

# ADR IN THE MUSIC INDUSTRY: TAILORING DISPUTE RESOLUTION TO THE DIFFERENT STAGES OF THE ARTIST-LABEL RELATIONSHIP

*Kaleena Scamman*

## I. INTRODUCTION

“Stop trying to treat music like it’s a tennis shoe, something to be branded. If the music industry wants to save money, they should take a look at some of their six-figure executive expense accounts. All those lawsuits can’t be cheap either.”<sup>1</sup>

Various types of disputes within the music industry<sup>2</sup> and their subsequent litigation constitute much of the music news we hear today.<sup>3</sup> The music industry is comprised of many different relationships, as well as ever-changing and developing technology, creating new problems not yet encountered and new solutions left to be worked out.<sup>4</sup> These many factors contribute to the great number of disputes arising in the music industry today.<sup>5</sup>

---

<sup>1</sup> Jeff Tweedy Quotes, [http://www.brainyquote.com/quotes/authors/j/jeff\\_tweedy.html](http://www.brainyquote.com/quotes/authors/j/jeff_tweedy.html) (last visited Feb. 20, 2008).

<sup>2</sup> See The Chartered Institute of Arbitrators, *New Scheme Means Musicians Can Now Afford to Fight Contractual Disputes*, <http://www.arbitrators.org/Institute/PRMusiciansUnion.asp> (last visited Feb. 20, 2008) (“Contractual disputes, non-payment for gigs and internal band issues all lead to disputes within the music industry.”).

<sup>3</sup> See David Ortiz, *Brown Ensnared In National Music-Sharing Dispute*, PROVIDENCE BUSINESS NEWS, Dec. 31, 2007, <http://www.pbn.com/stories/28950.html> (reporting that Brown University students who used the school’s computer network to illegally copy and share digital music are being fined or threatened with lawsuits); Guylaine Cadorette, *Madonna and Warner Music Settle Maverick Dispute*, HOLLYWOOD (June 15, 2004) [http://www.hollywood.com/news/News\\_June\\_15\\_Madonna\\_Warner\\_Music\\_Settle\\_Dispute\\_Distribs\\_Seek\\_PG13\\_Rating\\_for\\_Fahrenheit\\_911\\_Judge\\_Wont\\_Lower\\_Jacksons\\_Bail\\_More/2401001](http://www.hollywood.com/news/News_June_15_Madonna_Warner_Music_Settle_Dispute_Distribs_Seek_PG13_Rating_for_Fahrenheit_911_Judge_Wont_Lower_Jacksons_Bail_More/2401001) (detailing the circumstances surrounding Warner Music Group buying Madonna out of Maverick Records, the label she co-founded); Jeff Leeds, *Universal in Dispute With Apple Over iTunes*, N.Y. TIMES, July 2, 2007, available at [http://www.nytimes.com/2007/07/02/business/media/02universal.html?\\_r=1&ref=business&oref=slogin](http://www.nytimes.com/2007/07/02/business/media/02universal.html?_r=1&ref=business&oref=slogin) (explaining that Universal Music Group decided not to renew its annual contract to sell music through iTunes).

<sup>4</sup> DAVID BASKERVILLE, PH.D., *MUSIC BUSINESS HANDBOOK 4* (Sherwood Publishing Partners 2001) (“The music business . . . has grown so rapidly in recent decades it could be said that the decision makers are still trying to figure out how to run the store.” (emphasis omitted)).

<sup>5</sup> See discussion *infra* Part IIA-B (describing different types of disputes in the music industry, arising from major record label deals, as well as infringement and ownership issues).

Although there are many relationships in the music industry in which disputes may and often do arise,<sup>6</sup> this note will focus on the relationship between major record labels, specifically, and their artists, as many of the major disputes occur within the *major* label context, as opposed to the independent label.<sup>7</sup> Typically, disputes in the music industry, whether involving contracts or intellectual property (IP) related, are “solved” by litigating.<sup>8</sup> However, different forms of alternative dispute resolution (ADR) instituted at different stages of the artist-label relationship could prove to be beneficial to the artists and the labels, as well as the consuming public.<sup>9</sup>

---

<sup>6</sup> See discussion *infra* Part II (listing the different roles people may play in the music industry).

<sup>7</sup> There are some major differences in the way major labels are run compared to how independent labels function. Major labels are run by business executives, while independent labels tend to be run by only a few people who work closely with each artist. See How Are Independent Artists and New Technologies Dismantling the Impact of Major Record Labels?, [http://hs.riverdale.k12.or.us/~hfinnert/exhib\\_06/davidp/paper5.html](http://hs.riverdale.k12.or.us/~hfinnert/exhib_06/davidp/paper5.html) (last visited Jan. 16, 2008) [hereinafter Dismantling]. The small team of an independent label allows the artist to maintain his original vision of his music, while “the traditional, corporate environment of most major record labels often does not foster the same kind of creative, forward-thinking talent from its business people that is embraced at small independent labels.” How Are Independent Artists and New Technologies Dismantling the Impact of Major Record Labels?, [http://hs.riverdale.k12.or.us/~hfinnert/exhib\\_06/davidp/paper4.html](http://hs.riverdale.k12.or.us/~hfinnert/exhib_06/davidp/paper4.html) (last visited Jan. 16, 2008).

In addition to fostering greater creativity than major labels, the small team of independent labels acts as a sort of small business, rather than a large corporation. With fewer employees and “careful planning and budgeting,” independent labels are “able to keep marketing and overhead expenses within a manageable range. With expenses down, the profit margin is larger. They also have fairer profit sharing deals, often splitting profits equally between the label and the artist.” Sandy Cosser, Indie Labels Vs Major Record Companies, <http://ezinearticles.com/?Indie-Labels-Vs-Major-Record-Companies&id=858375> (last visited Nov. 30, 2007) (describing the differences between major and independent record labels). This is a major point of interest, as many disputes arising in the major label context are related to payment and royalties. With major labels, royalties tend to be weighted heavily in favor of the label, and often times artists may only earn a measly \$1 per disc sold. *Id.* “Major labels . . . have a reputation for giving artists unfavorable deals and rewarding the business team greater than the artist who created the music.” Dismantling, *supra*.

Another major difference between major labels and independent labels that may shed some light on why so many disputes occur in the major label context rather than the independent context is that independent labels let artists keep the rights to their works. This has been a major contention between artists and labels in drafting the initial contract. Also, relating to contract provisions requiring artists to deliver so many albums before they may be released from the contract, large labels prefer to “have the option of not releasing any music an artist has recorded, and all the while the artist remains bound to them by contract and can’t sign up with any other label. The artist is taken out of the public eye and effectively has his or her career terminated at the whim of the label.” Cosser, *supra*.

<sup>8</sup> See discussion *infra* Part II.C (discussing litigation between artists and labels).

<sup>9</sup> See discussion *infra* Part III (exploring the use of ADR in the artist-label relationship).

Part II will discuss the disputes that arise within the major record label and artist relationship in more detail, including a discussion of record deal basics, unfairness debates, infringement and ownership disputes, and litigation.<sup>10</sup> These disputes are largely to blame for the public's growing negative perception of the music industry.<sup>11</sup> Part III defines arbitration and mediation, and explains the benefits of and differences between the two types of ADR. Part III will also discuss the use of ADR in the artist-label relationship specifically, including a discussion of factors to consider in deciding whether to mediate or arbitrate based on the stage of the relationship. Part IV will discuss the problems encountered in suggesting the use of ADR to artists and record labels, and the incentives for artists and labels to overlook their inhibitions, as well as the possibility of a boost from Congress. Finally, Part V summarizes the argument for using ADR to solve disputes efficiently and effectively in the artist-label relationship context.<sup>12</sup>

## II. ARTIST-LABEL RELATIONSHIP DISPUTES

Although there are numerous types of disputes in the music industry arising out of the relationships between agents, managers,<sup>13</sup> band members,<sup>14</sup> record companies, performing rights orga-

---

<sup>10</sup> See discussion *infra* Part II (discussing recording contracts and disputes in the artist-label relationship).

<sup>11</sup> Zeb Schorr, Note, *The Future of Online Music: Balancing the Interests of Labels, Artists, and the Public*, 3 VA. SPORTS & ENT. L.J. 67, 71 (2003) ("Activism by musicians concerning their alleged unjust treatment by major labels has created turmoil within the industry and . . . has increased the public's negative perception of record labels.").

<sup>12</sup> See *infra* Part V (conclusion).

<sup>13</sup> Artists may have disagreements with managers, agents, or lawyers over how their career is being handled and fees that are being paid.

<sup>14</sup> Band disputes often occur when band members decide to leave their band or kick a member out. Also, there are often disputes over ownership when the band parts ways. See Stuart Yahm & Matt Kramer, *Your Ego, My Music: Conflict Management in the Music Industry*, [http://www.lamn.com/index.php?option=com\\_content&task=view&id=39&Itemid=34](http://www.lamn.com/index.php?option=com_content&task=view&id=39&Itemid=34) (last visited Feb. 20, 2008) (Artists often form relationships "before they have fully expressed their needs and expectations of each other and the group. As a result, they are surprised and unprepared for the conflicts that will surely arise.").

Marilyn Manson has recently countersued his former keyboardist for breach of contract. Manson claims his former band mate did not fulfill his obligations to take part in master recordings and contracts. Manson's suit came after the former band mate sued Manson claiming Manson shorted him on salary. MTV News Staff, *Marilyn Manson Countersues Bandmate* (Dec. 22, 2007) [http://www.mtv.com/news/articles/1578528/20071222/marilyn\\_manson.jhtml](http://www.mtv.com/news/articles/1578528/20071222/marilyn_manson.jhtml) (outlining the circumstances surrounding the suits between Manson and band mate Stephen Bier).

nizations,<sup>15</sup> broadcasters, distributors,<sup>16</sup> artists, producers,<sup>17</sup> and the consuming public,<sup>18</sup> among many others,<sup>19</sup> perhaps one of the most publicized types of music industry related disputes evident in the media involves the artist-record label relationship.

---

In addition to Manson's suit, in 2002 former Destiny's Child members filed a federal lawsuit that claimed the other members of the group made comments about them that violated an agreement reached in 2000, which prohibited each party from making such remarks against the other. The original suit in 2000 consisted of the former members suing the remaining members for wrongful expulsion. Joe D'Angelo, *Destiny's Child Ex-Members Sue Group Over 'Survivor' Jabs, Sony Music Also Named for Breach of Contract, Defamation, Libel, Fraud* (Mar. 1, 2002) [http://www.mtv.com/news/articles/1452696/20020301/destinys\\_child.jhtml](http://www.mtv.com/news/articles/1452696/20020301/destinys_child.jhtml) (describing the events surrounding the suit against Destiny's Child). In addition to the members, Sony Music, the parent company of Destiny's Child's label, Columbia Records, was also sued for breach of contract, defamation, libel and fraud. *Id.*

<sup>15</sup> Performing rights organizations protect its members' musical copyrights by monitoring public performances of their music. They also collect fees from users of the music and distribute them back to the copyright holders. The performing rights organizations in the United States include the American Society of Composers, Authors and Publishers (ASCAP), Broadcast Music Incorporated (BMI), and the Society of European Stage Authors and Composers (SESAC). American Society of Composers, Authors and Publishers, [http://en.wikipedia.org/wiki/American\\_Society\\_of\\_Composers%2C\\_Authors\\_and\\_Publishers](http://en.wikipedia.org/wiki/American_Society_of_Composers%2C_Authors_and_Publishers) (last visited Nov. 15, 2007); *see also* DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 33 (Simon & Schuster 2000) (explaining the workings of performing rights societies).

<sup>16</sup> Music distributors and retailers have been involved in litigation concerning issues such as price fixing. In 2002, a lawsuit alleged that the five largest distributors of compact discs and three music retailers engaged in a price-fixing scheme, in which the record companies "agreed to subsidize the cost of promoting a CD for retailers that agreed to sell it for a 'minimum advertised price' set by the labels." The distributors and retailers eventually settled the class action suit that was brought by the attorney generals of forty-one states for \$143 million. Jennifer Norman, Note, *Staying Alive: Can the Recording Industry Survive Peer-to-Peer?*, 26 *COLUM. J.L. & ARTS* 371, 406 (Summer 2003) (quoting Benny Evangelista, *Consumers Rush to Join CD Settlement*, *S.F. CHRON.*, Jan. 27, 2003, at E1); *Get Money for Music You Bought*, *CHI. TRIBUNE*, Jan. 27, 2003, at 3.

<sup>17</sup> In July of 2005, a Jury determined that R&B singer Ashanti breached a contract with her producer and ordered her to pay him \$630,000. Chris Harris, *Ashanti Breached Contract, Jury Rules; Singer Must Pay Producer \$630,000* (July 22, 2005) <http://www.mtv.com/news/articles/1506183/20050722/ashanti.jhtml> (describing the events surrounding the suit against Ashanti). The producer filed a civil suit against Ashanti in 2004, claiming she breached her contract with him after not compensating him when he released her from his contract soon after she signed with a major label, but only with the understanding of receiving certain compensation. *Id.*

<sup>18</sup> *See* BASKERVILLE, *supra* note 4, at 3 ("The successful musician can hardly function without the ongoing professional assistance of a whole array of associates.").

<sup>19</sup> Singer Chris Brown is currently being sued by his set designer for breach of contract. Set designer, John Troxtel, claims in a federal lawsuit filed December 24, 2007, that he was only paid for some of his labor. Troxtel is seeking more than \$1 million in damages and is also suing Brown for unjust enrichment. *See* *Brown Sued for Breach of Contract* (Jan. 3, 2008) [http://www.mtv.com/news/articles/1578909/20080103/t\\_i\\_.jhtml](http://www.mtv.com/news/articles/1578909/20080103/t_i_.jhtml) (providing a short summary of the suit against Chris Brown).

There are many sources of disputes in artist-label relationships.<sup>20</sup> Many disputes arise out of artist complaints. Artist complaints focus on several concerns, including inequitable recording contracts (i.e. “poor royalty schemes,”<sup>21</sup> which essentially dictate how much the artist gets paid when their album sells, and “injurious accounting policies,”<sup>22</sup>) and ownership issues that arise after the official relationship has ended.

### A. Major Record Label Deals

The major label record deal is a key source of many artist complaints. The typical record deal consists of many provisions. The “term” is the length of the artist’s recording contract. In the past, the standard length was often one year with a number of one-year options available for the company to extend the contract. Today, it is common for the length of the contract to be tied to recording release requirements.<sup>23</sup> For example, a contract may

---

<sup>20</sup> Disputes may arise out of the recording agreement, infringement, ownership issues, etc. See discussion *infra* Part II (discussing different sources and types of disputes in the artist-label relationship).

<sup>21</sup> Music royalties are paid in exchange for the privilege of using another person’s music. There are many types of royalties depending on the specific use of the music, such as performance royalties, mechanical royalties, and songwriter royalties. BMI, ASCAP, and SESAC collect performance royalties, which are owed when a person performs a copyrighted song. Buche & Associates, P.C., Music Law, <http://www.westerniplaw.com/music.html> (last visited Jan. 17, 2008) (describing the different types of royalties in the music industry).

When a person wants to record and distribute a song written by others, a mechanical license is needed, which translates to mechanical royalties paid to the owner. Congress sets a statutory rate for mechanical royalty rates; however, “it is commonplace for record companies to contract to pay [only] 75% of the statutory rate in most contracts.” *Id.*

Songwriter royalties are what a songwriter earns every time a reproduction of the artist’s song is sold. This is the royalty referred to when discussing royalty rates in record label contracts. The royalty percentage an artist earns varies depending on many factors, such as the artists’ popularity and the medium licensed. *Id.* A typical royalty on a music album could be in the range of 8-25% of a suggested retail list price. *Id.*

<sup>22</sup> Schorr, *supra* note 11, at 83 (describing the problems faced by artists and labels in the current music industry climate).

<sup>23</sup> Lawyers often attempt to negotiate contracts on a per-album basis. For example, a three-album contract would provide for the artist’s delivery by a certain date and company’s release of the recordings, and would terminate after delivery of the final album. BASKERVILLE, *supra* note 4, at 320. However, “[t]he average recording contract requires seven albums with a normal cycle between each album of approximately eighteen to twenty-four months.” Recording Artists’ Coalition, Seven-Year Statute, [http://www.recordingartistscoalition.com/issues\\_7yearstatute.php](http://www.recordingartistscoalition.com/issues_7yearstatute.php) (last visited Nov. 15, 2007) (explaining the provisions of and controversy around California’s “Seven Year Statute”). This usually ties an artist to a contract that frequently exceeds the seven-year limitation established by California Labor Code §2855(a). *Id.*

contain a record label's commitment to accept one album, and may have an options clause that requires the artist to record and deliver additional albums if the record label so chooses.<sup>24</sup> Typically, a record label will commit to one album with options for six additional albums.<sup>25</sup> It is also common for agreements to include an exclusivity clause,<sup>26</sup> which requires the artist to record only for the label during the term of the contract.<sup>27</sup>

Creative control is also an issue addressed in recording contracts. Artists often demand control over issues such as the selection of songs to be recorded, the producer, and the album's graphic art, but lesser known artists usually have to accept the judgments of the company.<sup>28</sup> Musical group Radiohead recently posted on the group's website concern of their want of control over their music:

What we wanted was some control over our work and how it was used in the future by them [record label, EMI] – that seemed reasonable to us, as we cared about it a great deal. [EMI boss] Mr. Hands was not interested. So neither were we. We made the sign of the cross and walked away. Sadly. (emphasis omitted).<sup>29</sup>

Although Radiohead was able to walk away from their label with continued success, not all artists are able to do that and survive in the music industry.

As far as the label making back their money that they invest in artists, advances the record label gives artists are not returnable,

<sup>24</sup> Note, *California Labor Code Section 2855 and Recording Artists' Contracts*, 116 Harv. L. Rev. 2632, 2639 (2003); see also M. WILLIAM KRASILOVSKY & SIDNEY SHEL, *THIS BUSINESS OF MUSIC: THE DEFINITIVE GUIDE TO THE MUSIC INDUSTRY* 14 (8th ed. 2000).

<sup>25</sup> See Note, *supra* note 24, at 2639.

<sup>26</sup> "Exclusivity" relates to recording albums for only the company with which the artist is signed. The contract does not establish an exclusive relationship, that is, artists may pursue simultaneous careers in film, as producers, etc. See *Labor Code Section 2855: Hearings Before the Senate Comm. On the Judiciary*, 2002 Leg., Reg. Sess. 26 (Cal. 2002) (statement of Hilary Rosen, President and CEO of the RIAA).

<sup>27</sup> See BASKERVILLE, *supra* note 4, at 320 (explaining the different issues that recording contracts typically cover). Although the artist may be required to record for only for the label for the duration of the contract, the contract may be written to permit occasional outside services, such as recording from time to time as a session musician or sideman. *Id.*

<sup>28</sup> See *id.* at 321. Although companies may not want to give up their power, few would force an artist to record or work with a producer with whom the artist could not perform comfortably. *Id.*

<sup>29</sup> FYI\_If You Care, <http://www.radiohead.com/deadairspace/index.php?a=324> (Dec. 29, 2007) (blog posting explaining the circumstances of failing to resign with label EMI).

but are recoupable.<sup>30</sup> That is, if the artist does not sell any albums, he is not held accountable to return the money the label gave him in advance.<sup>31</sup> However, if the album sells, the artist is required to pay back the label before he is able to get any money from album sales for himself.<sup>32</sup> For example, the record label will pay an advance of money to the artist, and keep the artist's royalties until the label is paid back. Companies usually include stipulations in their contracts that they do "not have to pay the artist any royalties . . . until the label has recovered, through a recoupment from the artist's royalties, its out-of-pocket production costs and advances."<sup>33</sup> There is no standard policy among record companies on royalty advances.<sup>34</sup> Royalty offers can range from 8% to 25% of retail prices.<sup>35</sup>

Masters,<sup>36</sup> which are the original recordings, are also a point of contention in major record label contracts. In recording agreements, "[i]nitially, the recording company owns all the rights" to the masters.<sup>37</sup> Although the artists' attorneys often try to negotiate transfer of ownership to their clients when a contract is terminated, recording companies are rarely willing to give up ownership of masters.<sup>38</sup> Another major issue in recording contracts is publishing

---

<sup>30</sup> See BASKERVILLE, *supra* note 4, at 322. A record label recovers its up front recording costs and other advances made to the artist by recouping the artist's royalties. Advances are not returnable in the sense that if the artist does not sell records and hence does not earn royalties, the label will not be paid back. *Id.*

<sup>31</sup> An advance may include video production costs and recording costs, including studio time, equipment rental, travel, union wages paid to the artists, etc. See *id.* at 337 ("Recording expenses that are paid for by the label will be considered an advance against future earnings.")

<sup>32</sup> See *id.* at 322.

<sup>33</sup> *Id.* (explaining the different issues that recording contracts typically cover).

<sup>34</sup> See Buche & Associates, *supra* note 21. (describing features of a typical recording contract).

<sup>35</sup> See *id.*

<sup>36</sup> "A master recording, is an original recording from which copies may be made. . . . The phrase 'original master recording' is commonly used indiscriminately within the music industry. There is only one original master recording, and that's the recording made at the time of the original recorded performance." Master Recording, [http://en.wikipedia.org/w/index.php?title=master\\_recording&oldid=179765063](http://en.wikipedia.org/w/index.php?title=master_recording&oldid=179765063) (last visited Jan. 18, 2008).

<sup>37</sup> See BASKERVILLE, *supra* note 4, at 323 (explaining the different issues that recording contracts typically cover). Typically, independent artists will pay a recording studio up front to produce songs, and since the artist has financed the project, the artist owns the master. However, "[i]f the studio, production company or record company finances the master . . . then that studio or company owns the master. Major record companies . . . will not offer the artist the option to finance the production of their own master" and "the record companies will likely own the masters indefinitely." *Id.*

<sup>38</sup> See *id.* (explaining the different issues that recording contracts typically cover). Record labels have a great interest in retaining ownership of masters, as masters generate income. When record labels own the rights to the master of a sound recording, any reproduction of that

rights and controlled compositions.<sup>39</sup> Record companies “try to persuade the artist to place all of those songs with a publishing company owned by or affiliated with the label” and “[i]f the label’s publishing wing cannot obtain full publishing rights, it will probably attempt to ‘split’ the copyrights in some way, sharing the publishing revenue with the composer-performer.”<sup>40</sup>

It is understandable that artists may have problems with some of these stipulations in recording agreements, and therefore contractual disputes account for much of the artist-label disputes. Recording contracts are traditionally skewed in favor of the record labels. In fact, “approximately 99.6% of all recording artists at major labels are in debt because they receive little, if any, royalties from the sale of their albums.”<sup>41</sup> It is not unusual for artists to fulfill all of their recording obligations and have successful albums, yet still not receive any royalties.<sup>42</sup> An explanation of what may be behind these seemingly contradictory facts is that labels allegedly “intentionally under-report and underpay artist royalties.”<sup>43</sup>

Record companies try to reduce the price on which royalties are calculated in many ways. First, companies generally retain 25% or more of royalties in a “reserve account” in anticipation of returns.<sup>44</sup> Also, royalty discounts include breakage allowance, pack-

---

recording will require a license of the master, which means any person who wants to use that recording must obtain master use rights and pay the record label for their use of the song. *Buche & Associates, supra* note 21 (describing features of a typical recording contract).

<sup>39</sup> A controlled composition clause in a contract refers to the mechanical publishing income that the record company pays you, aside from royalties on the records that are sold. A publisher grants a mechanical license to the record company to reproduce the artist’s songs, and the publisher is entitled to collect the mechanical royalties for every composition on the record that is owned, written, or controlled by the artist. Record companies try to limit the amount they have to pay out because they cannot recoup their expenses against an artist’s publishing income like they can against the royalties. *Recording Contracts – Getting Started in the Music Business*, [http://www.governor.state.tx.us/music/guides/tmlp/tmlp\\_contracts.htm](http://www.governor.state.tx.us/music/guides/tmlp/tmlp_contracts.htm) (last visited Nov. 15, 2007); see also Todd Brabec & Jeff Brabec, *Music & Monday: Controlled Composition Clauses* (2007), <http://www.ascap.com/musicbiz/money-clauses.html> for a more technical explanation of controlled composition clauses.

<sup>40</sup> See *BASKERVILLE, supra* note 4, at 323 (explaining the different issues that recording contracts typically cover). Often, artists refusing to accept this term in the contract do not get signed. *See id.*

<sup>41</sup> Schorr, *supra* note 11, at 83 (describing the problems faced by artists and labels in the current music industry climate).

<sup>42</sup> See *BASKERVILLE, supra* note 4, at 323 (explaining the different issues that recording contracts typically cover).

<sup>43</sup> Schorr, *supra* note 11, at 84.

<sup>44</sup> See *BASKERVILLE, supra* note 4, at 320-21 (explaining that some of the records sold will be returned by dealers for credit, so artists should not get paid for records returned).

aging discount, and free goods.<sup>45</sup> At one time, these discounts made sense. Today, however, with improvements that have been made, it seems as though the discounts have been kept in the agreements simply to keep from paying artists what they are due. Breakage allowances, for instance, are allowances set aside to cover any type of breakage of goods during shipping.<sup>46</sup> Labels often only offered royalties based on 85% or 95% of sales, based on the claimed justification that about 10% of records will be damaged in transit.<sup>47</sup> Although the proportion of damage has been reduced, the breakage allowance has remained consistent.<sup>48</sup> Also, labels will deduct up to 25% of the price to cover costs of packaging materials, even though they do not cost this much anymore.<sup>49</sup> Record companies also discount royalties for free goods, which are records given away in promoting an album, oftentimes to radio stations or magazines.<sup>50</sup> Artists receive no royalties on free goods, so the royalty-based price of an album is further reduced by 15% to reflect this policy.<sup>51</sup>

Record companies' accounting methods are not consistent with typical accounting policies.<sup>52</sup> Record label contracts stipulate that accounting figures become final within a period of one or two years after the statement is sent to the artist. At that point the artist can no longer dispute the numbers.<sup>53</sup> Artists may audit the record company's books. Nevertheless, since many artists don't recoup any money and auditing is a very expensive process, many

---

<sup>45</sup> See BASKERVILLE, *supra* note 4, at 327 (explaining the different issues that recording contracts typically cover).

<sup>46</sup> *See id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> PASSMAN, *supra* note 15, at 164. Typical accounting is four years in California or six years in New York. *Id.*

<sup>53</sup> *Id.*

artists can not afford to question the label's accounting figures<sup>54</sup> and are forced to accept them.<sup>55</sup>

These issues and others form the basis for many artists' debates over the fairness of their contracts. Often, the main issue in a case challenging the conscionability of the standard major label recording contract is whether the recording label used its superior bargaining power to force the artist into a contract or a clause that is "outrageously oppressive."<sup>56</sup> Some of these clauses may include no royalties for foreign sales, no punitive damages, costs, or termination of contract, auditing, and copyright ownership of recorded material.<sup>57</sup>

A major point of debate is the controversy surrounding California's amendment to Labor Code §2855(a).<sup>58</sup> This section of the Code limits the amount of time a person can be held to a personal service contract to seven years.<sup>59</sup> However, while other creative artists such as film actors may take advantage of the freedom in-

<sup>54</sup> Band Hawthorne Heights, in 2006, sued their record label for fraudulent accounting practices. The lawsuit asserted that the label, Victory, had "received more than \$10 million in revenue from Hawthorne Heights CDs, DVDs and merchandise, yet the label still claims the band owes Victory more than \$1 million." Corey Moss, Hawthorne Heights Sue Victory Records, Say They've Been 'Abused' (Aug. 7, 2006) [http://www.mtv.com/news/articles/1538058/20060807/hawthorne\\_heights.jhtml](http://www.mtv.com/news/articles/1538058/20060807/hawthorne_heights.jhtml) (describing the suit by Hawthorne Heights against record label Victory). Hawthorne Heights are not the first ones to sue their label on claims of questionable accounting practices however. The band says they "are in fact owed substantial amounts of money much like audits from [bands] Taking Back Sunday, Thursday and Atreyu have uncovered." *Id.*

<sup>55</sup> Audits are expensive, costing \$25,000 to \$50,000 and more. *PASSMAN*, *supra* note 52, at 165.

<sup>56</sup> Phillip W. Hall Jr., Note, *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 *HASTINGS COMM. & ENT. L.J.* 189, 225 (2002) (detailing the features of recording contracts that artists find unfair).

<sup>57</sup> *See id.* Often companies require artists to sign over their ownership of the material as a work-for-hire. *Id.*

<sup>58</sup> The statute states:

(a) Except as otherwise provided in subdivision (b), a contract to render personal service, other than a contract of apprenticeship as provided in Chapter 4 (commencing with Section 3070), 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.

CAL. LAB. CODE §2855(a) (2007).

<sup>59</sup> Recording Artists' Coalition, *supra* note 23.

tended by §2855, music artists can not.<sup>60</sup> The amendment to that code, §2855(b),<sup>61</sup> is essentially an exception to §2855(a), and “allows record companies to sue recording artists for undefined damages whenever the artist attempts to terminate a contract under section 2855(a).”<sup>62</sup> Even if an artist invokes §2855(a) after seven years but before delivering all contractually required albums, the artist will be subject to the damages provision of §2855(b)(3).<sup>63</sup>

In the event a party to [a recording contract] is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified 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.<sup>64</sup>

As it stands, recording artists are the only class of personal service workers unable to take advantage of Labor Code 2855(a).<sup>65</sup> There have been hearings on California’s Seven-Year Rule and the exception of recording industry practices; however, the bill<sup>66</sup> was put on hold and will be revisited.<sup>67</sup>

Breach of contract is an issue that often arises from debates about unconscionability. It is only logical that artists may breach

---

<sup>60</sup> Courtney Love Sues UMG Recordings Charging Violation of California Labor Code (Feb. 28, 2001) [http://www.nyrock.com/worldbeat/02\\_2001/022801.asp](http://www.nyrock.com/worldbeat/02_2001/022801.asp) (describing the labor code which was at the heart of Love’s fight against major label recording contracts).

<sup>61</sup> (b) Notwithstanding subdivision (a):

(1) Any employee who is a party to a contract to render personal service in the production of phonorecords in which sounds are first fixed, as defined in Section 101 of Title 17 of the United States Code, may not invoke the provisions of subdivision (a) without first giving written notice to the employer in accordance with Section 1020 of the Code of civil Procedure, 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.

CAL. LAB. CODE §2855(b) (2007).

<sup>62</sup> A. Barry Cappello & Troy A. Thielemann, Contract Wars, [http://www.lamn.com/index.php?option=com\\_content&task=view&id=41&Itemid=34](http://www.lamn.com/index.php?option=com_content&task=view&id=41&Itemid=34) (last visited Feb. 20, 2008) (describing the case involving Love and her band Hole, and Geffen Records centering around Labor Code §2855).

<sup>63</sup> Note, *supra* note 24, at 2642.

<sup>64</sup> Cal. Lab. Code §2855(b)(3) (2007)

<sup>65</sup> Recording Artists’ Coalition, *supra* note 23.

<sup>66</sup> California Senate Bill 1246 is for the repeal of subsection (b) of section 2855 of the California Labor Code. *Id.*

<sup>67</sup> *Id.*

contracts made and enforced under the amendment to the seven-year statute in California. Considering “[t]he average recording contract requires seven albums with a normal cycle between each album of approximately eighteen to twenty-four months . . . it [is] virtually impossible for artists to fulfill their contract within seven years.”<sup>68</sup> Country singer LeAnn Rimes testified in a California hearing focusing on the amendment that exempts recording artists from California Labor laws, “I just turned nineteen last month, and if I record at a rate of one album every two years, which is the industry average, I will be thirty-five before the contract is over.”<sup>69</sup> Also at the hearing, Courtney Love, lead singer for Hole, testified, “I don’t care what the [industry] says to you today; they lied to you . . . . I cannot make seven albums in seven years. They will not let me.”<sup>70</sup> In theory, it may be possible to complete seven albums in seven years. Realistically though, standard music industry practices often preclude this.<sup>71</sup> Artists are often contractually obligated to promote their albums with national and even international touring,<sup>72</sup> with tours often lasting more than a year.<sup>73</sup> Accordingly, record labels often insist on a minimum of a two-year gap between album releases.<sup>74</sup> Perhaps the reason for so many breach of contract disputes is that record companies insist on an “unrealistic quota of records” in the majority of recording contracts,<sup>75</sup> giving artists little chance to deliver the specified number of albums in seven years,<sup>76</sup> thus undermining their rights to terminate their contracts under §2855(a).<sup>77</sup> Until §2855(b) has been repealed, this particular statute will continue to cause much debate and many disputes within the music industry. Artists are often unaware of how this statute affects them and what impact it will have on their careers.<sup>78</sup>

It is important to note that despite artists being unable to leave their record labels before they have delivered the specified

---

<sup>68</sup> *Id.*

<sup>69</sup> Teri VanHorn, Courtney Love, Don Henley, LeAnn Rimes Testify On Artists’ Rights (Sep. 6, 2001) [http://www.mtv.com/news/articles/1448678/20010906/henley\\_don.jhtml](http://www.mtv.com/news/articles/1448678/20010906/henley_don.jhtml) (featuring quotes of the different artists’ testimonies).

<sup>70</sup> *Id.*

<sup>71</sup> Note, *supra* note 24, at 2642.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 2651.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 2652.

<sup>78</sup> Recording Artists’ Coalition, *supra* note 23.

number of albums, regardless of whether it takes longer than seven years or not, and regardless of whether their label has refused to release their recordings, recording contracts may include opt-out clauses for the label.<sup>79</sup> In other words, “in the event an artist’s popularity dips or they release non-hit albums under the deal” the label may drop the artist before their contract is up.<sup>80</sup> Perhaps the most notable instance of this occurrence was in 2002, when Mariah Carey’s \$80 million deal with Virgin Records was canceled by Virgin and she was dropped from the label after a highly publicized physical and emotional breakdown coupled with the poor reception of her latest release.<sup>81</sup>

Although artists can’t exactly “fire” their labels, and are often sued by their labels for breach of contract, it is not uncommon for artists to sue their labels for breach of contract. The band 311 filed a lawsuit in 2000 against its label, Capricorn Records, alleging that the label “breached its agreement by failing to provide ‘major label’ marketing, promotion, and support for the group’s most recent albums.”<sup>82</sup> 311 claimed that Capricorn’s bouncing between numerous label partnerships created an “unstable atmosphere which has demonstrably been to the detriment of 311’s career.”<sup>83</sup>

## B. Infringement and Ownership Issues after the Contract Ends

Aside from contractual disputes regarding the recording agreement stipulations, another area of the artist-label relationship in which disputes arise frequently regards infringement and ownership issues, often times after the artist leaves the label. One instance where this is the case concerns James Brown’s final

---

<sup>79</sup> See Recording Contract, [http://en.wikipedia.org/wiki/Recording\\_contract](http://en.wikipedia.org/wiki/Recording_contract) (last visited Feb. 20, 2008).

<sup>80</sup> *Id.*

<sup>81</sup> See, e.g., Mariah Carey To Be Dropped by Virgin Records (Jan. 24, 2002) <http://www.avrev.com/news/0102/24.mariahcarey.shtml> (describing the events surround Virgin dropping Carey). Mariah Carey is not the only artist to be dropped from a label though. Singer, Shaggy, was also dropped by Virgin before being picked up by MCA Records. See Mariah Tipped for Comeback (Jan. 24, 2002) <http://news.bbc.co.uk/1/hi/entertainment/music/1779636.stm> (describing the circumstances of Mariah Carey being dropped by Virgin Records).

<sup>82</sup> Tina Johnson, 311 Files Suit Against Record Label (Aug. 29, 2000) <http://www.mtv.com/news/articles/1434820/20000829/311.jhtml> (describing 311’s suit against their record label).

<sup>83</sup> *Id.*

recordings and feuds over the legend's estate.<sup>84</sup> Disputes over who should get Brown's music royalties are preventing the release of more than fifty unreleased songs.<sup>85</sup>

Another major area of dispute deals with the ownership of masters.<sup>86</sup> Recording agreements are usually worded in such a way that the record label retains ownership of the master recordings.<sup>87</sup> However, in a few years, authors who transferred away their rights to the labels will have a chance to recapture ownership.<sup>88</sup> Under the 1976 Copyright Act, which went into effect January 1, 1978, authors may recapture ownership after thirty-five years. However, many labels classify recordings as works for hire, which do not qualify for the recapturing of ownership,<sup>89</sup> so there will likely be continued debate over the ownership of masters.

### C. Current Solution: Pros and Cons of Litigating

Currently, many artists and labels choose to litigate their disputes rather than consider a form of ADR. One of the disputes centering on the amendment to Labor Code 2855(a) involved Courtney Love and her band Hole, which was signed to Geffen Records,<sup>90</sup> a subsidiary of Universal. Universal first sued Love for breach of contract after Love announced that she would leave the label after only completing two albums of a five-album deal.<sup>91</sup> Love invoked §2855(a) and terminated Hole's contract.<sup>92</sup> Univer-

---

<sup>84</sup> T.I. Suppression Hearing Postponed Until February (Jan. 3, 2008) [http://www.mtv.com/news/articles/1578909/20080103/t\\_i\\_.jhtml](http://www.mtv.com/news/articles/1578909/20080103/t_i_.jhtml) (describing the feud surrounding James Brown's final recordings).

<sup>85</sup> *Id.*

<sup>86</sup> See *supra* Part II.A regarding masters provisions in recording agreements.

<sup>87</sup> *Id.*

<sup>88</sup> Eric Boehlert, Four Little Words (Aug. 28, 2000) [http://archive.salon.com/ent/music/feature/2000/08/28/work\\_for\\_hire/](http://archive.salon.com/ent/music/feature/2000/08/28/work_for_hire/) (discussing the record industry's use of legislative amendments to try to own artists' works forever).

<sup>89</sup> *Id.*

<sup>90</sup> Geffen Records was, at the time, a record label specializing in rock bands. Cappello & Thielemann, *supra* note 62.

<sup>91</sup> Heidi Drockelman, Courtney Love: The Making of a Martyr (July 12, 2001) <http://www.indie-music.com/modules.php?name=news&file=article&sid=819> (describing details and implications of the lawsuit between Love and Universal).

<sup>92</sup> See *Love v. Geffen Records Inc.*, No. BC 223, 364 (Cal. Super. Ct. L.A. County, filed Feb. 7, 2001).

sal sued Love under §2855(b),<sup>93</sup> which exempts recording artists from the provisions of §2855(a). According to the cross-complaint, one of the reasons Love cancelled her contract with Universal was because Universal closed Geffen Records, the label that originally signed Love.<sup>94</sup> According to Love, “Geffen Records provided special and unique services to its artists and that Universal’s closure of Geffen” rendered her contract void.<sup>95</sup> Also in her countersuit, Love challenged the constitutionality and applicability of §2855(b),<sup>96</sup> claiming that the contracts of the entire major label industry were “unconscionable and unlawful,” often resulting in a “relatively low return in royalties that artists receive once they become successful.”<sup>97</sup> She claimed that record companies coerce artists into signing unfair agreements, and that the length of agreements in the music industry is “unparalleled in any other industry, including television, film, and sports.”<sup>98</sup> Many artists supported Love in her fight against the “long-term contracts that major record labels practically force artists to sign.”<sup>99</sup>

Although a highly successful artist who might have some comparable bargaining power may be able to negotiate a decent record deal, a long term deal doesn’t necessarily equal security. Often-times, an artist may be stuck at a label that is unwilling to release the artist’s music.<sup>100</sup> Meanwhile, other labels may want to offer the

---

<sup>93</sup> Note, *California Labor Code Section 2855 and Recording Artists’ Contracts*, 116 HARV. L. REV. 2632, 2636. (2003) (describing the problems associated with section 2855 and suggesting remedies).

<sup>94</sup> Courtney Love Sues UMG Recordings Charging Violation of California Labor Code (Feb. 28, 2001), [http://www.nyrock.com/worldbeat/02\\_2001/022801.asp](http://www.nyrock.com/worldbeat/02_2001/022801.asp) (describing the labor code which was at the heart of Love’s fight against major label recording contracts).

<sup>95</sup> *Id.*

<sup>96</sup> Note, *supra* note 24, at 2636 (citing A. Barry Cappello & Troy A. Thielemann, *Challenging the Practices of the Recording Industry: Recent Lawsuits by Recording Artists Question the Legality of Their Contracts*, L.A. Law., May 2002, at 14).

<sup>97</sup> Todd M. Murphy, Comment, *Crossroads: Modern Contract Dissatisfaction as Applied to Songwriter and Recording Agreements*, 35 J. MARSHALL L. REV. 795, 816 (2002) (describing the growing number of artists expressing dissatisfaction with their contracts).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> See Black Flag MP3 Downloads, <http://www.mp3.com/artist/black-flag/summary/> (last visited Feb. 20, 2008). The band Black Flag signed a record contract with Unicorn Records, a subsidiary of MCA, in 1981. The label refused to release the first record the band delivered, citing the content of the music as vulgar. The band later went on to release the record under their own record label and it received critical acclaim. Unicorn later sued Black Flag over the release of that record. *Id.* Reprise Records also refused to release the Wilco album Yankee Hotel Foxtrot. Reprise Records, [http://en.wikipedia.org/wiki/Reprise\\_Records](http://en.wikipedia.org/wiki/Reprise_Records) (last visited Feb. 20, 2008) (describing the incident in 2001 when Reprise records refused to release the Wilco album, Yankee Hotel Foxtrot).

artist better deals, or the artist may want to release the recordings on his own, however the artist has no choice but to stick out his current contract.<sup>101</sup> At one point, singer Alanis Morissette threatened to leave her label, Maverick, after Maverick was reluctant to put out her new releases and Morissette received competing offers of \$5 million per record.<sup>102</sup> The situation was eventually worked out, but such a scenario is not uncommon in the music industry.<sup>103</sup>

It is easy to see how one may benefit from litigation. When artists and labels litigate their disputes, there is a clear winner and loser in the situation. This makes it less likely for any further disputes concerning the same situation to arise due to grey areas. Also, in certain situations, mainly those involving questions of intellectual property, the parties may want a court decision in order to set precedent for future similar issues.<sup>104</sup>

However, there are many negative aspects of choosing to litigate in the music industry. One example is that most artists terminate their fights concerning the seven-year clause due to sheer frustration at the thought of endless litigation.<sup>105</sup> Also, many artists may either not have the financial support needed to carry through with a lengthy lawsuit, or may win their lawsuit, but be completely out of money by the time it comes to a close. Typically, “a damages lawsuit brought after the artist has invoked the seven-year rule will most likely wipe out all earnings the artist might receive under any subsequent recording contract.”<sup>106</sup> Singer Tom Petty fought with MCA Records in the 1970’s to renegotiate his contract and keep the price of his albums down. Although he eventually won his battles, he had to file for bankruptcy in the pro-

---

<sup>101</sup> Black Flag MP3 Downloads, *supra* note 100 (explaining that Unicorn Records sued Black Flag for releasing an album on their own that Unicorn had previously refused to release).

<sup>102</sup> Lori Reese, Alanis Morissette Resolves Her Dispute with Madonna’s Label (June 15, 2001) <http://www.ew.com/ew/article/0,,130763,00.html> (describing the dispute between Morissette and Maverick Records).

<sup>103</sup> *Id.*; See Note, *supra* note 96.

<sup>104</sup> See ALAN W. KOWALCHYK, AMERICAN ARBITRATION ASSOCIATION, ADR VS. LITIGATION: RESOLVING INTELLECTUAL PROPERTY DISPUTES OUTSIDE OF COURT: USING ADR TO TAKE CONTROL OF YOUR CASE 5, <http://www.adr.org/si.asp?id=5003> (last visited Feb. 20, 2008) (“Some IP cases clearly should go the litigation route: cases that present novel legal issues, where a legal precedent is desired for future enforcement efforts and where court-supervised discovery may be necessary because of the level of detail needed to obtain critical facts regarding the development of an invention.”).

<sup>105</sup> Capello & Thielemann, *supra* note 62.

<sup>106</sup> *Personal Service Contracts: Seven-Year Rule: Hearings Before the Senate Select Comm. On the Entm’t Indus.*, 201 Leg., Reg. Sess. at 8 (Cal. 2001) (Statement of Ann Chaitovitz, Director of Sound Recordings, American Federation of Television and Radio Artists).

cess.<sup>107</sup> Another downside of litigation is that courts often don't have the specific knowledge applicable to the unique aspects of the music industry in which disputes arise.<sup>108</sup>

#### D. Negative Public Perception of the Music Industry

Probably one of the greatest downfalls of choosing to litigate, rather than arbitrate or mediate, is the contribution that the publicity of the litigation makes to the negative public perception of the music industry as a whole, and major record labels specifically.<sup>109</sup> Record companies' bad business practices lead to unhappy artists who, in turn, file lawsuits and head campaigns against the record companies. The litigation between artists and record labels has brought attention to the industry's "questionable business practices."<sup>110</sup> In particular, the controversy surrounding §2855(b) eventually led to a hearing<sup>111</sup> before the California State Senate's Select Committee on the Entertainment Industry in September 2001.<sup>112</sup> At the hearing, artists, record company representatives, and trade groups testified regarding whether the provision should remain law,<sup>113</sup> however the issue has not yet been resolved.<sup>114</sup>

In addition, publicized lawsuits have "solidified the public's perception of record companies as gluttonous corporations" and

---

<sup>107</sup> See Eric Schumacher-Rasmussen, Henley, Petty, Love Urge Artists to Fight the Labels' Power (Mar. 29, 2001) <http://www.mtv.com/news/articles/1442322/20010329/love.jhtml> (describing the need for more fair recording contracts).

<sup>108</sup> Arbitration and mediation can alleviate this problem because in arbitration and mediation, the parties can choose their mediator and make sure they have someone with specific industry or technical knowledge. See Arbitration & Mediation, <http://www.adr.org/sp.asp?id=28749> (last visited Oct. 25, 2007) (describing arbitration and mediation services of the American Arbitration Association).

<sup>109</sup> Norman, *supra* note 16, at 405-6 (Publicity of lawsuits between labels and artists like Courtney Love and the Dixie Chicks "have likely solidified the public's perception of record companies as gluttonous corporations.").

<sup>110</sup> *Id.*

<sup>111</sup> See Personal Service Contracts: Seven-Year Rule: Hearings Before the Senate Select Comm. On the Entm't Indus., 2001 Leg., Reg. Sess. (Cal. 2001).

<sup>112</sup> Note, *supra* note 24, at 2637.

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* "California State Senator Kevin Murray, chair of the Select Committee, introduced a bill to repeal section 2855(b). Subsequently, however, the campaign against section 2855(b) waned. Lacking sufficient support, Senator Murray withdrew the bill in August 2002. . . . However, Senator Murray reintroduced his legislation in February 2003." *Id.* (citations removed); See also Associated Press, *Musicians' Push for 7-Year Contract Cap Fails*, Hollywood Rep. (Aug. 16, 2002), <http://www.californiamusic.org/nws-012.html>.

have also “alienated consumers.”<sup>115</sup> One known case involves the country group, the Dixie Chicks, and their fight for their proper share of royalty payments.<sup>116</sup> After Sony sued the Dixie Chicks for breach of contract when the group tried leaving over the royalties dispute in 2001,<sup>117</sup> band member Emily Robinson made a public statement during an interview with Dan Rather on CBS’ “60 Minutes.” In response to Rather’s estimate that the band has generated at least \$200 million in album sales, Robinson said, “You’re depressing me because we see so little of that . . . I’ll just say that Sony Nashville has remodeled their new building. They remodeled on that.”<sup>118</sup> The publicity of such statements and ongoing litigation between labels and artists has contributed to the public’s negative perception of the industry, and consumers may have more sympathy toward artists and less respect for record companies. One instance of the publicity of an incident damaging a label occurred when Reprise Records refused to release the Wilco album, *Yankee Hotel Foxtrot*, and dismissed the band.<sup>119</sup> Not only did the album later go on to become a commercial success when it was released by another label, but Reprise’s reputation “suffered enormously and several top-level executives were fired” when the story became widely known.<sup>120</sup>

Also, consumer practices such as peer-to-peer (P2P) file sharing may result not only from consumers’ desires to acquire cheaper music, but also from consumers’ sheer lack of respect for the labels, feeling as though they should not give the labels their business. Peer-to-peer technology enables individual computers to connect to and communicate directly with other computers.<sup>121</sup> Rather than storing files in a central location to which individual computers must connect to retrieve the files, P2P technology enables individual computers to share files stored on those individual computers directly among themselves.<sup>122</sup> Currently, the most common appli-

---

<sup>115</sup> Norman, *supra* note 16, at 405-6.

<sup>116</sup> *Id.*

<sup>117</sup> See Michael Gray, *Sony Sues Dixie Chicks: Label Charges Breach of Contract* (Jul. 18, 2001) [http://www.mtv.com/news/articles/1445253/20010718/dixie\\_chicks.jhtml](http://www.mtv.com/news/articles/1445253/20010718/dixie_chicks.jhtml) (explaining the suit waged against the Dixie Chicks). Sony also sought an injunction to prevent the Dixie Chicks from recording for another label. *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Reprise Records, *supra* note 100.

<sup>120</sup> *Id.*

<sup>121</sup> STAFF REPORT, FED. TRADE COMM’N, *PEER-TO-PEER FILE-SHARING TECHNOLOGY: CONSUMER PROTECTION AND COMPETITION ISSUES 3* (2005), available at <http://www.ftc.gov/reports/p2p05/050623p2prpt.pdf> (detailing the issues surrounding peer-to-peer technology).

<sup>122</sup> *Id.* Defining P2P file sharing as consisting of four essential elements:

cation of P2P being used by consumers is the exchange of music and movie files with others.<sup>123</sup> This practice not only hurts the record labels, but also hurts the artists as well.<sup>124</sup>

### III. USING ADR IN THE ARTIST-LABEL RELATIONSHIP

It is in the best interest of the record labels to attempt to alter the public's negative view of them, since it is the consuming public's buying power and purchasing choices that can make or break an artist and their label. This could be accomplished "by altering business practices so as to favor artists — encouraging artistic development by allowing an artist to grow over a series of albums . . . lowering CD prices, and making realistic efforts into the online market."<sup>125</sup> Using ADR<sup>126</sup> could also help alter the negative image of the music industry by improving and preserving the relationship between artists and record labels, and thereby reduce the number of disputes brought into the public eye.

Since there are many different types of ADR available for use in the music industry, it is essential that certain factors be taken into consideration in deciding which type of ADR to use. For instance, the size and importance of the dispute should be considered, as well as the need for confidentiality and technical expertise, the importance of preserving the relationship, and the amount of control the parties wish to have over the process. Taking these factors into consideration, mediation and arbitration are the best options.

---

(1) a distributed software application running in users' computers, which allows users to (2) pool their files into a distributed pool (i.e., the files do not reside all in one location), (3) search the pool files with keywords, and (4) download the discovered files from peer to peer.

<sup>123</sup> *Id.* at 2.

<sup>124</sup> Popular songs can easily be found online, in either legal or pirated forms. See Ethan Smith, *Sales of Music, Long in Decline, Plunge Sharply*, WALL ST. J., Mar. 21, 2007, available at [http://online.wsj.com/article\\_email/SB117444575607043728-1MyQjAxMDE3NzI0MTQyNDE1Wj.html](http://online.wsj.com/article_email/SB117444575607043728-1MyQjAxMDE3NzI0MTQyNDE1Wj.html). Royalties cannot be calculated on illegally shared files, and "[m]easurements show that about 50% of the file exchanges are illegal copies of multimedia files." Privacy in File Sharing Networks, [http://en.wikipedia.org/wiki/Privacy\\_in\\_file\\_sharing\\_networks](http://en.wikipedia.org/wiki/Privacy_in_file_sharing_networks) (last visited Feb. 20, 2008) (describing peer-to-peer file sharing).

<sup>125</sup> See Norman, *supra* note 16, at 406.

<sup>126</sup> See The Chartered Institute of Arbitrators, *New Scheme Means Musicians Can Now Afford to Fight Contractual Disputes*, <http://www.arbitrators.org/Institute/PRMusiciansUnion.asp> (last visited Feb. 20, 2008) ("The music industry is fraught with disputes and arbitration provides a much more effective way of handling these disputes.").

## A. Arbitration and Mediation Defined

Mediation is a process where both parties meet with a mutually selected, impartial and neutral person who assists them in the negotiation process.<sup>127</sup> It is a non-binding procedure in that parties may opt out at anytime. However, once an agreement has been reached, that agreement may be enforced.<sup>128</sup> Mediation may be thought of as “assisted communications for agreement.”<sup>129</sup> Mediation generally begins with a joint session to set an agenda, define the issue and ascertain the positions and concerns of the parties.<sup>130</sup> Parties are encouraged to work together to solve their problems and reach what they perceive to be their best agreement.<sup>131</sup> Parties have complete decision-making power and nothing can be imposed on them,<sup>132</sup> rather “the mediator acts as a catalyst between opposing interests attempting to bring them together by defining issues and eliminating obstacles to communication, while moderating and guiding the process to avoid confrontation and ill will.”<sup>133</sup> At the same time, mediation allows for an opportunity for both parties to obtain and incorporate expert information and advice, and the mediator cannot favor the interests of one party over another.<sup>134</sup> The mediator has a responsibility to assist each party and cannot favor a particular result.<sup>135</sup> The likelihood of the parties’ satisfaction has been found to be elevated through the use of mediation.<sup>136</sup>

Alternatively, arbitration is a binding, adjudicatory form of dispute resolution.<sup>137</sup> Often it is administered by a private organization that maintains a list of available arbitrators.<sup>138</sup> Parties often-

---

<sup>127</sup> See JAMS, *Mediation and Role of Mediator* (2003), <http://www.jamsadr.com/mediation/mediation-defined.asp> (defining mediation and describing the process and roles of the mediator).

<sup>128</sup> See JAMS, *Guide to Dispute Resolution Clauses for Commercial Contracts 2* (2006), [http://www.jamsadr.com/images/PDF/Commercial\\_Arbitration\\_Clauses-2006.PDF](http://www.jamsadr.com/images/PDF/Commercial_Arbitration_Clauses-2006.PDF) (describing mediation and arbitration and providing sample ADR clauses).

<sup>129</sup> Definitions of Mediation – National Arbitration Forum (2005), <http://www.mediation-solution.com/mediation-defined.htm> (providing definitions and explanations of common mediation terms).

<sup>130</sup> JAMS, *supra* note 127.

<sup>131</sup> Definitions of Mediation, *supra* note 129.

<sup>132</sup> *Id.*

<sup>133</sup> JAMS, *supra* note 127.

<sup>134</sup> See Definitions of Mediation, *supra* note 129.

<sup>135</sup> See *id.*

<sup>136</sup> See *id.*

<sup>137</sup> See JAMS, *Arbitration Processes* (2003), <http://www.jamsadr.com/arbitration/defined.asp> (defining arbitration and discussing the different types of arbitration and their processes).

<sup>138</sup> *Id.*

times select arbitrators on the basis of their expertise in certain fields.<sup>139</sup> In arbitration, parties may choose the arbitrator and select the rules that will apply, the place of arbitration, the substantive law that will govern, and the length of the hearings.<sup>140</sup> Arbitration may provide a faster method of obtaining a final and binding resolution of a dispute that cannot be resolved through direct or assisted negotiations.<sup>141</sup> Since the decision is final and binding, it is only subject to a very limited court review.

## B. Benefits of and Key Differences between Arbitration and Mediation

Arbitration and mediation provide many benefits not available to the parties through litigation.<sup>142</sup> Overall costs of mediation and arbitration are lower than litigation,<sup>143</sup> in part because it is usually a shorter process.<sup>144</sup> Being a shorter process, ADR is well suited for businesses in which time is critical,<sup>145</sup> like the music industry where there are deadlines and public expectations to meet. Also, “[b]ecause of the celebrity status of individuals and the public hunger for information about disputes both personal and professional in entertainment, the confidentiality requirements of mediation and arbitration are invaluable.”<sup>146</sup> Confidentiality is often the reason most parties select these forms of ADR,<sup>147</sup> since it

---

<sup>139</sup> *Id.*

<sup>140</sup> KOWALCHYK, *supra* note 104, at 6.

<sup>141</sup> *See* JAMS, *supra* note 128.

<sup>142</sup> *See* MU-Backed Scheme Aims to Prevent Costly Disputes, MUSIC WEEK, Jan. 19, 2002, <http://www.musicweek.com/story.asp?storyCode=1330&sectioncode=1> (explaining that arbitration typically takes between three and four months and only costs a fraction of any dispute that goes to court); The Chartered Institute of Arbitrators, *supra* note 125 (explaining that arbitration provides a more effective way of handling music industry disputes than going to court).

<sup>143</sup> *See* Why Mediation, <http://www.mediation-solution.com/why-mediation.htm> (last visited Feb. 20, 2008) (“Mediation is 50-75% less expensive than a lawsuit in a copyright infringement matter.” (citing Judith A. Szepesi, Maximizing Protection For Computer Software, 12 COMPUTER & HIGH TECH. L.J. 173, 199-200 (1996))).

<sup>144</sup> KOWALCHYK, *supra* note 104, at 6; *see also* The Chartered Institute of Arbitrators, *supra* note 126 (describing an arbitration scheme that provides a “cost-effective solution and a quicker method than the courts of solving disputes within the music industry”).

<sup>145</sup> Alida Camp & Louise E. Dembeck, AMERICAN BAR ASSOCIATION, COMMITTEE UPDATES, *News From the Entertainment ADR Committee*, [www.abanet.org/dch/committee.cfm?com=DR030500&edit](http://www.abanet.org/dch/committee.cfm?com=DR030500&edit) (Oct. 25, 2007).

<sup>146</sup> *Id.*

<sup>147</sup> *See* Claude R. Thomson & Annie MK. Finn, *Confidentiality in Arbitration: A Valid Assumption? A Proposed Solution!*, DISP. RESOL. J. (2007), available at [http://findarticles.com/p/articles/mi\\_qa3923/is\\_200705/ai\\_n19435153](http://findarticles.com/p/articles/mi_qa3923/is_200705/ai_n19435153).

disallows the media to exploit the issue, which often times creates negative feelings in the public for the record labels. Also very beneficial is the ability to select an arbitrator or mediator with knowledge of the specific area of law to which the dispute relates.<sup>148</sup> Specific subsections of the industry may be run by different rules, and it is important to be able to select a neutral who is familiar with the rules applicable to the particular sector involved.<sup>149</sup> Ultimately, ADR is a sensible alternative when financial resources are limited and litigation is unlikely to produce an acceptable result.<sup>150</sup>

One key difference between arbitration and mediation is that in mediation, the parties are guided toward their own mutually satisfactory resolution.<sup>151</sup> It is not an adjudicative process like arbitration, rather it is advisory or facilitative in nature.<sup>152</sup> The goal is to seek business solutions that are acceptable to both sides through negotiation, compromise, and creative problem solving.<sup>153</sup> In arbitration, the arbitrator's award is final, binding, and enforceable in court.<sup>154</sup>

It is important to consider the nature of the relationship between the parties when deciding whether to use arbitration or mediation. In instances where it is important for the relationship between parties to be preserved, it may be beneficial to consider mediation over both litigation and arbitration<sup>155</sup> because parties with ongoing business relationships, such as the relationships between artists and record labels, know about each other's business and have an interest in the success of each other.<sup>156</sup> Mediation is known for preserving business relationships,<sup>157</sup> as it encourages parties to work together to come to a mutually satisfactory result, and discourages hostility.<sup>158</sup> In the music industry, it is often important to preserve the relationship between artist and record label in order to produce better music. However, the need for technical

---

<sup>148</sup> Why Mediation, *supra* note 143 (“[T]he National Arbitration Forum provides knowledgeable, qualified legal professionals with subject matter expertise.”).

<sup>149</sup> Camp & Dembeck, *supra* note 145; *see also* The Chartered Institute of Arbitrators, *supra* note 125 (describing a scheme that provides legally qualified music specialists for arbitration).

<sup>150</sup> KOWALCHYK, *supra* note 104, at 5.

<sup>151</sup> Yahm & Kramer, *supra* note 14.

<sup>152</sup> *See* KOWALCHYK, *supra* note 104, at 3.

<sup>153</sup> *See id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See* The Chartered Institute of Arbitrators, *supra* note 126 (describing a scheme which offers the “soft” benefits of maintaining relationships with employers).

<sup>156</sup> KOWALCHYK, *supra* note 104, at 6.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

expertise is also an important factor,<sup>159</sup> and arbitrators should be considered if there is a need for technical expertise, such as that required in IP cases.<sup>160</sup>

As far as control is concerned, the parties need to consider whether they have a greater interest in control over the process or control over the actual resolution. Arbitration provides for the most control over the process,<sup>161</sup> allowing one to choose arbitration rules and procedures specially crafted to suit various types of disputes.<sup>162</sup> Mediation provides parties with the greatest amount of control over the resolution of the dispute,<sup>163</sup> since the individual parties make the final decisions, rather than the neutral. Parties may control the length of process, place of mediation, information to consider, the type of mediator,<sup>164</sup> as well as agree to business solutions that would not be granted by a court.<sup>165</sup> In mediation, parties are not forced into a settlement they do not want, as they would be with binding arbitration.<sup>166</sup>

---

<sup>159</sup> See The Chartered Institute of Arbitrators, *supra* note 126 (“A significant proportion of music disputes are both legally and technically complex.”).

<sup>160</sup> KOWALCHYK, *supra* note 104, at 6. “An experienced patent arbitrator familiar with ‘claim interpretation’ issues will more quickly appreciate the important technical terminology and be able to more efficiently review and decide the case.” *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> See JAMS, *supra* note 128, at 3.

<sup>163</sup> KOWALCHYK, *supra* note 104, at 7.

<sup>164</sup> The parties can

select a mediator who is ‘facilitative’ or ‘evaluative.’ Commercial parties often prefer an evaluative mediator with relevant subject matter experience because they want to hear how the mediator thinks a court or arbitrator would consider issues and/or claims in the case. The mediator’s views often increase the seriousness with which settlement proposals and counterproposals are considered.

*Id.*

<sup>165</sup> *Id.*

<sup>166</sup> In arbitration, “depending on the provisions of the contract between the parties, the resulting decision can be binding.” There are both federal and state laws on arbitration, and “[a]s a result, ‘the arbitration agreement and decision of the arbiter may be enforceable under state and federal law.’” Toni L. Wortherly, Note, *There’s No Business Like Show Business: Alternative Dispute Resolution in the Entertainment Industry*, 2 VA. SPORTS & ENT. L.J. 162, 167 (2002) (quoting Legal Information Institute, Alternative Dispute Resolution (ADR): An Overview, <http://www.law.cornell.edu/wex/index.php/ADR> (last visited Oct. 25, 2007)). But “[u]nlike an arbitrator, a mediator does not decide a case and generally does not comment on the case’s merits.” *Id.*; see also Christine Lepera & Jeanie Costello, *Benefits of Mediating Intellectual Property and Entertainment-Related Disputes*, *Metropolitan Corporate Counsel*, August 1997, at 15, n. 8, reprinted in *WHAT THE BUSINESS LAWYER NEEDS TO KNOW ABOUT ADR* 733 (William L.D. Barrett, ed., Practising Law Institute 1998). In addition, “[m]ediation is voluntary and settlement-driven.” *Id.* Mediation is facilitative in nature; “The mediator’s role is to facilitate communication between the parties and help them consider a variety of solutions to all or part of the issues in dispute. . . . Thus, in mediation, the mediator does not decide substantive issues.” KOWALCHYK, *supra* note 104, at 7.

Using ADR in the music industry is not unheard of. In January of 2001, The Chartered Institute of Arbitrators (CI Arb) in London teamed up with the Musician's Union (MU)<sup>167</sup> in Europe to institute a unique arbitration scheme that provides a quicker and more cost-effective solution than using the courts to solve disputes within the music industry.<sup>168</sup> As part of the service, CI Arb will offer mediation or arbitration alone, or mediation followed by arbitration,<sup>169</sup> and will provide legally qualified music specialists.<sup>170</sup> The confidential mediation and arbitration service is available for record companies, publishers, agents, managers, producers, and musicians in cases where claims are up to £100,000.<sup>171</sup>

Although the MU and CI Arb are on the right track, the key is to use a service such as this and tailor the ADR to the different stages of the artist-label relationship to get the best results. Not just any type of ADR will necessarily be highly beneficial to artists and labels, as mediation and arbitration have some different pros and cons.<sup>172</sup> The different stages of the artist-label relationship may benefit from one form of ADR more than another, depending on the specific nature of the relationship at that point in time.<sup>173</sup>

### C. Initial Contract Negotiation: Mediation

The initial contract negotiation is one of the most important parts of the artist-label relationship, for it sets the tone of how things will be handled not only for the duration of the contract, but also after the contractual relationship ends. At this stage in the artist-label relationship, mediation is the option most likely to generate a mutually agreeable result.

---

<sup>167</sup> Musicians' Union, <http://www.musiciansunion.org.uk/site/cms/contentCategoryView.asp?category=226> (last visited Feb. 20, 2008) ("The Musicians' Union is the largest organization for musicians in the UK.")

<sup>168</sup> The Chartered Institute of Arbitrators, *supra* note 126.

<sup>169</sup> Music Week, *supra* note 142.

<sup>170</sup> *Id.*; see also The Chartered Institute of Arbitrators, *supra* note 126 ("A significant proportion of music disputes are both legally and technically complex. The CI Arb was able to tailor a scheme for the Union providing legally qualified music specialist arbitrators — a much more effective method than going to court.")

<sup>171</sup> The Chartered Institute of Arbitrators, *supra* note 125; see also Music Week, *supra* note 142.

<sup>172</sup> See discussion *supra* Part III.B (describing the benefits of and differences between arbitration and mediation).

<sup>173</sup> See discussion *infra* Part III.C-E (discussing the stages of the artist-label relationship).

Naturally, record labels have more power in the bargaining process than do artists, as labels are often multi-million dollar corporations and artists are often new to the industry, naïve, and unknowledgeable in the area of recording contracts.<sup>174</sup> Considering the financial backing of labels, it may be safe to assume that a major label can afford a lawyer who is more highly skilled and experienced in the specific area of music industry contract negotiation than a struggling artist's lawyer. Using ADR in the contract negotiation process will not only help level the playing field between artist and label, but also start off the relationship in a less intimidating fashion.<sup>175</sup> With the initial contract negotiation, there is no need for an arbitrator to decide the terms of the contract, for the parties should be able to work out among themselves the specific stipulations of their upcoming relationship.<sup>176</sup> Instead, it is more appropriate for a neutral mediator to facilitate the process of negotiation<sup>177</sup> between artist and record label so that the two parties may come to a result that is acceptable to both.<sup>178</sup>

#### D. Preserving the Relationship: Step Clause

Since so many of the disputes between artists and their record labels arise during the actual contractual relationship, it is important to have an effective means of resolving those disputes, while still maintaining as good a relationship as possible. A "step clause" would be ideal in such a situation.<sup>179</sup>

Mediation provides a means to come together and attempt to work out any issues while still maintaining a working relationship. However, it is unlikely that all issues in every case will be resolved

---

<sup>174</sup> See Bandweblogs, *Why Artist Development Makes A Difference*, <http://www.bandweblogs.com/blog/2006/09/25/why-artist-development-makes-a-difference/> (last visited Sept. 26, 2006). ("[M]ore often than not, naïve artists were at the label's mercy.")

<sup>175</sup> See *Definitions of Mediation*, <http://www.mediation-solution.com/mediation-defined.htm> (last visited Feb. 20, 2008) ("The mediator's role is to ensure that parties reach agreements in a voluntarily and informed manner, and not as a result of coercion or intimidation.")

<sup>176</sup> See *id.* (Parties have complete decision-making power and nothing can be imposed on them).

<sup>177</sup> See *id.* ("[M]ediation is 'assisted communications for agreement.'")

<sup>178</sup> See *id.* "You are encouraged to work together to solve your problem(s) and to reach what you perceive to be your best agreement." *Id.*

<sup>179</sup> See JAMS, *supra* note 128 ("A 'step clause' provides for a mediation or other ADR process to precede an arbitration proceeding."). Binding ADR can be initiated after a meditative process has taken place in order for a neutral authority to choose from among final settlement offers of the parties in mediation. *Id.*

during the initial mediation process. For this reason, it may be in everyone's interest to insert a "step clause" in the initial agreement, which will provide for an arbitration proceeding to follow mediation, in the case that there are unresolved issues.<sup>180</sup> A typical "step clause" may read as follows:

The parties agree that any and all disputes, claims or controversies arising out of or relating to this Agreement shall be submitted to [organization] for mediation, and if the matter is not resolved through mediation, then it shall be submitted to [organization] for final and binding arbitration.

Either party may commence mediation by providing the other party a written request for mediation. The parties will cooperate with [organization] and with one another in selecting a mediator from [organization's] panel of neutrals, and in scheduling the mediation proceedings. The parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs.

Either party may initiate arbitration with respect to matters submitted to mediation by filing a written demand for arbitration at any time following the initial mediation session or 45 days after the date of filing the written request for mediation, whichever occurs first. The mediation may continue after the commencement of arbitration if the parties so desire. Unless otherwise agreed by the parties, the mediator shall be disqualified from serving as arbitrator in the case.<sup>181</sup>

A step clause is a desirable option at this point in the relationship because parties are able to maintain a civil relationship and work out some issues, while still ending with a binding resolution.<sup>182</sup> Since "the mediative process may have succeeded in settling most issues in a dispute, or may have narrowed the gap between settlement positions,"<sup>183</sup> bringing in an arbitrator to resolve remaining disputes or issues rather than turning to litigation will result in a binding process that both parties had an opportunity to engage in and shape, while keeping the costs down.

As discussed earlier, Courtney Love was involved in a suit with Universal Records that centered on her alleged breach of con-

---

<sup>180</sup> See *id.*

<sup>181</sup> *Id.*

<sup>182</sup> See JAMS, *supra* note 128. Binding ADR can be initiated after a meditative process has taken place in order for a neutral authority to choose from among final settlement offers of the parties in mediation. *Id.*

<sup>183</sup> JAMS, ADR Frequently Asked Questions, <http://www.jamsadr.com/adrtips/faqs.asp> (last visited Feb. 20, 2008) (frequently asked questions about ADR).

tract and allegations that record label contracts are unlawful.<sup>184</sup> After a long-running lawsuit, Love and Universal finally settled, with each side claiming some victory. Universal waived rights to Love's future records, which was a key concession sought by Love.<sup>185</sup> On the other side, "Love and members of the [Kurt] Cobain<sup>186</sup> estate granted Universal Music Group . . . permission to release new Nirvana records featuring previously unreleased songs and compilations of the group's old hits."<sup>187</sup> If ADR had been instituted in the first place to resolve this dispute between Love and Universal, not only would it have saved much time, energy, and money, but it would have given both parties a chance earlier on to sit with a neutral party and perhaps work out more of the key complaints that remained open at the end of litigation.<sup>188</sup>

### E. End of Relationship: Arbitration

After the contractual relationship ends, parties should submit to arbitration to resolve disputes concerning ownership of masters, copyright infringement, breach of contract, and any other disputes that may arise with the end of a contract. At this point in the artist-label relationship, there is no pressing need to maintain anything more than a civil relationship, unlike when disputes arise *during* the relationship and it is important for business to maintain a *good* relationship. Arbitration after the contractual relationship ends would be more beneficial to the parties than mediation, essentially because a solid decision will be made which will leave little confusion and little left about which to argue,<sup>189</sup> especially if the

---

<sup>184</sup> Courtney Love, *Universal Settle Legal Dispute*, THE BADGER HERALD, Oct. 1, 2002, available at [http://badgerherald.com/artsetc/2002/10/01/courtney\\_love\\_univer.php](http://badgerherald.com/artsetc/2002/10/01/courtney_love_univer.php) (explaining the Love-Universal settlement).

<sup>185</sup> *Id.*

<sup>186</sup> Cobain was married to Love and was the "lead singer of alternative rock band Nirvana before he committed suicide in 1994. In the years since, he has become a rock icon, which has made songs from the band's CDs, like 1991's smash *Nevermind* highly valuable for Universal." *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> The settlement was "difficult" because many key complaints remain open. *Id.*

<sup>189</sup> The arbitrator will read briefs and documentary evidence, hear testimony, and then render a decision at the end of the hearing in the form of an "award of the arbitrator." The award may be entered as a judgment and is final and binding. See JAMS, *supra* note 137.

arbitration is binding.<sup>190</sup> A typical arbitration clause may read as follows:

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in (the desired place of arbitration), before [(number)] arbitrator(s). At the option of the first to commence an arbitration, the arbitration shall be administered by [organization] pursuant to its [rules that will govern]. Judgment on the Award may be entered in any court having jurisdiction.<sup>191</sup>

#### F. Negatives of ADR in the Music Industry

Although ADR may prove to be beneficial in many areas of the music industry, including during the various stages of the artist-label relationship, in some cases ADR may not be the best option. In particular, in cases that involve certain IP issues, litigation may be the better route; “[C]ases that present novel legal issues, where a legal precedent is desired for future enforcement efforts and where court-supervised discovery may be necessary because of the level of detail needed to obtain critical facts” may be better candidates for litigation.<sup>192</sup>

### IV. INSTITUTING ADR

#### A. Artist and Label Reluctance to use ADR

Although ADR is currently used in the entertainment industry, it is not yet widely accepted in the music industry.<sup>193</sup> Though the benefits of ADR to both artists and record labels may seem apparent, ADR is still met with some resistance. Artists may have their own reasons for not wanting to choose mediation or arbitra-

---

<sup>190</sup> Although arbitration may be non-binding if the parties agree to make it so, more often than not it is a “binding, adjudicatory process.” *Id.*

<sup>191</sup> JAMS, *supra* note 128, at 4.

<sup>192</sup> KOWALCHYK, *supra* note 104, at 5.

<sup>193</sup> See Worthery, *supra* note 166, at 173 (explaining why entertainment/music companies are reluctant to pursue mediation as a form of dispute resolution).

tion over litigation.<sup>194</sup> Many artists might actually want the publicity of litigation to expose the “questionable business practices” of record labels, in order to gain sympathy from the public.<sup>195</sup> Artists are not the only ones who may object to submitting disputes to ADR. Record labels may also meet ADR with resistance. Many artists and others in the industry lack basic knowledge of the business,<sup>196</sup> which makes it easy for record labels and their executives who *are* knowledgeable to take advantage of unsuspecting artists and create better deals for themselves.

Also, music companies are less likely to use mediation or arbitration because they may believe that litigation “may be a more appropriate method to resolve contract disputes and copyright infringement claims in the music industry because litigation involves certainty in the application of the law; allowing parties to draft future agreements more carefully.”<sup>197</sup> Another obstacle in convincing music companies to use ADR is that the in-house counsel may have a lack of training in that area, or the corporation may be unable to determine when mediation is appropriate.<sup>198</sup>

To increase knowledge and use of ADR, “[t]he ABA Entertainment ADR Committee actively involves committee members in both understanding dispute resolution in the entertainment, arts and sports industries and in persuading counsel and their clients to use ADR.”<sup>199</sup> In Los Angeles and New York, interactive

---

<sup>194</sup> See Norman, *supra* note 16, at 406 (pointing out that disputes between record labels and the artists they represent have drawn attention to the industry’s “questionable business practices”).

<sup>195</sup> *Id.*

<sup>196</sup> See BASKERVILLE, *supra* note 4, at 5 (explaining that many people in the music industry lack basic information about the business).

<sup>197</sup> Wortherly, *supra* note 166, at 173 (explaining why entertainment/music companies are reluctant to pursue mediation as a form of dispute resolution); see also Gerald F. Phillips, *Entertainment Industry is Accepting ADR*, 21 No. 1 ENT. L. REP. 5, at Table 2 (1999).

<sup>198</sup> See Wortherly, *supra* note 166, at 173:

[E]ntertainment companies in general have been somewhat reluctant to pursue mediation as a form of dispute resolution. Some of the reasons cited for this reluctance include management’s lack of knowledge regarding mediation; management’s lack of awareness about mediation as an option for dispute resolution . . . the corporation’s inability to assess all claims and to determine when mediation is appropriate; in-house counsel’s lack of appropriate training, coupled with the fact that outside counsel may not advance the goals of the company by quickly and inexpensively resolving disputes while simultaneously preserving valuable relationships; and the potential of business executives to allow their own attorneys to resolve disputes through litigation.

*Id.*

<sup>199</sup> Camp & Dembeck, *supra* note 145 (updates about educating people in the music industry about ADR).

programs designed to introduce attorneys and clients to mediation and arbitration have helped people become more familiar with ADR.<sup>200</sup> Also, the Committee meets with various organizations to try to convince them of the value of including mediation and arbitration clauses in their agreements.<sup>201</sup> Although people do not always think of ADR as an option, there have been cases in which ADR has been used.<sup>202</sup>

## B. Overcoming the Problems

With all the reasons record labels have to not engage in ADR, what incentives do they have *to* engage in ADR? For one thing, record labels should be interested in keeping their artists happy as well as the public, for it is the public that can either keep the record companies in business or cause their demise. Probably one of the greatest contributors to the negative perception of the industry is the public reception via the media of various artist-label disputes and how they are handled.<sup>203</sup> Improving relations with artists will lead to better music, since artists will be satisfied with their labels and actually *want* to produce quality music for them.<sup>204</sup> With major label contracts being skewed in favor of the labels and labels retaining ownership of the artists' songs and music,<sup>205</sup> it appears that "big labels have forgotten what's important in the music industry, that the artists are the resource to be treasured and not the

---

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> In the case of *Robert Lewis Rosen Associates, Ltd v. Webb*, a television sports director was ordered to pay commissions to his agent from monies for TV contract renewals made after the agent won an arbitration award against him. See *Robert Lewis Rosen Associates, Ltd. v. Webb*, 473 F.3d 498 (2d Cir. 2007).

<sup>203</sup> Norman, *supra* note 16, at 405-6 (giving examples of disputes in the music industry which have contributed to the negative public perception of the industry). See also *supra* Part II.D (discussing the impact legislation has on the public perception of the music industry).

<sup>204</sup> One of the reasons artists are leaving their record labels to produce and release music on their own appears to be that they are simply "tired of being pushed around by their record labels." David Leonard, *More Artists Mulling the Radiohead Path*, *FORTUNE*, Jan. 14, 2008, available at [http://money.cnn.com/2008/01/11/news/companies/leonard\\_emi.fortune/index.htm?section=money\\_topstories](http://money.cnn.com/2008/01/11/news/companies/leonard_emi.fortune/index.htm?section=money_topstories) (explaining that other bands and artists may be choosing to leave their labels).

<sup>205</sup> See *supra* Part II.A (discussing major label deals and ownership of masters) and note 39; BASKERVILLE, *supra* note 4, at 323 (explaining that "Major record companies . . . will not offer the artist the option to finance the production of their own master" and "the record companies will likely own the masters indefinitely").

songs.”<sup>206</sup> Satisfied artists, less hostile artist-label relationships, and more fairly-handled disputes and resolutions will lead to fewer image-damaging disputes reaching the media and subsequently received and judged by the public.<sup>207</sup> A positive public perception would be extremely beneficial to record labels, since it is the public that is consuming the music and ultimately controlling the state of the music industry, which, today, does not look promising for the labels.<sup>208</sup>

Consumers no longer need major record labels to provide them with the music they desire. The growth in consumption of music has led to changes in the way music is distributed and consumed. Technological advances have proven to be both helpful and detrimental to artists and consumers,<sup>209</sup> as well as record labels.<sup>210</sup> Internet distribution developments (including peer-to-peer and legitimate downloading sites as well as internet radio), digital

<sup>206</sup> Cosser, *supra* note 7.

<sup>207</sup> See Part II.D for a discussion of the negative public perception of the industry.

<sup>208</sup> The Economist reported a change in the music industry, and began with this anecdote:

In 2006 EMI, the world's fourth-biggest recorded-music company, invited some teenagers into its headquarters in London to talk to its top managers about their listening habits. At the end of the session the EMI bosses thanked them for their comments and told them to help themselves to a big pile of CDs sitting on a table. But none of the teens took any of the CDs, even though they were free. "That was the moment we realised [sic] the game was completely up," says a person who was there.

*The Music Industry – From Major to Minor*, THE ECONOMIST, Jan. 10, 2008, available at [http://www.economist.com/business/displaystory.cfm?story\\_id=10498664](http://www.economist.com/business/displaystory.cfm?story_id=10498664) (discussing the problems facing major record labels). Also, CD sales have been falling since 2000. *The Music Industry* (Jan. 15, 2008) [http://www.economist.com/background/displayBackground.cfm?story\\_id=10498664](http://www.economist.com/background/displayBackground.cfm?story_id=10498664) (providing background to the Fortune article about problems facing the major labels). Also, major artists have been leaving their record labels due to financial reasons, wanting more creative control, and "typically nasty negotiation between [ ] their label." See Leonard, *supra* note 204 (explaining that artists such as Robbie Williams, Coldplay, the Eagles, and Madonna are leaving their major labels). Duncan Riley, *And the Walls Came Tumbling Down: Madonna Dumps Record Industry* (Oct. 10, 2007) <http://www.techcrunch.com/2007/10/10/and-the-walls-came-tumbling-down-madonna-dumps-record-industry/> (reporting that Oasis, Jamiroquai, and Madonna have joined the move away from the record industry), Greg Sandoval, Trent Reznor: *Take My Music, Please* (Oct. 30, 2007) [http://crave.cnet.com/8301-1\\_105-9807934-1.html](http://crave.cnet.com/8301-1_105-9807934-1.html) (describing Nine Inch Nails and Radiohead as having become "symbols of a growing movement among performers who are trying to use the Web to cut out the traditional middlemen of distribution: record labels").

<sup>209</sup> Willing artists are able to more directly distribute their music to consumers through online outlets, however the system is often taken advantage of. Illegal file sharing takes away from artist profits, and attempted remedies have proven to be quite the nuisance to consumers.

<sup>210</sup> "The industry has seen a fourteen percent drop in the number of CDs sold in the U.S. compared with the same time last year, according to Nielsen SoundScan. Sales of digital tracks online are up forty-six percent over the same period, but have yet to offset the industry's losses during the past decade." Associated Press, *Are Record Labels Dead?*, <http://www.cnn.com/2007/SHOWBIZ/Music/10/12/irrelevantrecordlabels.ap/index.html> (last visited Feb. 20, 2008) (describing the difficulties labels are facing today).

music players, and satellite radio are just a few of the new technologies the industry has seen in the last few years. Recently, the music group Radiohead agreed to a deal with iTunes, the online music store, to make their *In Rainbows* album available online. Thom Yorke of the band has reported making more money out of that record than out of all of the other Radiohead albums put together.<sup>211</sup> CNN asks the question, “Do superstars even need traditional multiyear album contracts when CD sales are plummeting and fans are swiping tons of music for free online, or tuning in to their favorite bands via YouTube, MySpace and other Internet portals?”<sup>212</sup>

Although record labels cannot put a halt to technological advances in the field of music, improving how the public perceives them may at least help settle the common impression that labels are greedy<sup>213</sup> and do not deserve the public’s money. This could lead to people being more willing to pay for music that record labels are offering,<sup>214</sup> as opposed to swiping a free, but slightly lesser quality copy. It is important to note, however, that there will always be a portion of the public that is unwilling to pay for music,<sup>215</sup> regardless of whether or not the free copies they find are of a lesser quality. These are not the people the industry’s changes will affect, but rather a change in public perception may affect those who purposely do not pay for music on the principle of not supporting the greedy entities known as major record labels.

Just as consumers are turning to other outlets to get their music, such as both legal and illegal peer-to-peer file sharing, artists may be turning to other outlets to create their music.<sup>216</sup> Since artists have a major impact on a record label’s success, the importance of retaining happy, successful artists should be a priority for labels, especially since today’s technology allows artists to produce and

---

<sup>211</sup> T.I. Suppression Hearing Postponed Until February, *supra* note 84.

<sup>212</sup> Associated Press, *supra* note 210 (“‘There’s a prevailing wisdom that many established acts don’t need a record label anymore.’”).

<sup>213</sup> Norman, *supra* note 16 (explaining that publicized lawsuits have “solidified the public’s perception of record companies as gluttonous corporations”).

<sup>214</sup> According to ComScore, the average Radiohead fan who downloaded Radiohead’s album under the pay-what-you-wish format voluntarily paid \$6 for the album. See Leonard, *supra* note 204.

<sup>215</sup> Adam Sherwin, From Today, Feel Free to Download Another 25 Million Songs – Legally (Jan. 28, 2008), [http://entertainment.timesonline.co.uk/tol/arts\\_and\\_entertainment/music/article3261591.ece](http://entertainment.timesonline.co.uk/tol/arts_and_entertainment/music/article3261591.ece) (“[W]e now accept that people steal music.”).

<sup>216</sup> Dismantling, *supra* note 7 (describing the ways independent artists can get around needing a major record deal).

distribute their music without the need for a major record label.<sup>217</sup> This anecdote about a band's decision to not sign with a label is insight into how many artists may feel about labels:

One day in the mid-1980s, a group of music industry executives gathered in Los Angeles to compete for a chance to sign Jane's Addiction to their respective labels. As the suits watched with anticipation, Perry Farrell jumped up on a table to announce the band's decision: 'F— you, assholes! We're gonna make our own record!'<sup>218</sup>

In the age of digital music distribution and rising accessibility of home audio production equipment, it is becoming easier and easier for artists to produce and distribute their own music without the need to be signed to a record label that could easily take advantage of them.<sup>219</sup> Working to the advantage of artists, "[s]tudios are cheaper (due to constant advancements in recording technology), marketing can be hired out to powerful and effective agencies, and there are numerous distribution options for independent artists in this age of consumer demand for diversity in music and music delivery methods."<sup>220</sup> Today, "[b]ecause digital distribution is cheap and accessible for artists, almost anyone can start a record label and release music,"<sup>221</sup> which is what many artists are doing. By forming their own record labels, artists are able "to have complete creative control over the record making process and is the ultimate in self-expression for any indie artist."<sup>222</sup>

Before releasing their new album for the standard rate on iTunes, Radiohead first released *In Rainbows* under a pay-what-you-wish scheme,<sup>223</sup> explaining that "the majors and the big infra-

<sup>217</sup> Artists no longer need major labels to finance their recordings, as an album can now be made on a laptop. Digital distribution is basically free. See David Byrne, David Byrne's Survival Strategies for Emerging Artists – and Megastars (Dec. 18, 2007), [http://www.wired.com/entertainment/music/magazine/16-01/ff\\_byrne?currentPage=2](http://www.wired.com/entertainment/music/magazine/16-01/ff_byrne?currentPage=2) (describing the changing aspects of the music industry).

<sup>218</sup> Perry Farrell, Anecdoteage.Com, <http://anecdoteage.com/index.php?aid=12132> (last visited Feb. 20, 2008). Perry Farrell is the front man of the band, Jane's Addiction. Perry Farrell, [http://en.wikipedia.org/wiki/Perry\\_Farrell](http://en.wikipedia.org/wiki/Perry_Farrell) (last visited Feb. 20, 2008) (Perry Farrell biography).

<sup>219</sup> See *supra* Part II.A (describing typical recording contract issues that artists find unfair).

<sup>220</sup> How Are Independent Artists and New Technologies Dismantling the Impact of Major Record Labels?, [http://hs.riverdale.k12.or.us/~hfinnert/exhib\\_06/davidp/paper5.html](http://hs.riverdale.k12.or.us/~hfinnert/exhib_06/davidp/paper5.html) (last visited Jan. 16, 2008) (describing the impact of technology on the music industry).

<sup>221</sup> *Id.*

<sup>222</sup> Cosser, *supra* note 7.

<sup>223</sup> See Jon Pareles, *Pay What You Want for This Article*, N.Y. TIMES, Dec. 9, 2007, available at <http://www.nytimes.com/2007/12/09/arts/music/09pare.html> ("Buyers can pay zero or whatever they please up to £99.99 (about \$212) for the album in MP3 form.")

structure of the music business has not addressed the way artists communicate directly with their fans. . . . In fact, they seem to basically get in the way. Not only do they get in the way, but they take all the cash.’”<sup>224</sup> Radiohead was not the only band to decide to release music without the backing of a major record label. The Eagles have partnered with Wal-Mart, and Madonna has signed with Live Nation, a concert promoter.<sup>225</sup> In addition, Oasis and Jamiroquai have also decided to leave the major label setting.<sup>226</sup> Nine Inch Nails member Trent Reznor has stated that “‘relationships between music labels and artists [ ] aren’t going well.’”<sup>227</sup> Even artists who are not abandoning labels altogether are still leaving the major labels in pursuit of independent labels.<sup>228</sup> At the end of the day, artists are tired of being pushed around by their record labels and crave independence.<sup>229</sup>

With ADR in place throughout the artist-label relationship, more artists are likely to have faith that their labels will not take advantage of them, that there will be more fair resolutions of conflicts, and that their experience being signed to the label will be a more positive and enjoyable experience. Consequently, the positive attributes<sup>230</sup> of being signed to a major label may be more enticing and worthwhile to artists than struggling to succeed on their own.

With the current state of affairs of the music industry declining<sup>231</sup> due to the popularity of digital music and public disregard for music companies, in addition to labels joining the digital revolu-

<sup>224</sup> T.I. Suppression Hearing Postponed Until February, *supra* note 84 (describing Radiohead’s online release of their new album).

<sup>225</sup> According to ComScore, the average Radiohead fan who downloaded Radiohead’s album under the pay-what-you-wish format voluntarily paid \$6 for the album. *See* Leonard, *supra* note 204 (describing Radiohead’s online release of their new album).

<sup>226</sup> Duncan Riley, *supra* note 208 (reporting that Oasis, Jamiroquia, and Madonna have joined the move away from the record industry).

<sup>227</sup> Greg Sandoval, *supra* note 208 (describing Nine Inch Nails and Radiohead as having become “symbols of a growing movement among performers who are trying to use the Web to cut out the traditional middlemen of distribution: record labels”).

<sup>228</sup> *See* Pareles, *supra* note 223 (explaining that even “songwriters as influential as Joni Mitchell and Paul McCartney, who moved to Hear Music, the independent label partly owned by Starbucks” are making the move from major labels).

<sup>229</sup> Leonard, *supra* note 204.

<sup>230</sup> Major labels have the advantage of having money and power. With more money and better distribution networks than independent labels, and more money and resources than independent artists, major labels have a better ability to promote artists and meet a demand for their product as they see it growing. *See* Dismantling, *supra* note 7 (describing pros and cons of major and independent labels).

<sup>231</sup> *See supra* note 208 and accompanying text (Economist anecdote).

tion, improving artist-label relationships with the use of ADR may be one of the only other things the music industry may truly be able to control in its efforts to remain standing.<sup>232</sup>

### C. Help from Congress

Despite all of the reasons labels should incorporate ADR into their business practices, and the potential benefits they could reap in the long run from using ADR, record labels may be too focused on the short term to make a real effort to incorporate ADR into their practices. For this reason, labels may need a boost in improving their business practices with artists and instituting a system of ADR in the artist-label relationship. Congress first needs to seriously reconsider the amendment to California's seven-year statute singling out the record industry.<sup>233</sup> Secondly, legislation requiring record labels to at least give artists the option of inserting some type of arbitration or mediation clause into their initial contract<sup>234</sup> may help start a trend of opting for arbitration or mediation rather than going straight to the courts.

## V. CONCLUSION

Alternative Dispute Resolution has many benefits<sup>235</sup> over litigation in the music industry. Given the cost, time, and uncertainty of litigation, many issues arising within the artist-label relationship may be better addressed using ADR approaches, such as mediation or arbitration.<sup>236</sup> Mediation and arbitration will provide both parties with confidentiality, which will help curb the negative public perception of the music industry, since this negative view largely

---

<sup>232</sup> The major record labels are struggling with digital music, declining CD sales, and more recently, "[t]he fact that Radiohead debuted its latest album online and Madonna defect[ed] from Warner Bros. to Live Nation . . . is held to signal the end of the music business as we know it." Byrne, *supra* note 217.

<sup>233</sup> See Note, *supra* note 24, at 2632 (discussing the problems arising from § 2855 and suggesting that a repeal of § 2855(b) may be in order).

<sup>234</sup> See JAMS, *supra* note 137 (explaining that most arbitration is driven by a pre-dispute contract entered into by the parties).

<sup>235</sup> See *supra* Part III.B (discussing the benefits of mediation and arbitration).

<sup>236</sup> *Id.*

results from the publicity of litigation between artists and labels.<sup>237</sup> In addition to providing privacy, ADR can also help maintain workable relationships between artists and labels because, given the nature of the music industry, and more specifically the fact that in order for music to reach the public, everyone in the process must work together, it would be wise “not to destroy working relationships with other industry personnel.”<sup>238</sup>

To be most effective, the type of ADR used should be tailored to each stage of the artist-label relationship.<sup>239</sup> ADR clauses inserted into initial contracts can save valuable time, energy, and careers, as well as the reputation and subsequent success of major record labels in today’s age of advancing technology, increasing competition, and talented, deserving artists.

Improving the relationship between label and artist would ultimately help improve the public perception of the music industry as a whole, and would be a step toward improving the overall success and happiness of all involved in the process of creating music. Tailoring ADR to the stages of the artist-label relationship is the means to achieve this end of overall success. While ADR will not fix all of the problems resulting from technological issues facing the industry today, it could be a major first step toward improving artist-label relations, and subsequently the quality of music produced, which is beneficial for labels, as well as artists and the consuming public.

---

<sup>237</sup> See *supra* Part II.D (discussing how litigation contributes to the negative public perception of the music industry).

<sup>238</sup> Worthierly, *supra* note 166 (discussing the possibility of maintaining business relationships in the entertainment industry through the use of ADR).

<sup>239</sup> See discussion *supra* Part III.C-E (discussing the factors to consider in deciding whether to mediate or arbitrate, and which to use for initial contract negotiation, disputes arising during the artist-label relationship, and disputes arising after the contractual relationship ends).