuck in a contract, they could still potentially count on ancillary rights to drive profits. For example, since 30 Seconds to Mars was not locked into a 360 deal,¹⁶³ the label most likely could not take a percentage of their touring and merchandising revenues. Therefore, in previous disputes, even if an artist was sued for damages, the artist would have still been able to derive revenue from other streams, such as endorsements, merchandising, and other entertainment-related appearances.¹⁶⁴ However, with a 360 deal, a label may not only sue the artist for damages upon the exercise of the termination right as a result of section 2855 (b), but also participate in all revenue streams until the exercise of termination.¹⁶⁵ Thus, the record labels' safeguard of investment justification for the amendment to section 2855 seems even less sound, as labels now have access to all revenue streams, including ones in which they did not invest and seemingly have no attachment.

Against a backdrop of decline in record sales and piracy abound, these clauses serve to recoup the financial investment of the labels as quickly as possible, regardless of the state of the music industry. While this insurance on their investment may seem fair, artists can remain severely in debt to their labels if record sales do not amount to more than the advance, plus numerous added costs. An artist simply cannot afford to exit a recording agreement after seven years and face the

¹⁶¹ Gardner, *supra* note 4, at 743.

¹⁶² *Id.*

¹⁶³ ARTIFACT, *supra* note 1, at 1:20:00.

¹⁶⁴ Gardner, *supra* note 4, at 743.

¹⁶⁵ Simmons-Rufus, *supra* note 154.

prospect of damages while already in debt to the label.

3. 360 Deals and Their Effect on the Justification of Artist Negligence

In campaigning for an amendment to section 2855, RIAA and record labels also claimed that artist negligence was a chief source of undelivered records.¹⁶⁶ RIAA further argued that artists favoring other pursuits, such as TV appearances and live concerts, caused this negligence.¹⁶⁷ However, neither of these justifications have sound basis anymore. Not only do artists have increased marketing and promotional obligations, which naturally delay the time between production of albums, but, with the new guard of 360 deals, record labels derive profits from these other pursuits of the artist.

While at the time of the amendment, it may have been possible for an artist to produce seven albums within a seven year time span, this no longer holds true and, in fact, is undesirable for both record labels and artists alike.¹⁶⁸ In a previous age of music, it was not unheard of for an artist, such as Prince or Elton John, to produce an album roughly once a year (or even less).¹⁶⁹ However, this immense productivity took place during a time in which record sales were a viable avenue of making profits.¹⁷⁰ Nowadays, comparatively, with a steady increase in the cost of concert tickets, profit is primarily derived from touring.¹⁷¹ For an artist without a 360 deal, meaning the record label would not share in revenue from touring or merchandise,¹⁷² touring is a means to produce income.¹⁷³ In fact, touring has long been the primary source of income for artists, even when album sales were at their height.¹⁷⁴ Even if a band is not locked into a 360 deal in which the label derives profit from touring and merchandise, touring provides a necessary promotional aspect, which benefits the label through exposure to potential

¹⁶⁶ Gardner, *supra* note 4.

¹⁶⁷ Chuck Philips, *Lawmakers Take Aim at Music Industry Contracts*, L.A. TIMES (Aug. 8, 2001), <http://articles.latimes.com/2001/aug/08/business/fi-31594/2>.

¹⁶⁸ Love Cross Complaint, *supra* note 18.

¹⁶⁹ Mark Caro, *Why do albums take so long to make?*, CHICAGO TRIBUNE (Aug. 12, 2014, 5:21PM), <http://www.chicagotribune.com/entertainment/ct-why-do-albums-take-so-long-2014-0812-column.html> (“Prince released his first 10 albums from 1978 to 1988; Elton John reigned with 11 studio albums between 1969 and 1976 . . .”).

¹⁷⁰ *Id.* (“Now, for both established and up-and-coming acts, there’s this elephant in the room: Album sales no longer necessarily pay the bills.”).

¹⁷¹ *Id.*

¹⁷² Simmons-Rufus, *supra* note 154.

¹⁷³ Caro, *supra* note 169.

¹⁷⁴ Frank DiGiacomo, *Economist Paul Krugman on How to Fix the Music Industry (and Why Not Much Has Changed in the Last 150 Years)*, BILLBOARD (June 19, 2015), <http://www.billboard.com/articles/business/6605432/paul-krugman-how-to-fix-music-industry> (“Even in the height of the CD era, artist earnings from live performances were something like seven times that from their recording.”).

consumers of music.

With 360 deals, or at least some form of them, quickly becoming standard,¹⁷⁵ and record sales on the decline,¹⁷⁶ record labels actually have an incentive to encourage touring and the pursuit of other avenues, such as TV appearances. This changing paradigm has produced a new idea of productivity, with artists such as Taylor Swift only producing an album every two or three years.¹⁷⁷ While at the time of the amendment, an artist touring and seeking out other projects other than recording albums took away profit from the label, this is simply no longer true. While in 1985, a record label would not have had the financial incentive to encourage an artist, such as Madonna, to pursue movie appearances,¹⁷⁸ the financial incentives have changed because the record label has a stake in those profits. Since this financial incentive seems to be the basis of the labels' justification for artist negligence causing undelivered albums, this concern is now mitigated by 360 deals. Simply put, record labels cannot have their cake and eat it too by simultaneously claiming artist negligence while deriving enormous profits from these other revenue streams of the artist.

IV. SECTION 2855(B) AND DAMAGES THEORIES

Since section 2855(b) lacks a definition of the term “damages,”¹⁷⁹ artists are left vulnerable to being immediately slapped with a lawsuit for an uncertain amount of liability upon exercise of their termination right after seven years. Since the legislature has not provided guidance as to how much in damages for undelivered albums a record label is capable of recovering from an artist, the record label holds all the cards in the dispute. Without guidelines or a limit on damages, the record label can essentially sue for a seemingly arbitrary dollar amount once the termination right is exercised.¹⁸⁰ After all, “it doesn’t keep [the record labels] awake suing you for [millions of dollars],” but rather it serves to exert emotional and financial stress on the artist until the artist caves in and agrees to settle.¹⁸¹

Not only do 360 deals make justifications given for the amendment unreasonable, they also make a potential damages calculation under the statute even more onerous to artists. Since the statute lacks a definition

¹⁷⁵ ARTIFACT, *supra* note 1, at 1:21:00.

¹⁷⁶ ARTIFACT, *supra* note 1, at 1:21:00.

¹⁷⁷ Caro, *supra* note 169.

¹⁷⁸ *See generally* Madonna, *supra* note 76.

¹⁷⁹ Cal. Lab. Code § 2855 (West 1989 & Supp. 2003).

¹⁸⁰ ARTIFACT *supra* note 1, at 00:05:15 (Recalling COO of EMI, Jeff Kempler saying of EMI’s \$30 million lawsuit against 30 Seconds to Mars, “I have no idea where the number came from, other than it certainly wasn’t a wink to the press, or weren’t we clever to use the same number.”).

¹⁸¹ ARTIFACT, *supra* note 1, at 00:06:55.

of damages,¹⁸² record labels argue that a damages calculation should be based on lost profits based on the undelivered albums. At the time of the amendment to section 2855, profits were derived largely from record sales and labels did not participate in other revenue streams. However, with the taking of a percentage of revenue from ancillary rights becoming standard, the potential damages calculation is even more oppressive to the artist.

A. *Potential Damage Theories: Lost Profits*

Without statutory guidance for a definition of damages,¹⁸³ and without case law on the matter, artists are left to speculate potential damages amounts when considering whether to terminate a contract under section 2855. In suggesting a basis for damages, record labels put forth the theory of damages based on lost profits, calculated by expected profits on the additional undelivered albums.¹⁸⁴

However, this lost profits approach is problematic for a few reasons. An analysis of lost profits damages would need to include a finding that the defendant's conduct was a proximate cause of the damages, that the damages were foreseeable, and that the damages can be shown with reasonable certainty.¹⁸⁵ A theory of lost profits presents a potential issue for the reasonable certainty prong of the analysis.¹⁸⁶ First and foremost, lost profits are "notoriously hard to quantify."¹⁸⁷ For example, prior success of an artist does not necessarily guarantee the success of future albums, and little success in the past does not necessarily preclude enormous success of a future album. Past record sales, evidence of a fan base, and other artist data could be used to help with an assessment of lost profits; however, that assessment would still lack certainty.¹⁸⁸ While commentators have suggested that a court should not be involved in assessing such an incalculable number,¹⁸⁹ a lack of statutory guidance by the legislature requires that courts potentially make this rather subjective assessment of an artist's present and future career success. Secondly, the theory of lost profits in today's music industry is even more onerous to artists than when the damages amendment was introduced. At the time of the amendment, record labels only derived profits from record sales (along with recoupment of

¹⁸² Cal. Lab. Code § 2855 (West 1989 & Supp. 2003).

¹⁸³ *Id.*

¹⁸⁴ 116 HARV. L. REV., *supra* note 32, at 2642.

¹⁸⁵ Gardner, *supra* note 4, at 740 ("Recovery of damages for lost profits depends on three questions: whether the defendant's conduct was the proximate cause of the damages; whether the damages were foreseeable as a probable result of the breach at the time the contract was made; and whether the damages can be proven with reasonable certainty.").

¹⁸⁶ Gardner, *supra* note 4, at 740.

¹⁸⁷ Katten Muchin Rosenman LLP, *supra* note 70.

¹⁸⁸ Gardner, *supra* note 4, at 741.

¹⁸⁹ *See id.* at 742.

the advance and other expenditures).¹⁹⁰ However, with labels now also deriving profits from ancillary activities through the use of 360 deals,¹⁹¹ a record label would likely argue that a lost profits estimation would include revenue from those ancillary avenues as well. This, potentially, results in an even more outrageous damages calculation than was likely at the time of the amendment. Additionally, if an artist is successful in terminating the contract, he is free to seek out another label. However, since label profits almost always outweigh artist profits, the damages that the artist would be subject to would certainly outweigh any profits made by the artist under a new record deal.¹⁹² Therefore, with no limit or guidelines on this lost profits calculation, an artist is not incentivized to exercise his legal right to terminate.

B. *Potential Damage Theories: Actual Investment*

Commentators, in contrast, have advocated for a theory of damages based on actual investment by the record label, stating that a lost profits theory is too speculative.¹⁹³ These commentators suggest that expenditures in the artist's career, such as advances and recoupable expenditures, including recording and video production costs, should form the sole basis of liability.¹⁹⁴ However, with the decline of record sales and pervasive piracy, the paradigm of an artist remaining in debt to their record label even after commercial success is becoming all too common. Record labels are entering into contracts fully apprised of current economic conditions and are choosing to make large pre-production advances. An artist should not be punished for present economic conditions by having to repay advanced costs if the artist has rendered his recording, marketing, and promotional obligations under the agreement in good faith. It is also suggested that artists should only be liable when a label has exercised an option and paid the advance, after which the artist terminates the agreement.¹⁹⁵ This damages theory also seems to only provide a solution for a very narrow set of circumstances, as record labels in campaigning for the amendment did not stress concern about an artist "making off with advances."¹⁹⁶ While this calculation would certainly be less onerous to the artist, it would effectively make the damages provision inapplicable in all but a very narrow set of circumstances, rendering a full repeal of the amendment a far more preferable alternative.

¹⁹⁰ *Id.* at 726.

¹⁹¹ Simmons-Rufus, *supra* note 154.

¹⁹² Gardner, *supra* note 4, at 742.

¹⁹³ See 116 HARV. L. REV., *supra* note 32, at 2644.

¹⁹⁴ 116 HARV. L. REV., *supra* note 32, at 2647-48.

¹⁹⁵ 116 HARV. L. REV., *supra* note 32, at 2648.

¹⁹⁶ 116 HARV. L. REV., *supra* note 32, at 2648.

C. Effect of Lack of Statutory Guidance on Damages

This uncertainty about the amount of damages that the artist will be exposed to seems to play an enormous role in the decisions of artists to settle with their record labels instead of litigating.¹⁹⁷ In fact, the provision appears “uniquely geared to forcing settlement.”¹⁹⁸ For example, 30 Seconds to Mars’ documentary shows them extensively wrestling with whether to continue litigation against EMI, in the face of such an obscene amount of possible liability.¹⁹⁹ As mentioned before, 30 Seconds to Mars was not locked into a 360 deal,²⁰⁰ and EMI still claimed \$30 million in liability. This begs the question: how obscene an amount of damages would a record label claim under a 360 deal, when those damages could encompass virtually every action in the entertainment industry taken by the artist?²⁰¹ Frankly, that is simply not a question a struggling artist wants the answer to. This uncertainty serves to create a situation in which the artist is incentivized to remain with the record label, regardless of the number of years that have passed or the character of the relationship with the label, in order to avoid liability. Rather than being free to pursue other employment opportunities, and possessing the ability to change circumstances in order to optimize their welfare,²⁰² artists must choose to remain bound to a contract for an inordinate number of years or be figuratively slapped with a lawsuit for an astounding amount of liability. Without the resources or time to weather a drawn out lawsuit, artists are forced to compromise with the very record label they seek to depart from. Should the legislature step in to provide guidance for the calculation of damages, an artist would have a better bargaining position in a potential dispute with a record label.

V. PROPOSAL

While section 2855 becomes the focus of attention during the time of a dispute between an artist and his or her record label, historically, the spotlight has waned shortly after settlement between the parties.²⁰³ We cannot sit idly and wait another few years for an additional major dispute between an artist and a label to address artists’ concerns about the statute. We must revive the efforts made by Senator Kevin Murray in 2002 to draw the legislature’s attention to review of section 2855.²⁰⁴

¹⁹⁷ See generally ARTIFACT, *supra* note 1.

¹⁹⁸ Katten Muchin Rosenman LLP, *supra* note 70.

¹⁹⁹ ARTIFACT, *supra* note 1.

²⁰⁰ ARTIFACT, *supra* note 1.

²⁰¹ Gordon, *supra* note 144.

²⁰² 116 HARV. L. REV., *supra* note 32.

²⁰³ See, e.g., *id.* at 2636; Montgomery, *supra* note 60.

²⁰⁴ SB 1246, *supra* note 14.

Specifically, a revival of a campaign to allow the legislature to review the applicability of section 2855 to recording contracts,²⁰⁵ with a focus on the section 2855(b) damages provision, must occur.²⁰⁶ The legislature must step in to evaluate the application of the provision in the face of a changed music industry. When considered in light of current economic circumstances and 360 deals, the damages provision serves to create an even more pervasively unfair result for the artist.

While a full repeal of section 2855(b)(3)²⁰⁷ has been furiously advocated for in the past and remains the ideal solution for artists,²⁰⁸ those numerous efforts have not seen much success.²⁰⁹ Since the number of major record labels dominating the music industry has only decreased²¹⁰ since the last major dispute over section 2855,²¹¹ the power to stall these efforts has only grown more concentrated. Given the power that these major labels exercise over the industry,²¹² and their necessary role in the career of an artist,²¹³ a full repeal appears unlikely.

While a full repeal remains unlikely, the legislature must review the statute in light of current industry circumstances,²¹⁴ and the resulting inapplicability of justifications given by the recording industry for a damages provision.²¹⁵ I propose two compromises to remedy the pervasively unfair results that the statute has caused: (1) the addition of a good faith requirement, and (2) guidance from the legislature on the calculation of damages, specifically a limit on recovery of damages to one undelivered album.

Even though record labels have claimed that artist negligence causes options under a recording contract to remain unfulfilled, extensive marketing and promotional obligations are the more likely cause. It is certainly reasonable to demand damages on undelivered albums from an artist that has intentionally neglected his duties to record under the agreement to the detriment of the record label. For example, it would be reasonable to seek damages from an artist who takes the advance from the record label and then subsequently refuses to record or from an artist who intentionally sits out the remainder of the contract. However, the damages provision applies to all artists equally, rather than being restricted to cases of willful artist neglect. If an artist

²⁰⁵ SB 1246, *supra* note 14.

²⁰⁶ Cal. Lab. Code § 2855(b)(3) (West 1989 & Supp. 2003).

²⁰⁷ *Id.*

²⁰⁸ *See generally* Rosenberg, *supra* note 140.

²⁰⁹ Oppelaar, *supra* note 46.

²¹⁰ Christman, *supra* note 8.

²¹¹ *See generally* Lewis, *supra* note 52.

²¹² Christman, *supra* note 8.

²¹³ Gardner, *supra* note 4.

²¹⁴ *See supra* Section II.A for an analysis of current music industry conditions.

²¹⁵ *See supra* Section II.B for an explication of those justifications and an analysis of their applicability.

is required to participate in extensive promotional and marketing obligations, these required activities could naturally delay the time between recording albums. The artist is required to participate in these record-delaying activities, while still facing punitive damages when attempting to legally terminate the agreement. It is simply unreasonable for a record label to have the ability to not only require these activities, but to demand damages from unfulfilled recording obligations when those recording dates are pushed back by required promotional efforts.

To remedy this, the first change that must be implemented is a good faith requirement, along with an abolishment of damages as a result of a finding of good faith. If an artist has attempted, in good faith, to record albums required under the agreement with a reasonable time period in between each recording, the artist should not be subjected to punitive action in the form of damages. Provided that there is no evidence of intentional action to sit out the contract until seven years from commencement, there is no reasonable basis for punishing the artist. Although record labels may take the position that the damages constitute compensation of future losses, these future losses are never guaranteed even with a massively successful artist.²¹⁶ A good faith requirement would serve to hold the artist accountable and reduce the possibility of artist negligence, while providing an artist with some measure by which to evaluate his actions in deciding whether to exercise a termination right. A good faith requirement would incentivize the artist to comply with all obligations under the agreement, while not being subject to damages if, because of economic or other conditions, a record label has not recouped all of its investment.

The second change that must be implemented is a limit on the damages imposed on an artist to one undelivered album, if an artist has not complied in good faith. Artists may have many reasons for sitting out a contract, including an unproductive relationship with his label or the financial need to pursue other income avenues. While these reasons do not excuse acting in bad faith to wait out the agreement, holding an artist liable for damages for all options left on the agreement is excessively punitive and the measure of which is wholly speculative. This compromise would insure that a record label can recoup its immediate or near future potential losses, while granting the artist the freedom to seek out a different record label. This limit would also only put a slight short-term financial burden on the artist and allow the artist to better optimize his welfare by lessening the time it would take to turn profit under the new recording contract.²¹⁷ In addition, while the damages for one undelivered album may not be simple to calculate, the

²¹⁶ Katten Muchin Rosenman LLP, *supra* note 70.

²¹⁷ Gardner, *supra* note 4, at 742.

calculation would be much less speculative than a calculation of damages based on multiple albums, which would necessarily be influenced by factors such as success of each previous album.

Finally, the legislature must step in to determine how to calculate damages under the statute. Since these disputes usually do not make it to a courtroom, a record label can simply claim any amount in damages in order to force the artist into settlement. This causes a perversion of the intent of the legislature in enacting the statute²¹⁸ by restricting the freedom of contract and all but eliminating the prospect of seeking out new employment opportunities after seven years. Furthermore, with the possibility of profits from ancillary rights being included in a damages calculation, the connection between the termination of the agreement and a claimed damages amount by the record label can become even more attenuated and onerous on the artist. The legislature should seek to limit a damages calculation to lost profits based on reasonably projected revenue from record sales, touring, and merchandising. The inclusion of potential lost profits from other ancillary activities unrelated to music merely serves to create a more pervasively unfair calculation, since these profits are even more speculative and incalculable than revenue from traditional music-related avenues. These proposed changes would serve to mitigate the unfair results that section 2855(b) has continued to impose on artists.

CONCLUSION

While much ink has been spilled expounding on recording contracts and the doctrine of unconscionability,²¹⁹ the reality is that in order for a court to have a chance to find a standard recording contract's term provision unconscionable, a dispute must actually make it before a court. However, the statute, as written, simply does not make it feasible or attractive for an artist to maintain the wherewithal necessary to litigate against a record label, especially a major label.²²⁰ Furthermore, an artist may be wary to even exercise a termination right after seven years for fear of an uncertain amount of liability. Considering the public policy reasons for enacting the statute, this cannot be the result that the legislature intended.

Furthermore, in light of a changed music industry, the justifications for the damages provision seem less valid than at the time of the passage of the amendment. Instead of waiting for another dispute

²¹⁸ 116 HARV. L. REV., *supra* note 32.

²¹⁹ See generally Gardner, *supra* note 4; 116 HARV. L. REV., *supra* note 32; Chang, *supra* note 146.

²²⁰ S.B. 1246, *supra* note 14 (“While the artist might prevail in that litigation, . . . no artist can afford to risk taking off three to five years during his or her career while the litigation takes place.”).

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between an artist and a record label to open the discussion of section 2855 again, the legislature must step in to evaluate the operation of section 2855 in today's music industry. With the future of the music industry more uncertain than ever, and artists struggling to generate profits, the legislature cannot allow blameless artists that provide a necessary service to the population to be subject to lawsuits for an outrageous amount of damages. As is, the statute allows record labels to have the upper hand in disputes and forces the artist to make the choice between indentured servitude and enormous potential liability. In good conscience, the legislature cannot allow this result to persist.

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* Notes Editor, CARDOZO ARTS & ENT. L.J. Vol. 35, J.D. Candidate, Benjamin N. Cardozo School of Law (2017); B.A., Politics, New York University (2012). I would like to thank all of my loved ones for their enduring encouragement and unrelenting support. I would also like to thank my mentors, Jonathan Ehrlich and Kim Zeitlin, for their words of wisdom and guidance throughout my law school journey. This Note is dedicated to my great-grandmother, Clara Marcello, a strong and courageous woman whose example I strive to live up to.