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THE RIGHT OF A RECORDING COMPANY TO ENJOIN AN ARTIST FROM RECORDING FOR OTHERS

by Jay L. Cooper*

I. BACKGROUND

California Civil Code Section 3423 (Fifth)¹ provides that in order for an employer to obtain an injunction against an employee to prevent the breach of a contract for the rendition or furnishing of personal services, the contract must be in writing and must be one "where the minimum compensation for such services is at the rate of not less than \$6,000 per annum and where the promised service is of a special, unique, unusual, extraordinary or intellectual character. . . ."²

Although the code section was enacted in 1919, there was no authoritative case law interpreting it until the 1966 decision of *Foxx v. Williams*.³ In that case, comedian Redd Foxx brought an action against the recording company that was distributing his comedy albums for a declaration of rights, an accounting, and other relief. The recording company cross-complained, seeking, among other remedies, injunctive relief to prevent Foxx from making sound recordings for any other party and from using his name and likeness in connection with sound recordings made by any other party. After a court trial, Foxx was enjoined and appealed from the judgment.⁴ The Court of Appeal vacated the injunction, holding that the statutory requirement of Civil Code Section 3423 had not been met because Foxx's only compensation under the recording contract was in the form of royalties which were *contingent* upon sales of his records. Therefore, the contract did not *guarantee* Foxx receipt of any money as a result of his performance.⁵ Noting that the decision was not based on the absence of proof of the amount of royalties actually earned pursuant to the contract, the court explained its holding as follows:

An injunction which forbids an artist to accept new em-

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1. Cal. Civ. Code § 3423 (Fifth) (West 1970).

2. *Id.*

3. *Foxx v. Williams*, 244 Cal. App. 2d 223 (1966).

4. *Id.* at 227.

5. *Id.* at 236.

ployment may be a harsh and powerful remedy. The monetary limitation in the statute is intended to serve as a counterweight in balancing the equities. The Legislature has concluded that an artist who is not entitled to receive a minimum of \$6,000 per year by performing his contract should not be subjected to this kind of economic coercion. Under the statutory scheme, an artist who is enjoined from accepting new employment will at least have the alternative of earning \$6,000 or more per year by performing his old contract.⁶

Foxx is significant as the first and only appellate court decision on the effect of Civil Code Section 3423 as it applied to the entertainment industry. A series of cases preceded *Foxx* involving this issue as applied to the recording industry in particular, but none besides *Foxx* reached the Court of Appeal. As a result of the *Foxx* decision, the \$6,000 minimum compensation requirement has become an important issue in the recording industry. This article will focus on two recent decisions: *Discreet Records, Inc. v. Dalton*,⁷ which illustrates the recording companies' response to the *Foxx* decision; and *MCA Records, Inc. v. Newton John*,⁸ which indicates how many artists have used the statute to their advantage.

II. *DISCREET RECORDS, INC. V. DALTON*⁹ AND THE \$6,000 OPTION

Many record companies in California have attempted to circumvent the effect of *Foxx v. Williams* by inserting a provision in their contracts granting the record company an *option* to pay the artist compensation for services at a rate not less than \$6,000 per year. Such clauses read essentially as follows:

Company shall have the right and option, by giving written notice to you at any time during each year of the term hereof (as the same may be extended) to elect to revise this Agreement so that during the then current period, and/or all subsequent periods for which this Agreement may be renewed or extended, Company shall guarantee payments to you as an advance against royalties an amount equal to not less than \$6,000. In the event Company elects to revise this Agreement in accordance with the above, Company shall pay to you prior to the end of the then current period and/or all subse-

6. *Id.*

7. *Discreet Records, Inc. v. Dalton*, LA Sup. Ct. No. 122 536 (1976).

8. *MCA Records, Inc. v. Newton-John*, 90 Cal. App. 3d 18 (1979).

9. *Supra* note 7.

quent periods the difference between the royalties and advances received by you pursuant to the provisions of this Agreement (other than this paragraph) and \$6,000 or an amount equal to that portion of \$6,000 that the number of days remaining in the subject period bears to 365.

Such options were thought to put the record company in a position of the least possible financial risk in the event the recording artist decided to record for another company. If the artist had not earned enough money for the record company, the company would not exercise the option; but if the artist had earned enough, the company would.

The provision raised several questions left unanswered by *Foxx*. Was it necessary to compensate the employee \$6,000 per year from the inception of the contract, or was it sufficient that the sum was guaranteed before the injunction was sought, even if such guarantee was made subsequent to the alleged breach? The court in *Foxx* suggested that the decision was reached as a matter of public policy; thus, the bootstrapping effect of the option provision would appear to be contrary to the legislative intent of the statute. Furthermore, what if the election to guarantee the required amount was not made until some point after the expiration of the initial year of the term? Does the public policy nature of the statute require that the \$6,000 be guaranteed in every year of the contract period, or does the remedial nature of the statute indicate that judicial inquiry will extend only to the year in which the alleged breach was made? Since this option provision can be exercised at any time the record company elects, may the record company elect to exercise the option on the last day of the term, thereby paying the artist 1/365th of \$6,000, and still be entitled to injunctive relief?

In the case of *Discreet Records, Inc. v. Dalton*,¹⁰ a singer professionally known as Kathy Dalton entered into an exclusive recording agreement with Discreet Records in 1973. The agreement provided that Ms. Dalton would receive a \$5,000 advance against royalties at the time of execution of the contract, as well as any compensation required by any applicable collective bargaining agreements. The contract also purported to give the record company an option substantially similar to the one referred to above.

A dispute arose between the parties regarding the musical compositions to be included on the second album to be produced under the agreement, as a result of which, on May 9, 1974, Discreet suspended the agreement, alleging failure of performance. Ms. Dalton denied the

10. *Id.*

charges and notified Discreet that she considered the suspension, as well as other activities of the record company, to be a material breach of the agreement, and she indicated that if Discreet failed to cure such breaches within the time period specified in the agreement, she would terminate the agreement. Discreet did not cure, and on June 28, 1974, Ms. Dalton terminated the agreement by written notice to Discreet. On September 3, 1974, the record company corresponded with Ms. Dalton, seeking to make recording arrangements, and Ms. Dalton responded that the offer came too late, since the contract had been terminated in June.

Shortly thereafter, Discreet notified Ms. Dalton that it was exercising its option to increase her compensation to at least \$6,000 per year, and a couple of weeks later sent out letters to record companies informing them that Ms. Dalton was signed to an exclusive long-term recording agreement with Discreet and that any attempt by them to interfere with Discreet's contractual rights would be "acted upon immediately and vigorously."

About March 1, 1975, Ms. Dalton entered into a recording agreement with another record company, and Discreet sought an injunction to restrain her performance thereunder. The court denied relief on the grounds of insufficient compliance with the statute; and subsequently, Ms. Dalton filed a cross-complaint seeking both actual and punitive damages, among other remedies, arising out of Discreet's interference with Ms. Dalton's efforts to seek a new recording agreement. After trial, the jury dismissed Discreet's complaint, and awarded Ms. Dalton over \$68,000 in damages, \$12,000 of which were punitive.

The \$6,000 option clause is still being used by a few record companies in a modified form, providing that the option must be exercised prior to any breach or threatened breach by the artist. Although this variation appears to be less at odds with the legislative intent of Civil Code Section 3423 (Fifth) than the provision quoted above, it still risks invalidation by the courts on several of the grounds left open by *Discreet*, including absence of a guarantee for the entire duration of the agreement. However, *Discreet* certainly was a victory for recording artists in that it has served as a warning to record companies that the type of notice used by Discreet to "discourage" other record companies from contracting with a recording artist engaged in a dispute with the artist's current employer could subject the record company sending such notice to punitive as well as actual damages.

III. *MCA RECORDS, INC. v. NEWTON-JOHN*:¹¹ THE OTHER SIDE OF THE \$6,000 COIN

Many disgruntled artists have invoked Civil Code Section 3423 (Fifth) in an effort to terminate recording agreements in situations where the artists have become dissatisfied with their relationships with the record companies or hungry for contractual freedom and the promise of more attractive terms that such freedom holds. Perhaps the most famous of these cases, due in part to the popularity of the artist involved, is the case of *MCA Records, Inc. v. Newton-John*.¹²

In 1975, Ms. Newton-John entered into an exclusive recording agreement with MCA for an initial period of two years, giving MCA three options, each to renew the agreement for a period of one additional year. During each year, Ms. Newton-John was obligated to record for and deliver to MCA, in accordance with a delivery schedule, a sufficient number of masters to constitute two long-playing record albums. MCA, in turn, was obligated to pay Ms. Newton-John royalties based on record sales, as well as specified non-returnable advances against royalties upon delivery of the masters for each album as follows: \$221,500 for each album in the initial term, and \$100,000 for each album in each option period. MCA could reject only those masters that were technically unsatisfactory for use in manufacturing records, and was obligated to release for sale in the United States and Canada albums manufactured from the masters delivered to it. Ms. Newton-John was responsible for all costs incurred in producing the masters.

Ms. Newton-John had delivered the masters for the first four albums due under the agreement and MCA had released each of those albums and made the payments due her in connection therewith. Production costs for the third and fourth albums were approximately \$58,000 and \$132,000 respectively. The fifth album was not delivered according to schedule (no later than October 12, 1977); and on February 10, 1978, MCA gave Ms. Newton-John notice of its election pursuant to the agreement to extend the term of the agreement for a period equivalent to all or any part of the period that Ms. Newton-John remained in default. In March 1978, while Ms. Newton-John remained in default, MCA paid her approximately \$590,000 for royalties from record sales. On May 23, 1978, Ms. Newton-John notified MCA of her intent to enter into an agreement with another record company, and

11. *Supra* note 8.

12. *Id.*

about one week later MCA filed an action for injunctive relief. A preliminary injunction was issued to restrain Ms. Newton-John from recording for a company other than MCA pending a trial on the merits, and Ms. Newton-John appealed.

The issues raised by this case are interesting ones: What is the nature of the "compensation" required by the statute to be guaranteed to the artist? Is it sufficient that the artist be guaranteed at least \$6,000, when the contract by its own terms requires that an unspecified amount of the sums guaranteed as compensation be expended in performing the services to be rendered? If the statute does refer to net profits, how are such profits computed?

In her case, Ms. Newton-John was to be advanced approximately \$200,000 against royalties during the contract year, and was required to deliver masters sufficient to constitute two albums. It was Ms. Newton-John's contention that her obligation to assume the responsibility for the costs incurred in connection with the production of the masters should have been taken into account in determining whether the agreement provided for the requisite minimum compensation. She alleged that she would spend in excess of \$194,000 to produce the masters, citing production costs of \$132,000 on the fourth album delivered under the agreement.

MCA argued that the requirement of Civil Code Section 3423 (Fifth) was satisfied by her guaranteed receipt of \$200,000, and that to take production costs into account would confuse the requirement of "compensation" with "net profits," broadening the scope of the inquiry mandated by the statute to such an extent that the determination would be practically impossible. MCA argued further than even if Ms. Newton-John's obligation to assume the responsibility for production costs could be taken into account, the \$6,000 requirement was met since it was possible for her to fulfill her contractual obligation to produce the required number of masters for less than \$194,000 and therefore net at least \$6,000, citing expert testimony that masters for two albums for an artist of Ms. Newton-John's stature could be produced for less than \$150,000. Although the decision in *Foxx* clearly indicated that the issue was what compensation the employer was contractually obligated to pay, not whether the employee *actually* received at least \$6,000, MCA noted that Ms. Newton-John was guaranteed \$1,000,000 over two years for performing her contractual obligations as a recording artist, having in fact received compensation in excess of \$2,500,000 over

the first three years of the agreement.¹³

The trial court agreed with both arguments advanced by MCA, finding that the "minimum compensation" referred to in Section 3423 (Fifth) did not mean "net profits," and even if it did, Ms. Newton-John had been granted an amount sufficient to enable her to make satisfactory recordings and still net minimum compensation of \$6,000 a year. The appellate court sustained this ruling, noting:

It is decisive here that under the terms of the agreement exclusive control of production costs remained in defendant's hands at all times. Defendant was free to record in as tight-fisted or as open-handed a manner, costwise, as she chose. Defendant's interpretation of the minimum compensation statutes would allow her to nullify her contract at any time merely by increasing her production expenses, which at all times remained under her exclusive control. We do not believe the legislature intended to sanction such a one-sided bargain, and *we agree with the trial court's ruling in both aspects*.¹⁴

The ruling of the Court of Appeal is significant. It suggests that if an artist is guaranteed only \$6,000 per year and is contractually obligated to deliver, and bear the production costs of two albums per year, the record company could still get an injunction. Although this result appears to be contrary to the public policy rationale of the statute, the language of the decision clearly gives record companies broad latitude and possibly a new way to circumvent the effect of *Foxx v. Williams*.

IV. CONCLUSION

While *Discreet Records, Inc. v. Dalton* and *MCA Records, Inc. v. Newton-John* have resolved some of the issues left open in *Foxx v. Williams*, the two cases probably raise more questions than they answered. Only time will be able to answer the many questions that remain . . . subject, of course, to raising more!

13. Respondent's Brief, *MCA Records v. Newton-John*, *supra* note 8, at 35.

14. *Supra* note 8 at 22.

