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# NEGOTIATING POWER AND INEQUALITY IN MUSIC INDUSTRY CONTRACTS: A CRITICAL ANALYSIS

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## ABSTRACT

This article examines the challenges arising in the negotiation of entertainment contracts within the music industry, focusing on the imbalance of bargaining power between artists and record labels. While classical contract theory assumes agreements are freely negotiated between parties of equal standing, this assumption is largely inapplicable in this context. Structural inequalities, driven by an oversupply of aspiring musicians, high industry risk, and disparities in legal and commercial knowledge, grant record labels a dominant negotiating position. The analysis is primarily grounded in United Kingdom law, while situating the discussion within the broader global music industry.

The article explores how this imbalance leads to recurring disputes concerning remuneration, exclusivity, and creative control. It argues that mechanisms such as recoupable advances, royalty-based earnings, and broad exclusivity clauses often operate to the detriment of artists and may, in some cases, amount to unreasonable restraints of trade.

While recognising that record labels assume significant financial risk, the article contends that excessive bargaining power can be counterproductive, undermining creativity and long-term commercial relationships. It concludes that more balanced contractual practices are both equitable and commercially beneficial, reducing the likelihood of disputes and fostering sustainable success.

This article critically examines the problems that arise while negotiating an entertainment contract, specifically in the music industry. It has been a common assumption that a contract is ‘freely entered into by the parties on their terms<sup>1</sup> subject to legal bounds<sup>2</sup> and based on a classical theory of allowing the parties to freely negotiate on what they want.’<sup>3</sup> However, this is not true in entertainment industry contracts due to unfair bargaining power between the parties, with record companies having significant influence.<sup>4</sup> Therefore, this article will address the impact of this unfair bargaining power and why the negotiation of entertainment contracts is called “multi-dimensional chess matches.”<sup>5</sup>

This article question will be dissected into three parts, with the first critically analysing why problems arise during an entertainment contract negotiation. Secondly, it will analyse the “cutting edge and challenging”<sup>6</sup> problems that arise and whether this unfair negotiation process leads to a fair outcome. Lastly, the primary argument advanced in this article will be that although record labels take on significant risks and have higher bargaining power, their abuse can negatively impact the outcome for all the parties involved.

The classical theory above is inapplicable to entertainment contracts because of the unfair bargaining power, as seen in *Silvertone*,<sup>7</sup> which challenges the principle of parties negotiating terms in their best interest.<sup>8</sup> In addition, no law remedies a situation if a person merely enters into a poorly negotiated contract,<sup>9</sup> often seen in entertainment contracts.<sup>10</sup> Therefore, issues are bound to arise for the artists<sup>11</sup> because “the paper deal does not reflect the real deal.”<sup>12</sup>

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<sup>1</sup> Ryan Murray, *Contract Law: The Fundamentals* § 1-003 (6th ed., Sweet & Maxwell 2023).

<sup>2</sup> Neil Andrews, *Contract Law* 4–5 (2d ed., Cambridge Univ. Press 2015); Ryan Murray, *supra* note 1, § 1-003.

<sup>3</sup> *Printing & Numerical Registering Co. v. Sampson*, (1875) L.R. 19 Eq. 462, 465 (Sir George Jessel); *supra* note 1.

<sup>4</sup> Guy Osborn & Steve Greenfield, *Understanding Commercial Music Contracts: The Place of Contractual Theory*, 23 J. CONT. L. 1, 3 (2007).

<sup>5</sup> Brett Greenberg, *A Law Student's Perspective from the Forum's Annual Meeting: Negotiating Contracts in Entertainment & Sports Industries*, 34 ENT. & SPORTS L. 86, 87 (2018).

<sup>6</sup> Cydney A. Tune, *Entertainment Law Ethics*, 23 ENT. & SPORTS L. 1, 2 (2005).

<sup>7</sup> *Silvertone Records Ltd. v. Mountfield*, (1993) E.M.L.R. 152. (The classical theory in this statements refers to the ability of parties to freely enter into a contract and negotiate the terms in their best interests)

<sup>8</sup> Murray, *supra* note 1, § 1-010.

<sup>9</sup> *Chappell & Co. v. Nestlé Co.*, [1960] A.C. 87; Edwin Peel, *The Law of Contract* 86 (14th ed., Sweet & Maxwell 2015).

<sup>10</sup> Murray, *supra* note 1, § 1-010.

<sup>11</sup> *Silvertone Records Ltd. v. Mountfield*, (1993) E.M.L.R. 152, 155; *Panayiotou v. Sony Music Entm't (UK) Ltd.*, (1994) E.M.L.R. 229; *Ryder v. Nicholl*, (1999) 12 WLUK 447; *A. Schroeder Music Publ'g Co. v. Macaulay*, [1974] 1 W.L.R. 1308; *ZTT v. Johnson*, (1993) E.M.L.R. 61.

<sup>12</sup> Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44 (2003).

## Unfair Bargaining Power

However, before discussing these issues, it is crucial to understand why this unfair bargaining power exists, and a significant reason is the gap between the supply and demand of musicians.<sup>13</sup> There is an “impossible-to-calculate number of musicians”<sup>14</sup> as opposed to the limited demand by major record labels, an example of which is the Katseye group recruitment.<sup>15</sup> Although the music industry and its revenue have constantly been growing,<sup>16</sup> it is also true that only a few significant record labels majorly generate this revenue.<sup>17</sup> Conversely, prima facie, the audience and revenue of music streaming platforms<sup>18</sup> and the artists on these platforms have constantly increased;<sup>19</sup> the background reality reflects that this revenue and audience growth is concentrated among a handful of artists.<sup>20</sup> Therefore, by default, this gap between the demand and supply gives record labels a higher negotiating power, allowing them to manipulate the artist’s desperation to enter this competitive industry.<sup>21</sup> However, the market dynamic is changing due to the increase of self-releasing capabilities of artists through streaming

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<sup>13</sup> Matt Mcvicar et al., *Supply and demand of independent UK music artists on the web*, Proceedings of the ACM Web Science Conference (2015), mcvicar2015a.pdf (aalto.fi), (last visited, 24<sup>th</sup> April 2024).

<sup>14</sup> Brett Greenberg, *A Law Student’s Perspective from the Forum’s Annual Meeting: Negotiating Contracts in Entertainment & Sports Industries*, 34 ENT. & SPORTS L. 86, 87 (2018); Niall, *How many official musicians are there in the world*, Big Time Musicians, (2023), *How Many Official Musicians Are There in the World?* (bigtimemusicians.com).

<sup>15</sup> International Federation of the Phonographic Industry, *Global Music Report*, (IFPI, 2024) <IFPI\_GMR\_2024\_State\_of\_the\_Industry\_db92a1c9c1.pdf (ifpi-website-cms.s3.eu-west-2.amazonaws.com)> last visited on 1<sup>st</sup> May 2024, page 44, 45 (20 candidates were selected out of 120,000 applicants around the world).

<sup>16</sup> Ursula Smartt, ‘Media and Entertainment Law’ 614 (4<sup>th</sup> Edition, Routledge, 2020); Statista Rsch. Dep’t, *Global Recorded Music Revenue from 1999 to 2023*, STATISTA (Apr. 2024), *Recorded music industry - global revenue 2023* | Statista.

<sup>17</sup> Marie Charlotte Götting, *Record Companies: Market Share Worldwide 2022*, STATISTA (Mar. 2024), *Global record companies’ market share by format 2022* | Statista; Ursula Smartt, ‘Media and Entertainment Law’ 616 (4<sup>th</sup> Edition, Routledge, 2020); Marie Charlotte Götting, *Major & Independent Record Labels Market Share Worldwide 2017, by Country*, STATISTA (Jan. 2021), <https://statista.com>.

<sup>18</sup> Marie Charlotte Götting, *Spotify’s Monthly Active Users 2015–2023*, STATISTA (Mar. 2024), *Spotify MAUs worldwide 2023* | Statista.

<sup>19</sup> Rohit Shewale, *Spotify Stats for 2024: Users, Artists & Revenue*, DEMANDSAGE (Feb. 2024), *Spotify Stats for 2024 (Users, Artists, & Revenue)* (demandsage.com).

<sup>20</sup> David Andrew Wiebe, *10 Jaw-Dropping Music Industry Stats: Infographics*, DAVID ANDREW WIEBE (Mar. 2017), *10 Jaw-Dropping Music Industry Stats [INFOGRAPHIC]* - David Andrew Wiebe; Marie Charlotte Götting, *Spotify’s Most Streamed Artists as of 2023*, STATISTA (Feb. 2024), *Spotify’s most streamed artists 2023* | Statista; Marie Charlotte Götting, *Spotify: Artists with the Most Monthly Listeners Worldwide 2023*, STATISTA (Sept. 2023), *Spotify: most streamed artists worldwide 2023* | Statista; David Andrew Wiebe, *Deconstructing the Spotify Delusion*, DAVID ANDREW WIEBE (Sept. 2022), *Deconstructing the Spotify Delusion* - David Andrew Wiebe; Intellectual Property Office, ‘Research and Analysis: Executive Summary’ (Government of UK, Sept. 2021), *Executive summary* - GOV.UK ([www.gov.uk](http://www.gov.uk)).

<sup>21</sup> Cydney A. Tune, *Entertainment Law Ethics*, 23 ENT. & SPORTS L. 1, 2 (2005); International Federation of the Phonographic Industry, *supra* note 15, at 16.

platforms<sup>22</sup>, and today, the proportion of independent musicians amounts to almost 52%.<sup>23</sup>

Secondly, the entertainment industry presents a notably uneven risk-to-reward ratio, often the former outweighing the latter.<sup>24</sup> This highly volatile ratio cannot precisely be calculated,<sup>25</sup> reflecting the industry's unpredictability and a severe gap. The definition of reward from the record label's perspective varies from what artists might perceive<sup>26</sup> because, for the former, the reward is primarily an artist's economic success.<sup>27</sup> However, the likeliness of a musician being economically successful is as low as 10 to 15%.<sup>28</sup> Therefore, the companies stay vigilant while negotiating the contracts to earn enough profits from commercially successful artists and cover the costs/losses of most artists.<sup>29</sup> Further, the median income of major record label artists is £51,000 compared to £12,000 for self-releasing artists.<sup>30</sup> Therefore, the lucrativeness of being signed by a record label and their selective nature due to the high-risk factors increases the competition for the artists and the demand for record labels.<sup>31</sup>

Lastly, the significant disparity between record labels and musicians' understanding of market dynamics and contractual agreements further amplifies existing inequality.<sup>32</sup> This issue is prominent mainly among budding artists with little understanding of the industry<sup>33</sup> or the capability to afford an appropriate legal representative,<sup>34</sup> as seen initially in *Schroeder*<sup>35</sup> and

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<sup>22</sup> Smartt, *Supra* not 16, at 614.

<sup>23</sup> Intellectual Prop. Off., Research and Analysis: Executive Summary, Gov. of UK (Sep. 2021), [www.gov.uk](http://www.gov.uk); Melissa Daniels, *Why Independent Musicians Are Becoming the Future of the Music Industry*, FORBES (July 2019), *Why Independent Musicians Are Becoming The Future Of The Music Industry* ([forbes.com](http://forbes.com)).

<sup>24</sup> *Silvertone Records Ltd v Mountfield* (1993), E.M.L.R. 152,165.

<sup>25</sup> Intellectual Prop. Off., Research and Analysis: Executive Summary, Gov. of UK (Sep. 2021), Executive summary - GOV.UK ([www.gov.uk](http://www.gov.uk)).

<sup>26</sup> David Andrew Wiebe, *10 Jaw-Dropping Music Industry Stats: Infographics*, David Andrew Wiebe (Mar. 2017), *10 Jaw-Dropping Music Industry Stats [INFOGRAPHIC]* - David Andrew Wiebe; Melissa Daniels, *supra* note 23.

<sup>27</sup> Alan Coulthard, *Music Industry: disputes over agreements*, 12(4) Coms. L. 135,137 (2007) (This economic success allows the record label to recoup their costs/investments on the artists and generate profit)

<sup>28</sup> Guy Osborn & Steve Greenfield, *Understanding Commercial Music Contracts: The Place of Contractual Theory*, 23 J. CONT. L. 1, 3 (2007).

<sup>29</sup> *Id.* at 1–3; Raul Resnikoff, *The Top 1% of Artists Earn 77% of Recorded Music Income*, DIGITAL MUSIC NEWS (Mar. 2014), *The Top 1% of Artists Earn 77% of Recorded Music Income, Study Finds...* - Digital Music News.

<sup>30</sup> Intellectual Property Office, *supra* note 23.

<sup>31</sup> Shane Murphy, *Music Marketing in Digital Music Industries, An Autoethnographic Exploration of Opportunities and Challenges for Independent Musicians*, 9 INT'L J. MUSIC BUS. RES. 6, 7 (2020); Andy Boon et al., *Complete Control? Judicial and Practical Approaches to the Negotiation of Commercial Music Contracts*, 24 INT'L J. SOC. L. 89, 109; Sherri Burr & William Henslee, *Entertainment Law: Cases and Materials on Film, Television and Music* 682 (Thomson West 2004).

<sup>32</sup> *Silvertone Records Ltd. v. Mountfield*, (1993) E.M.L.R. 152, 153.

<sup>33</sup> Rich Stim, *Music Law: How to Run Your Band's Business*, 109 (7th ed., Nolo 2015).

<sup>34</sup> Stewart Macaulay, *The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules*, 66 MOD. L. REV. 44 (2003).

<sup>35</sup> *A. Schroeder Music Publ'g Co. v. Macaulay*, [1974] 1 W.L.R. 1308.

re-emerged in *Silvertone*.<sup>36</sup> This lack of understanding and legal advice raises various problems for the artists because they end up agreeing to terms without fully understanding their consequences, like the royalties clause in *Silvertone*.<sup>37</sup> In addition, although the absence of representation might skew the decision of courts in favour of artists in disputes,<sup>38</sup> it is not guaranteed.<sup>39</sup> Conversely, legal advice does not guarantee protection from this unfairness, as seen with *Shaun Ryder*,<sup>40</sup> where he, irrespective of having a legal advisor, signed an agreement without consulting or even reading it. Hence, the artists often mindlessly sign the contracts with an “I don’t care attitude”<sup>41</sup> because of their desperation<sup>42</sup> and the “take it or leave it”<sup>43</sup> nature of these opportunities. However, they ignore the fact that good representation is necessary for potential long-term success.<sup>44</sup>

Therefore, unfair bargaining power in entertainment contracts results from various underlying reasons, promoting disputes.<sup>45</sup> The most prominent disputes generally concern pay structure, high control of record labels<sup>46</sup>, and differences of opinion because these terms are critical to an artist’s career and can directly impact the earnings/reputation of record labels.

## Negotiation Disputes

It is essential to analyse these disputes from the dual perspective of artists and record labels, among which the first is money.<sup>47</sup> The pay structure for musicians is often rigorous<sup>48</sup> because of the “many are called, but few are chosen”<sup>49</sup> approach in the entertainment industry, and that

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<sup>36</sup> *Supra* note 32, at 158, 166.

<sup>37</sup> *Id.* at 166.

<sup>38</sup> Boon et al., *supra* note 31, at 89, 103.

<sup>39</sup> Steve Greenfield & Guy Osborn, *Contract and Control in the Entertainment Industry: Dancing on the Edge of Heaven* 188 (Dartmouth 1998).

<sup>40</sup> *Shaun Ryder v William Archibald Nicholl & ANR* (1999) 12 W.L.U.K. 447.

<sup>41</sup> Stim, *supra* note 33, at 6; *Supra* note 39.

<sup>42</sup> Jane Lavender, *Shaun Ryder’s Poignant Explanation for Losing £5m and Having No Cash for 20 Years*, MIRROR (June 2020), *Shaun Ryder’s poignant explanation for losing £5m and having no cash for 20 years - Mirror Online*; *Shaun Ryder v William Archibald Nicholl & ANR* (1999) 12 W.L.U.K. 447 (original case report unavailable and hence taken assistance from the transcript approved by the Court page 2 and 3); Holly Johnson, *A Bone in My Flute* 187 (Arrow 1995).

<sup>43</sup> Stim, *supra* note 33, at 318.

<sup>44</sup> Sherri Burr & William Henslee, *Entertainment Law: Cases and Materials on Film, Television and Music* 683 (Thomson West 2004).

<sup>45</sup> Steve Greenfield & Guy Osborn, *Understanding Commercial Music Contracts: The Place of Contractual Theory*, 23 J. CONT. L. 2 (2007).

<sup>46</sup> *Supra* note 44, at 766.

<sup>47</sup> *Supra* note 45, at 18.

<sup>48</sup> Soudeon, *What Is the Typical Revenue Split Between Labels and Artists for Streaming Royalties?*, MEDIUM (July 2018), *What is the typical revenue split between labels and artists for streaming royalties?* | by Soudeon | Soudeon | Medium.

<sup>49</sup> *Supra* note 32, at 156; *Supra* note 45, at 3.

originates from the unpredictability of whether an artist will be economically prosperous, the chances of which are very thin.<sup>50</sup> Therefore, the record labels pay an advance, which is easily recoupable<sup>51</sup> and bases most of an artist's earnings on royalty payments. Prima facie seems reasonable, but an artist's chances of earning a significant amount from royalties are 'nearly impossible except for their top-selling albums.'<sup>52</sup> In addition, most of today's revenue comes from artists' music on streaming platforms,<sup>53</sup> for example, Spotify, where the royalty of 1 million streams is as low as £5,700,<sup>54</sup> out of which the artists get 13%,<sup>55</sup> equalling £700.<sup>56</sup>

Conversely, some artists aim for a considerable advance, allowing them to fund their lifestyle, tours, living expenses and recording studios,<sup>57</sup> while some mistake it for free money when, in reality, it is a debt recoupable from an artist's royalty payments.<sup>58</sup> This dispute around pay is avoidable if both parties understand that 'money is the short-term interest and should not be the main focus of negotiation when it can impact an important career phase, and money will follow for both parties if the artist is successful.'<sup>59</sup> However, it is still common for some record labels to exceed the boundaries of reasonability and include "unreasonable and out of phase"<sup>60</sup> payment clauses, as seen in *Silvertone*<sup>61</sup> and *Shaun Ryder*.<sup>62</sup> Similarly, in *Schroeder*,<sup>63</sup> 'the songwriter's payment was completely dependent on publishing his work, which the publishers

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<sup>50</sup> *Supra* note 45, at 1, 3.

<sup>51</sup> David Andrew Wiebe, *How Much Advances Do Record Labels Give, and How Much Should You Try and Get?*, Music Industry How To (Dec. 2020), How Much Advance Do Record Labels Give, And How Much Should You Try And Get? - Music Industry How To.

<sup>52</sup> *Supra* note 44, at 766.

<sup>53</sup> Intellectual Property Office, Research and Analysis: Executive Summary: Government of UK (Sep. 2021), Executive summary - GOV.UK ([www.gov.uk](http://www.gov.uk))> last visited on 2<sup>nd</sup> May 2024; SoundCharts Team, *What Music Streaming Services Pay per Stream*, Soundcharts Blog (Dec. 2018), Streaming Payouts [2020]: What Spotify, Apple, & Others Pay ([soundcharts.com](http://soundcharts.com)).

<sup>54</sup> *Spotify Royalty Calculator 2024*, Indie Music Academy (2024), Spotify Royalty Calculator - Apple Music, Amazon Music, YouTube, + ([indiemusicacademy.com](http://indiemusicacademy.com)).

<sup>55</sup> Lanre Bakare, *The Music Streaming Debate: What the Artists, Songwriters and Industry Insiders Say*, THE GUARDIAN (Apr. 2021), The music streaming debate: what the artists, songwriters and industry insiders say | Music streaming | The Guardian.

<sup>56</sup> Musicians' Union, *Musicians Union Response to DCMS Streaming Enquiry*, UK PARLIAMENT, [committees.parliament.uk/writtenevidence/18910/pdf/](https://committees.parliament.uk/writtenevidence/18910/pdf/).

<sup>57</sup> *Supra* note 44, at 645; Matt W., *Unravelling Music Artist Advances: An In-Depth Guide to How They Work*, UNCHAINED MUSIC (July 2023), *Unraveling Music Artist Advances: An In-Depth Guide to How They Work* | Unchained Music.

<sup>58</sup> Musicians' Union, *supra* note 56.

<sup>59</sup> Boon et al., *supra* note 31, at 89, 108.

<sup>60</sup> *Supra* note 32, at 169.

<sup>61</sup> *Id.* at 152,154.

<sup>62</sup> *Shaun Ryder v William Archibald Nicholl & ANR* (1999) 12 W.L.U.K. 447 (original case unavailable and hence taken assistance from the transcript approved by the Court page 2 and 3).

<sup>63</sup> *A. Schroeder Music Publ'g Co. v. Macaulay*, [1974] 1 W.L.R. 1308, 1313–15.

had no obligation to do<sup>64</sup> and was ruled a “one-sided and unenforceable agreement.”<sup>65</sup> Hence, this area has always been subject to disputes.

Another highly disputed area concerns the significant control the record labels place on artists due to their significant bargaining power. Even though the artists have little to no choice,<sup>66</sup> this factor can complicate the negotiation process. One of the clauses that might depict this control is exclusivity, as “each record label tries to secure an exclusive contract with the artist.”<sup>67</sup> This exclusivity allows a record label to reap the fruit of their investment and prevent artists from leaving if they become commercially successful<sup>68</sup> while allowing them to let go of the artists earlier if needed to minimise their losses.<sup>69</sup> Also, a territorial restriction usually accompanies exclusivity to keep it valid throughout the world,<sup>70</sup> and an unsuccessful/unreasonable attempt to do the same was seen in *Silverstone*<sup>71</sup>, which defined the territory of the contract applicability as “the world and its solar system.”<sup>72</sup> Therefore, this clause “lies at the heart of any contractual relationship,”<sup>73</sup> including film contracts, such as the exclusivity clause for Warren Skaaren to write Batman.<sup>74</sup>

However, these clauses have been disputable, an example of which is the case of *George Michael*.<sup>75</sup> Although the clause here was valid and fair,<sup>76</sup> this decision has been criticised and was “a rare victory for the industry”<sup>77</sup> because most rigorous exclusivity clauses are held to be a restraint of trade<sup>78</sup>, and the application of this principle to music contracts was confirmed in

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<sup>64</sup> Id. at 1308, 1313; *Supra* note 45 at 1, 15.

<sup>65</sup> *Supra* note 63.

<sup>66</sup> Rich Stim, *Music Law: How to Run Your Band's Business* 318 (7th ed., Nolo 2015).

<sup>67</sup> Ursula Smartt, *Media and Entertainment Law* 616 (4th ed., Routledge 2020) [examples of it can be seen as the Beatles recorded their albums at Abbey Road Studios exclusively with EMI. Tom Jones also used to record with EMI (What's New Pussycat? and Delilah), and then left for the Island record label (Praise and Blame)].

<sup>68</sup> Steve Greenfield & Guy Osborn, *Unconscionability and Contract: The Creeping Shoots of Bundy*, 7 DENNING L.J. 65, 71 (1992); Steve Greenfield & Guy Osborn, *Sympathy for the Devil—Contractual Constraint and Artistic Autonomy in the Entertainment Industry*, 15 MEDIA L. & PRAC. 117, 118 (1994).

<sup>69</sup> Id. at 117–18; Andy Boon et al., *Complete Control? Judicial and Practical Approaches to the Negotiation of Commercial Music Contracts*, 24 INT'L J. SOC. L. 89, 99.

<sup>70</sup> Greenfield & Osborn, *supra* note 68, at 117–18.

<sup>71</sup> *Supra* note 32, at 166.

<sup>72</sup> Id. at 163.

<sup>73</sup> Greenfield & Osborn, *supra* note 68, at 117.

<sup>74</sup> Sherri L. Burr, *Entertainment Law: Cases and Materials in Established and Emerging Media* 523 (West 2011).

<sup>75</sup> *Panayiotou v. Sony Music Entm't (UK) Ltd.*, (1994) ECC 395, 424–25.

<sup>76</sup> *Panayiotou v. Sony Music Entm't (UK) Ltd.*, (1994) E.M.L.R. 229 (Parker J.).

<sup>77</sup> Boon et al., *supra* note 69, at 89; Alan Coulthard, *George Michael v. Sony Music: A Challenge to Artistic Freedom?*, 58 MOD. L. REV. 731, 739–44; Greenfield & Osborn, *supra* note 68, at 117.

<sup>78</sup> Richard Bagehot, *Star or Slave? Holly Johnson Revisited*, 1 ENT. L. REV. 16, 21 (1990).

*Esso*<sup>79</sup> and enshrined in *Schroeder*.<sup>80</sup> This principle was later applied in *Johnson*<sup>81</sup> and *Silvertone*<sup>82</sup>, where the record labels exceeded the band of reasonability<sup>83</sup>, and hence, the concerned clauses were held invalid.

The exclusivity clause also tries to cover the duration of the contract, as seen in *Schroeder*<sup>84</sup> and *Silvertone*,<sup>85</sup> where to maintain exclusivity, the record labels could technically extend a contract for a much longer period<sup>86</sup> than what it showed prima facie.<sup>87</sup> However, record labels do this to protect their interest and investment in artists if they are economically prosperous.<sup>88</sup> However, similar clauses could also be invalid and in restraint of trade if they are “more than what is reasonably required to protect the legitimate interest.”<sup>89</sup> The reasoning behind this is the ‘cruelly brief careers of many musicians’ where even five five-year fame is considered an achievement.<sup>90</sup>

Lastly, a prominent reason for disputes during negotiation can be seen as the difference in expectations and opinions. Most artists prefer to ‘retain full creative control over their music’<sup>91</sup> instead of record companies, which are profit-oriented and would mostly prefer the artists to create something commercially successful, which is usually non-negotiable. However, some record labels are changing their outlook, or at least that is what is being portrayed. The example of this variation in understanding is reflected in the statements of various record labels<sup>92</sup> where they ‘acknowledge how creative freedom, a right team around artists and professionally and financially supportive environment could help artists develop and produce their best work.’<sup>93</sup>

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<sup>79</sup> *Esso Petroleum Co. v. Harper's Garage (Stourport) Ltd.*, [1968] A.C. 269; *supra* note 39, at 71.

<sup>80</sup> Michael A. Smith, *Restraint of Trade in the Music Industry*, 5 ENT. L. REV. 182, 183; *supra* note 39, at 79.

<sup>81</sup> *ZTT v. Johnson*, (1993) E.M.L.R. 61; *Boon et al.*, *supra* note 77, at 89, 104.

<sup>82</sup> *Supra* note at 32.

<sup>83</sup> Kevin Garnett, ‘The Holly Johnson Case’ (1990) 12(5) *European Intellectual Property Review* 175, 177, 178

<sup>84</sup> *A. Schroeder Music Publishing Co. Ltd v Macaulay* [1974] 1 WLR 1308

<sup>85</sup> *Supra* at (n 32)

<sup>86</sup> David Zeffman & John Enser, *The Impact of UK Competition Law on the Music Industry*, 4 ENT. L. REV. 67 (1993).

<sup>87</sup> Steve Greenfield & Guy Osborn, *Unconscionability and Contract: The Creeping Shoots of Bundy*, 7 DENNING L.J. 67, 70–71 (1992); David Zeffman & John Enser, *supra* note 86; Greenfield & Osborn, *supra* note 68, at 118.

<sup>88</sup> Alan Coulthard, *Music Industry: Disputes Over Agreements*, 12 COMMS. L. 135, 137 (2007).

<sup>89</sup> David Zeffman and John Enser, *supra* note 86.

<sup>90</sup> Greenfield & Osborn, *supra* note 68, at 118; *supra* note 39, at 73.

<sup>91</sup> Melissa Daniels, *Why Independent Musicians Are Becoming the Future of the Music Industry*, FORBES (July 2019), *Why Independent Musicians Are Becoming The Future Of The Music Industry* (forbes.com).

<sup>92</sup> International Federation of the Phonographic Industry, *Global Music Report 18-19 (2024)*, IFPI\_GMR\_2024\_State\_of\_the\_Industry\_db92a1c9c1.pdf (ifpi-website-cms.s3.eu-west-2.amazonaws.com) (Republic Records Senior VP, Universal Music CEO, Warner Music Group Recorded Music CEO, Sony Music Italy Head of A&R).

<sup>93</sup> International Federation of the Phonographic Industry, *supra* note 2, at 16

However, many artists are also ready to amend their creative direction<sup>94</sup> to obtain tremendous success, which is what a record label can provide.<sup>95</sup> This is evident from the fact that ‘ the top 0.1% tier of tracks by popularity contain nine times as many tracks owned by major record companies as opposed to non-majors,’<sup>96</sup> Hence assisting an artist in obtaining recognition and status as they can handle public relations of an artist. Therefore, several disputes are bound to arise while negotiating an entertainment contract, but the record company’s decision mostly prevails.<sup>97</sup>

### Key to Mutual Success

However, record labels should use this power equitably even if promoting their brand and earning profits<sup>98</sup> requires them to frame harsh contracts<sup>99</sup> because unnecessary exploitation for short-term gain might complement long-term failure,<sup>100</sup> as with *George Michael*.<sup>101</sup> Although the court here ruled in favour of Sony while considering their “equitable defences”<sup>102</sup>, George Michael said, “he will not record for Sony again.”<sup>103</sup> Therefore, Sony won, but it cost them a significant artist and obtaining specific performance concerning contracts for personal service is unlikely.<sup>104</sup> Hence, he cannot be forced to fulfil any of his recording commitments.

Furthermore, imposing an unreasonable pay structure can cause the artists to feel undue pressure and lose their creative mindset.<sup>105</sup> Artists are usually more focused on their music and creativity. However, money is the backbone of most contracts, and depriving the artists of it to maximise profits and minimise risks might pressure them, preventing them from producing commercially successful music. In addition, the record labels have sometimes been ignorant of artists’ mental health as they want the artist to perform irrespectively; for example, Amy

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<sup>94</sup> Daniels, *supra* note 91.

<sup>95</sup> Id.

<sup>96</sup> Research and Analysis: Executive Summary, *supra* note 25.

<sup>97</sup> Except where the artist in question is already successful who might be in a better bargaining position.

<sup>98</sup> ‘Complete Control? Judicial and Practical Approaches to the negotiation of commercial music contracts’, *supra* note 77 at 108.

<sup>99</sup> David Zeffinan and John Enser, The impact of UK competition law on the music industry, 4(3) Entertainment Law Review 67 (1993).

<sup>100</sup> *Supra* note 98 at 109-110

<sup>101</sup> Panayiotou v. Sony Music Entm’t (UK) Ltd., [1994] E.C.C. 395.

<sup>102</sup> Id. at 428.

<sup>103</sup> Greenfield & Osborn, *supra* note 68, at 117.

<sup>104</sup> Trade Union and Labour Relations (Consolidation) Act 1992, § 236 (U.K.); Greenfield & Osborn, *supra* note 68, at 118; Mairead Powell, *What Is Specific Performance of a Contract?*, HARPER JAMES (2020), What is specific performance in UK contract law? (harperjames.co.uk).

<sup>105</sup> Shinichi Furuya et al., *Factors of Choking Under Pressure in Musicians*, 16 PLOS ONE 1 (2021).

Winehouse<sup>106</sup> once performed ‘while being completely intoxicated and unsurprisingly delivered a disastrous performance, which is bound to happen in similar scenarios.’<sup>107</sup> Sadly, one month later, allegedly, the continuing substance abuse led to her death<sup>108</sup> and the label lost a successful artist.

Lastly, record labels should consider building a long-term relationship based on reasonability. This is much more fruitful for a record label if the artist is commercially successful, as opposed to an unreasonable contract which will end up being unenforceable, which no record label would prefer. Therefore, it is in the artist’s and record company’s best interest to leave breathing space for the artist, which will indirectly prevent wasting “several years and huge legal fees” in litigation<sup>109</sup> and build a long-term relationship if an artist succeeds.

In conclusion, several disputes arise during the negotiation of an entertainment contract due to unfair bargaining power, and the latter exists due to several factors, including the vast demand and supply gap. However, it is also true that although the record labels can exploit the negotiations, they should not necessarily do so and make the terms more equitable for the artists, which would benefit the record companies in the long term and help them avoid unnecessary litigation. Hence, many record companies now follow a considerable checklist to conclude an effectively favourable contract without it being too rigorous and turning out to be unenforceable.<sup>110</sup>

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<sup>106</sup> Marco Margaritoff, *How Did Amy Winehouse Die? Inside Her Fatal Downward Spiral*, ALL THAT’S INTERESTING (Nov. 2023), The Story Of Amy Winehouse’s Death And Her Tragic Final Days (allthatsinteresting.com).

<sup>107</sup> *Supra* note 44 at 823.

<sup>108</sup> *Supra* note 106.

<sup>109</sup> *Supra* note 39 at 79.

<sup>110</sup> *Id.* at 73.