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ARTICLES

ARTIST/MANAGEMENT AGREEMENTS AND THE ENGLISH MUSIC TRILOGY: ANOTHER BRITISH INVASION?†

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I. INTRODUCTION

Imposing obligations on an artist who signs lengthy, complicated, long-term agreements that affect his career and his ability to make a living is considered unfair. These agreements often have far reaching effects which continue after the contract's duration. Artists often feel that these agreements exist primarily for the benefit of managers, publishers and record companies.[1] For the most part, the industry expects artists to accept and sign so called "standard form agreements." Many view an artist's refusal to sign these agreements without the benefit of counsel as an early breach of faith indicating a deep lack of trust.[2] In a parallel view, held by many nonartists, the artist gratefully accepts and signs the standard form agreement at the beginning of his career on the basis of an unwritten inducement or assurance of a future renegotiation. Money is advanced and clauses are amended when the artist achieves measurable success.[3]

No legislation in California dictates or prescribes either the functions of the personal manager or his obligations to the artist. However,

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1. Hertz, *The Regulation of Artist Representation in the Entertainment Industry,* 8 LOY. L.A. ENT. L.J. 55, 56 (1988).

2. This view has prevailed throughout the music management industry for many years.

3. *See, e.g.,* Elton Hercules John v. Richard Leon James, High Court of Justice, Chancery Division, 1982 J. No. 15026 (Nov. 29, 1985).

the American Federation of Musicians [hereinafter AF of M], an international musicians trade union, attempts to control personal management activities by regulating booking agents. According to the AF of M, only the booking agent may procure employment for the artist.[4] The booking agent must be licensed by the AF of M and, if he is not, AF of M members are forbidden from employing his services.[5] The AF of M allows the booking agent, who is retained for ongoing representation, to receive a maximum of fifteen percent of the artist's gross receipts.[6]

The AF of M defines the personal manager as one who is responsible for the day-to-day and long-term development of the artist's career and one who offers advice and guidance to the artist.[7] The personal manager cannot procure employment for the artist and may receive a maximum of only five percent of the artist's gross receipts (beyond the fifteen percent agent's fee) for managerial services rendered.[8] This provision extends only to those licensed booking agents who also engage in personal management activities and does not extend to those who act solely as personal managers.

In practice, separating the functions and activities of personal managers and booking agents is difficult, since the personal manager often fulfills both roles. In addition, personal managers often charge fees well in excess of the maximum quoted by the AF of M for managerial services (usually as much as twenty-five percent).[9] However, unlike the booking agent, the manager often forfeits his commissions in the early years of the artist's career, hoping for greater future financial rewards.

The AF of M, faced with the practice of managers acting in the dual capacity of agent and manager and in contravention of its rules, is left with the sole remedy of exercising its authority under its international constitution to disallow or revoke booking agent licenses and suspend or

4. *By-Laws of the American Federation of Musicians of the United States and Canada,* [hereinafter *By-Laws of the AF of M*] revised Sept. 15, 1987, art. 23, § 2.

5. *By-Laws of the AF of M,* art. 23, § 5.

6. *By-Laws of the AF of M,* art. 23, §§ 2-6, 8.

7. *Personal Management Agreement of the AF of M.* The Agreement loosely defines a personal manager as one who "aid[s] (artists) in furthering their careers. . ." and one who "[i]s experienced and qualified to manage the business affairs of the Artists, and assist them in the furtherance of their professional careers as entertainers. . . ." The personal manager undertakes a duty to "advise and counsel" the artist(s) in the areas of selection of literary, artistic and musical materials, publicity and public relations, format of presentation of the artist's talents, selection of booking agents, employment selection and all other duties personal managers 'customarily perform.'" *Id.* at § 1 (a)-(f).

8. *By-Laws of the AF of M,* art. 23, § 8.

9. Hertz, *supra* note 1, at 55-56 n.4 (citing S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 86 (1985)).

expel those members who deal with unlicensed booking agents. This ineffective remedy is rarely imposed or enforced.[10]

In considering the enforceability of management, recording and publishing agreements, entertainment professionals and artists in the music industry have little precedent to guide them. In the absence of precedent and apart from general contract law, the California Labor Code and a recent trilogy of English cases provide the primary basis for considering issues arising from contracts in the music industry.

II. THE CALIFORNIA LABOR CODE

The Talent Agencies Act,[11] a part of the California Labor Code, provides a controversial approach to the protection of artists' rights to receive payment for their efforts. Like the By-Laws of the AF of M, this Act regulates only the booking agent and distinguishes between the booking agent and personal manager. The Act defines a booking agent as one who procures employment or attempts to procure employment for an artist.[12] The Act also gives legislative force to the various tariffs established by California entertainment trade unions, including those of the AF of M.[13]

Conflicts result because the manager often fulfills the functions of a booking agent while charging fees well in excess of the AF of M's tariff. Problems between a manager and an artist find their way to the Labor Commissioner in the form of a complaint against the manager. The Labor Commissioner, upon finding that the manager (who is not licensed as a booking agent) has attempted to procure or has procured employment for the artist, may find that the contract between the parties is void and unenforceable.[14] Based on that finding, the Labor Commissioner may order all fees and commissions that the manager received under the contract to be returned to the artist.[15]

Therefore, although the Act does not specifically regulate personal managers, an artist who can demonstrate that his manager has engaged

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10. *By-Laws of the AF of M,* art. 23, § 3.

11. CAL. LAB. CODE §§ 1700-1700.47 (West 1971 & Cum. Supp. 1989). For general discussions thereof, *see* Hertz, *supra* note 1; P.R. Green & B.R. Green, *Talent Agents and the New California Act,* 9:4 ENTERTAINMENT LAW REPORTER 3 (1987); Feller, *California's Revised Talent Agencies Act: Fine Tuning the Regulation of Employment Procurement in the Entertainment Industry,* 5:3 ENTERTAINMENT AND SPORTS LAWYER 3 (1986).

12. CAL. LAB. CODE § 1700.4 (West 1971 & Supp. 1989).

13. CAL. LAB. CODE § 1700.23 (West 1971 & Supp. 1989).

14. Buchwald v. Superior Court of San Francisco, 254 Cal. App. 2d 347, 353-56, 62 Cal. Rptr. 364, 370-72 (1967).

15. *Id.* at 355, 62 Cal. Rptr. at 372.

in booking agent activities as an unlicensed agent may challenge his management agreement. The artist may do this even if the agreement specifically restricts the manager to management activities, and the parties are mutual beneficiaries of a legitimate management agreement.[16] In essence, the Talent Agencies Act, which was originally designed to provide artists with income protection, is now used by artists to terminate contracts with managers who no longer suit the artists' purposes.[17] Managers, faced with this threat, may decide to either license themselves as agents, thereby subjecting themselves to the Talent Agencies Act, or refrain from engaging in agent activities. The former proposition is economically unfeasible given the AF of M's tariff and the risks which the manager must assume.[18] The latter proposition is difficult to achieve in practice, given the nature of personal management activities.

However, two amendments in 1982 to the Talent Agencies Act have made this latter proposition somewhat easier to achieve. The first amendment allows personal managers to procure employment for artists' recording contracts without being licensed agents.[19] The second amendment allows managers to work in conjunction with agents without being subjected to the Act.[20]

The Talent Agencies Act essentially regulates the procurement of contracts, protects artists' income and prevents unscrupulous and oppressive conduct regarding the most critical source of an artist's livelihood: the sale of his skill and copyrights. However, a manager who can successfully remove himself from the scope of the Act can relieve himself from regulation thereunder, and as such, his conduct will be governed by common law.

III. THE ENGLISH MUSIC TRILOGY

The "English music trilogy" consists of three cases concerning artists who signed so-called "standard form industry agreements" early in their careers. These artists ultimately became successful. The trilogy raises questions which American courts have yet to consider fully, and

16. *Id.* However, pursuant to the newly added California Labor Code § 1700.44(c), an action against an unlicensed booking agent must be commenced within one year of the alleged violation under the Act. CAL. LAB. CODE § 1700.44(c) (West 1971 & Supp. 1989).

17. Nimoy, *Personal Managers and the California Talent Agencies Act: For Whom the Bill Toils*, 2 LOY. L.A. ENT. L. J. 145, 163-64 (1982).

18. Johnson & Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 411-12 (1979).

19. CAL. LAB. CODE § 1700.4(a) (West 1971 & Supp. 1989).

20. CAL. LAB. CODE § 1700.44(d) (West 1971 & Supp. 1989).

provides a useful series of fact situations and decisions which appear to jeopardize industry practices common in England and the United States.

The trilogy is comprised of the cases of *A. Schroeder Music Publishing Co. Ltd. v. Macaulay*[21] (*"Schroeder"*), *Clifford Davis Management Ltd. v. WEA Records Ltd.*[22] (*"Davis"*) and *O'Sullivan v. Management Agency and Music Ltd.*[23] (*"O'Sullivan"*).

The House of Lords decided *Schroeder* in October 1974, on appeal from the English Court of Appeal. The case involved a young songwriter who entered into a standard form agreement with a music publishing company which gave the publishing company his exclusive services for five years and a perpetual worldwide assignment of his copyrights.[24] Additionally, if the songwriter's royalties equalled or exceeded five thousand pounds, the agreement was extended automatically for another five year term. The publishing company had a unilateral right to terminate the agreement at any time by giving one month's notice, as well as the right to assign the agreement or any particular work of the songwriter, which included all the rights and obligations under the agreement.[25] No such rights were given to the songwriter and, under the terms of the contract, the publisher had no obligation to publish anything. The court in *Schroeder* found the publishing contract to constitute an unreasonable restraint of trade and the agreement to be contrary to public policy. Accordingly, the contract was found to be void.[26]

The English Court of Appeal decided the *Davis* case only a few days after the House of Lords decided *Schroeder*. *Davis* involved two members of the pop group "Fleetwood Mac," who were experienced performers and composers, but inexperienced business persons.[27] They signed five year standard form publishing agreements with their manager, which were only renewable at the manager's option. The manager received royalties from the copyrights, and retained the right to assign or transfer the copyrights without the composers' consent. The agreements were unilateral to the extent that they imposed no duty to perform on the manager. The court also found that the composers signed the contracts without the aid of independent legal advice.[28]

21. [1974] 3 All E.R. 616. *See also* Instone v. A. Schroeder Music Publishing Co., Ltd., [1974] 1 All E.R. 171 (C.A.).
22. [1975] 1 All E.R. 237 (C.A.).
23. [1984] 3 W.L.R. 448, [1985] 3 All E.R. 351 (C.A.).
24. *Schroeder*, [1974] 3 All E.R. at 618.
25. *Id.* at 619.
26. *Id.* at 622.
27. *Davis*, [1975] 1 All E.R. at 240.
28. *Id.* at 241.

The manager, Clifford Davis, brought an action against the record company, WEA Records, to obtain an interim injunction restraining WEA from selling recordings of the composers' works. Davis claimed the exclusive rights to the works under his agreements with the composers. The composers, despite their agreements with Davis, had transferred these rights to WEA. The Court of Appeal set aside the lower court order granting Davis an interim injunction and held that since the record company had established a prima facie case of an inequality of bargaining power between the manager and the composers, the agreements were unenforceable.[29]

O'Sullivan, the final case of the trilogy, was decided by the English Court of Appeal in February 1984. The artist's personal manager, Mills, was a substantial shareholder in the management company, which owned both the publishing and recording companies, the latter of which Mills was chairman of the board.[30] The artist, Gilbert O'Sullivan, signed contracts with each of these companies. A third party, Smith, had a substantial interest in and was the managing director of each of these companies. Smith also managed a company set up to receive O'Sullivan's profits earned outside the United Kingdom. Smith drafted the recording and publishing agreements that O'Sullivan signed. O'Sullivan was a young, unknown composer and performer, wholly inexperienced in business when he signed these agreements.[31]

O'Sullivan brought an action seeking declarations that these agreements were void *ab initio* on the grounds that they imposed an unreasonable restraint on trade and were obtained by undue influence. By the time of trial, all of the agreements had been performed and had lapsed.[32] The trial judge found that the agreements restrained trade and that Mills, together with these four associated companies, owed a fiduciary duty to O'Sullivan. The trial judge presumed that these agreements were obtained by undue influence.[33] The defendants appealed the trial court's findings of undue influence against the companies to the Court of Appeal. That court addressed three specific issues. First, since a fiduciary relationship existed, the agreements were presumed to have been obtained by undue influence. Thus, the court had to decide whether the agreements were void or voidable. Second, since the agreements had been fully performed, the court had to determine the appropriate rem-

29. *Id.*

30. O'Sullivan v. Management Agency and Music Ltd., [1984] 3 W.L.R. 448, 454.

31. *Id.* at 453.

32. *Id.* at 457.

33. *Id.*

edy. Third, the court had to determine the appropriate rate of interest to be applied to the plaintiff's award.

The Court of Appeal affirmed the trial judge's findings of undue influence, but found the contracts voidable rather than void.[34] The court ordered all of the companies to provide an accounting of profits, plus a return of copyrights and a reassignment of mechanical copyrights to O'Sullivan.[35]

The English music trilogy raises issues in seven important areas.

1. Unreasonable Restraint of Trade

English courts have refused to enforce agreements which contain provisions that are contrary to public policy. Betting contracts fall under this category, as do contracts which could be found to unreasonably restrain trade, such as contracts restricting an individual from making a living.[36]

In *Schroeder,* the court concerned itself with a five year publishing contract which would automatically be renewed for another term if total revenue exceeded the stated amount.[37] The court in *Schroeder* noted that the publisher made no "satisfactory positive undertaking" to publish the artist's compositions.[38] The court found, absent any obligation of the publisher to publish, that binding the composer for ten years would be an unreasonable restraint of trade.[39] If the publisher chose not to publish, then the composer's earning capacity would be destroyed. During these deliberations, the court noted that the doctrine of unreasonable restraint of trade does not usually apply to the restrictions found in this case.[40] The court held that these restrictions could be reasonably enforced in a manner oppressive to the composer, and thus were unjustifiable.[41]

The form and clauses of the contract in *Schroeder* are well known in the entertainment industry. The issue following *Schroeder* is whether a refusal to enforce an agreement in these circumstances, based upon the court's unwillingness to enforce an agreement containing an unreasona-

34. *Id.* at 467.

35. Regarding the rate of interest to be paid, the court ordered the defendants to make "varied" interest payments (i.e., both simple and compound) to O'Sullivan, with credits for taxes paid or payable. *Id.* at 470.

36. *See* Esso Petroleum Co., Ltd. v. Harper's Garage (Stourport), Ltd., [1967] 1 All E.R. 699.

37. A. Schroeder Music Publishing Co., Ltd. v. Macaulay, [1974] 3 All E.R. 616, 618.

38. *Id.* at 622.

39. *Id.*

40. *Id.* at 621-22.

41. *Schroeder,* [1974] 3 All E.R. at 622.

ble restraint of trade, might be extended to personal management and recording agreements. These agreements usually contain unilateral or automatic rights of renewal. Most of them do not contain, as in *Schroeder,* a "means test," which requires performance as a condition for the exercise of the option or renewal provision. Thus, the question is whether all clauses allowing unilateral or automatic rights of renewal are void. In *Schroeder,* the court suggested that the contract might have been valid had it contained a provision entitling the composer to terminate. Lord Reid also implied that a contract involving an automatic right of renewal must be molded by the pressure of negotiation which usually occurs when established composers bargain on equal terms with management, publishing and record companies.[42]

Although standard form agreements with less than established composers may more easily be found to be invalid, the courts have also found an inequality of bargaining power where the composers are experienced and established.[43] The *Schroeder* court left open the questions of how much negotiation should be involved and whether the composer should be represented by counsel in these negotiations.

Management, recording and publishing companies may argue that trade practice and, more importantly, efficiency dictate that standard form agreements continue to be used. Efficiency may be a good reason for including unilateral rights. The right to renew allows the manager to reduce a high-risk investment by spreading the risk over a longer time period. Often the manager will receive virtually no revenue in the early years of the artist's career and will instead allow the artist to reinvest the money that would normally be paid to the manager. Also, managers profit from few of the artists they represent. Managers may argue that they can only absorb the losses incurred through their unprofitable artists by receiving a generous share of the revenue from their successful artists.[44]

While the California courts have yet to construe *Schroeder,* the question that it raises goes to the root of industry-wide standard form agreements, e.g., whether fairness and public policy will serve as an underlying basis for considering the enforceability of an agreement between

42. *Id.*

43. Clifford Davis Management Ltd. v. WEA Records Ltd., [1975] 1 All E.R. 237, 241.

44. *See also* Trebilcock, *The Doctrine of Inequality of Bargaining Power: Post-Benthamite Economics in the House of Lords,* 26 U. TORONTO L. J. 359 (1976). For further discussions of the law and entertainment industry economics *see* Biederman, *Self-Publishing, Etc.: A Rejoinder,* 8:5 ENTERTAINMENT LAW REPORTER 6 (1986) and Graubart, *Self Publishing and the Songwriter/Music Publisher Agreement,* 8:4 ENTERTAINMENT LAW REPORTER 3 (1986).

parties otherwise capable of making binding commitments outside of the entertainment industry.

2. Inequality of Bargaining Power and Undue Influence

The *Schroeder* case also addressed the issue of whether the bargain was fair.[45] Lord Diplock, in the course of his judgment, went on to cite a principle of law apparently directed at the entertainment industry. He stated the following test for determining the validity of the agreement before him:

> The test of fairness is, no doubt, whether the restrictions are both reasonably necessary for the protection of the legitimate interests of the promisee and commensurate with the benefits secured to the promisor under the contract. For the purpose of this test all of the provisions of the contract must be taken into consideration.[46]

Lord Diplock noted the publishing company's adoption of the familiar "take it or leave it" attitude towards the artist and the artist's responding willingness to enter into the contract.[47] He also noted that the publishing company's attitude and its superior bargaining power did not raise the presumption that the publishing company had exacted an unfair bargain from the artist.[48] Lord Diplock commented that, "in the field of restraint of trade it calls for vigilance on the part of the Court to see that they did not [exact an unfair bargain]."[49]

While judgments are usually limited to the facts before the court, the decision of the House of Lords in *Schroeder* clearly sent a message to the entire entertainment industry of its intended approach to determining the enforceability of the industry's standard form agreements by applying the law without a review of all of the underlying facts.

In *Davis,* the court reviewed Fleetwood Mac's publishing agreements. These agreements bound the composers to the publisher for a term of five years with a five year renewal right exercisable only by the publisher.[50] Although the composers assigned all of their copyrights to the publisher, the publisher was not bound to publish any of the works. Again, this form of contract was then and still is regarded in the industry as a standard agreement, available in printed form from legal stationers.

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45. A. Schroeder Music Publishing Co. Ltd. v. Macaulay, [1974] 3 All E.R. 616, 623.
46. *Id.*
47. *Id.* at 624.
48. *Id.*
49. *Id.*
50. Clifford Davis Management Ltd. v. WEA Records Ltd., [1975] 1 All E.R. 237, 239.

In this case, the artists were experienced and recognized performers and composers. In rendering judgment, Lord Denning laid out a series of criteria and principles for determining the enforceability of an entertainment contract. He stated that the artist may argue that the duration of the contract was manifestly unfair; in *Davis,* the ten year term was held to be as unfair as was the twenty-one year term in *Esso Petroleum Co., Ltd. v. Harper's Garage (Stourport), Ltd.*[51] The artist may also claim insufficient consideration for the transfer of copyrights, since he received grossly inadequate compensation. If the publisher decided not to publish the artist's works, the artist would receive nothing for his labor and the publisher would obtain these rights at virtually no cost.

Alternatively, in a case such as *Davis* where the manager is also the publisher, the artist may argue that his bargaining power was seriously impaired by the position in which the manager placed him. The artist would argue that he was dependent upon the manager to guide him in making business decisions and that he expected an equitable arm's length agreement. Finally, the artist may argue that the publisher or manager detrimentally exerted undue influence on him.[52]

3. Independent Legal Advice

The concept of requiring a party to obtain independent legal advice during contract negotiations is generally absent from the common law.[53] However, Lord Denning stated in *Davis* that where a manager or publisher uses a standard form agreement and exacts onerous terms to drive an unconscionable bargain, he is under a duty to ensure that the composer or artist receives independent legal advice.[54] In *O'Sullivan,* the court suggested that a publisher or manager has a duty to ensure that an artist is provided with independent legal advice to avert the possibility of undue influence.[55]

These decisions do not indicate with certainty when and under what circumstances independent legal advice is essential to an enforceable agreement. Artists and record companies desire to avoid protracted legal

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51. [1967] 1 All E.R. 699.

52. *Davis,* [1975] 1 All E.R. at 240-41.

53. *See* National Westminster Bank plc. v. Morgan, [1983] 3 All E.R. 85 (C.A.), *rev'd,* [1985] 1 All E.R. 821. *See also* Ogilvie, *Undue Influence In the House of Lords,* 11 CANADIAN BUS. L. J. 503, 512 (1986) (House of Lords decided that independent legal advice, or its absence, is a neutral factor in determining whether undue influence had been exerted). However, it should be noted that this House of Lords decision was rendered one year after *O'Sullivan* and ten years after *Davis.*

54. *Davis,* [1975] 1 All E.R. at 241.

55. O'Sullivan v. Management Agency and Music Ltd., [1984] 3 W.L.R. 448, 457.

negotiations. Consequently, standard forms are offered and signed with regularity. However, these cases suggest that a manager, publisher or record company should provide the artist with an agreement that has been fully negotiated with both sides bargaining on equal footing. They assume, perhaps naively, the equal competence of the legal talent involved in these negotiations.

4. The Duty of Good Faith

Most management contracts do not impose an obligation on the manager to manage. These contracts usually state that the manager is not obligated to provide employment for the artist. The manager usually has a right to manage other groups and to devote his efforts to various artists as he sees fit. On the other hand, these contracts usually tie the artist, and all decisions affecting the artist's career, to the manager.

In *Schroeder,* Lord Reid canvassed the obligations that the publisher owed to the artist. In the absence of an express duty owed by the publisher to an artist, the court held that the contract was unenforceable when it found an unreasonable restraint of trade.[56] In short, Lord Reid did not favor the agreement which assigned the creative rights of an artist to a publisher who had no obligation to do anything with the creation. However, he did not fully consider those obligations. In *Davis,* Lord Denning noted that in the absence of a publisher's express agreement to use his best efforts to promote the artist's work, an agreement might be implied.[57]

These decisions demonstrate that the English courts have not yet fully explored the concept of good faith, particularly with regard to management agreements. Apparently, the absence of a duty of good faith alone would not suffice to render a contract unenforceable, although courts will consider it as a factor in determining the enforceability of contracts. The American courts take a different view regarding the duty of good faith. The case of *Wood v. Lucy, Lady Duff-Gordon* (*"Lady Duff-Gordon"*) has long stood for the proposition that parties to an agreement undertake an implied duty of good faith and fair dealing.[58] Thus, an argument made in reliance on English law that a management agreement lacks mutuality may be severely limited.[59]

56. A. Schroeder Music Publishing Co. Ltd. v. Macaulay, [1974] 3 All E.R. 616, 622.
57. *Davis,* [1975] 1 All E.R. at 239.
58. 222 N.Y. 88 (N.Y. Ct. App. 1917).
59. *Id. See also* Biederman, *supra* note 44.

5. The Fiduciary Duty

Managers often serve the role of publishers or record companies for the artist. These additional roles may give rise to ramifications that are not initially considered in contract negotiations. The court in *Schroeder* stated its strong commitment to assuring that a publishing company did not exert undue influence on the composer where the publishing company is powerful enough to adopt a "take it or leave it" attitude. In effect, this places an onerous burden on the publishing company, one tantamount to a fiduciary duty.[60]

In the *Davis* case, the manager also acted as the publishing company. The appellant record company argued that the manager's conflict of interest gravely impaired the composer's bargaining power. Lord Denning commented on the manager's position as follows:

> [The artists'] needs and desires were dependent on his will. He could say Aye or No. He was skilled in business and finance. They were composers talented in music and song but not in business. In negotiation they could not hold their own. That is why they needed a manager.[61]

Although the court did not expressly say so, apparently it viewed the manager as a fiduciary by holding that if the manager wished to acquire publishing rights from artists under contract with him, he had to ensure that they had equal bargaining power and access to independent legal advice.[62]

In *O'Sullivan,* the parties conceded that the manager, Mills, owed a fiduciary duty to O'Sullivan, since O'Sullivan had total confidence in and implicitly trusted him.[63] The court, however, also imputed this fiduciary duty to the recording, publishing and financial management companies with which Mills was involved, reasoning that:

> [I]n the eyes of O'Sullivan, Mills and the companies were indistinguishable. Although the companies were not formally appointed managers by Mills, in fact they carried out most of the management functions[,] and this was the intention from the outset. From the moment he joined Mills, the affairs of O'Sullivan were run by the companies. They took it upon themselves to look after him. . . . Mills was chairman of one of the companies and Smith and the other directors knew the situ-

60. *See* Jossen, *Fiduciary Aspects of the Personal Manager's Relationship with a Performing Artist,* 11 PERFORMING ARTS REVIEW 108, 112-13 (1981).

61. *Davis,* [1975] 1 All E.R. at 240-41.

62. *Id.* at 240-46.

63. O'Sullivan v. Management Agency and Music Ltd., [1984] 3 W.L.R. 448, 457.

> ation as well as Mills. They knew they were dealing with a young and inexperienced man who was content to put himself entirely in their hands and relied entirely on them to give him a fair deal. They were responsible for the contractual arrangements and they were just as much in a confidential relationship to O'Sullivan as was Mills himself. In those circumstances the judge was right to hold that the companies as well as Mills were fiduciaries. . . .[64]

The *O'Sullivan* case places an awesome burden on managers who also act as publishers or record companies. This decision may place a manager in a fiduciary relationship, whether he is acting in the capacity of a record company, publisher or manager. The artist may, therefore, have an action against any company which is tainted by the artist/manager fiduciary relationship, regardless of whether the manager has acted as a de facto manager.

The court's reasoning in *O'Sullivan,* with respect to this fiduciary duty, was an extension of Lord Denning's decision in *Lloyds Bank v. Bundy,* in which a bank was found to be in a fiduciary relationship with its customer.[65] Whether the court in *O'Sullivan* fully understood or fully reasoned the ramifications of its extension of Lord Denning's decision is questionable. *O'Sullivan,* if followed, may place an inordinately onerous burden on recording and publishing companies. Nevertheless, *O'Sullivan* marks the first time that a court has *fully* considered and construed the legal relationships in the music industry.

6. Remedies

Because the agreements in *Schroeder* and *Davis* were found to be void, the courts in those cases simply sought to return the artists to their pre-contract positions. The court did not pursue the issue of other remedies. The court in *O'Sullivan* determined that O'Sullivan's agreements were voidable and ordered the return of copyrights, the reassignment of mechanical copyrights and an accounting of profits to O'Sullivan.[66]

Traditionally, upon finding that a contract is voidable due to a breach of fiduciary duty, courts will direct that all of the fiduciary's profits be returned to the innocent party. The case of *Regal (Hastings) Ltd. v. Gulliver*[67] (*"Gulliver"*) is authority for the equitable doctrine that those who misuse a fiduciary position for profit are liable to account for

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64. *Id.*
65. *Id.* at 456, 477. *See also* Lloyds Bank v. Bundy, [1975] 1 Q.B. 326 (C.A.).
66. *See supra* note 35 and accompanying text.
67. [1967] 2 A.C. 134, 144.

that profit to their beneficiaries without proof of, and in the entire absence of, fraud and *mala fides.*[68] This liability arises simply because a profit was made.[69] In *Phipps v. Boardman* (*"Phipps"*), the House of Lords did not require the breaching fiduciary to account for the entire resulting profit.[70] In *Phipps,* the agent Boardman held himself out as a fiduciary and profited from information that he acquired in that capacity. The court, faced with a complete absence of *mala fides,* allowed the fiduciary a profit for himself, thereby affirming the Court of Appeal's decision which gave the following reasoning:

> If the defendant has done valuable work in making the profit, then the court in its discretion may allow him a recompense. It depends on the circumstances. If the agent has been guilty of any dishonesty or bad faith or surreptitious dealing, he might not be allowed any remuneration or reward; but when, as in this case, the agents acted openly and above board, but mistakenly, then it would be only just that they should be allowed remuneration.[71]

In *O'Sullivan,* the court applied the reasoning in *Phipps.*[72] The Court, after finding the contracts voidable, held the recording, publishing and management companies accountable and ordered these companies to return all their profits to O'Sullivan, less a reasonable amount for services rendered, which included profit.[73] In doing so, the court observed that O'Sullivan might not have profited at all without the significant contribution of Mills.[74] Unlike in *Phipps,* the court in *O'Sullivan* found *mala fides* on Mills's part. Whether the Court of Appeal intended in *O'Sullivan* to extend the principle in *Phipps* (of providing a limited benefit to a fiduciary) to one acting with *mala fides* and in breach of his duties is questionable. The court recognized Mills' conduct and in so doing limited the profit element to a more modest amount than the "substantial sharing of profits" that was ordered in *Phipps.*[75]

The reasoning of the English Court of Appeal in *O'Sullivan* is consistent with California decisions under the Talent Agencies Act. The California Labor Commissioner allowed a *quantum meruit* approach in

68. *Id.*
69. *Id.*
70. Phipps v. Boardman, [1965] 1 All E.R. 849 (C.A.), *aff'd,* [1966] 3 All E.R. 721.
71. *Id.* at 857.
72. O'Sullivan v. Management Agency and Music Ltd., [1984] 3 W.L.R. 448, 465.
73. *Id.* at 475.
74. *Id.* at 476.
75. *Id.* at 475.

the case of *Bank of America v. Fleming.*[76] The Commissioner ordered the personal manager to return only those commissions from services unlawfully performed as an unlicensed artist's manager and allowed the manager to retain fees received for services lawfully performed. However, in the absence of a system of binding precedent, the precedential value of this decision is doubtful.

7. The O'Sullivan Case and Trust Law

The question for future consideration is whether *O'Sullivan* is a decision which is representative of traditional trust law or one which is limited, by its facts, to the kinds of relationships which arise between artists, personal managers, publishers and record companies. *O'Sullivan* is authority for the proposition that damages may result from a breach of trust where that trust has been imputed. This proposition is consistent with traditional trust law decisions, such as *Irving Trust v. Deutsch*[77] (*"Irving Trust"*), in which the Second Circuit Court of Appeals held that "one who knowingly joins a fiduciary in an enterprise where the personal interest of the latter is or may be antagonistic to his trust becomes jointly and severally liable with him for the profits of the enterprise."[78]

However, had the facts in *O'Sullivan* been present in the *Irving Trust* case, that case apparently would have resulted in a *per se* or strict liability approach for all profits arising. In *Gulliver,* the court stated:

> [S]uch questions or considerations as whether the profit would or should otherwise have gone to the plaintiff . . . or whether he took a risk or acted as he did for the benefit of the plaintiff, or whether the plaintiff has in fact been damaged or benefitted by his action [are not relevant in finding the fiduciary accountable for all profits received].[79]

Mr. Justice Fox, in *O'Sullivan,* commented that "[t]he rules of equity against retention of benefits by fiduciaries have been applied with severity."[80] In *Phipps,* the court found no *mala fides* on the part of the fiduciary.[81] The question is whether *O'Sullivan* represents an erosion of strict trust principles providing for a trustee's right to act contrary to the provisions of the trust, deal with the property of the trust for his own benefit, or violate the basic provisions of trust law regarding his obliga-

76. Bank of America v. Fleming, No. 1098 ASC MP-432 (Cal. Lab. Comm. 1982).
77. 73 F.2d 121 (2d Cir. 1934).
78. *Id.* at 125.
79. Regal (Hastings) Ltd. v. Gulliver, [1967] 2 A.C. 134, 144.
80. O'Sullivan v. Management Agency and Music Ltd., [1984] 3 W.L.R. 448, 474.
81. Phipps v. Boardman, [1965] 1 All E.R. 849, 862 (C.A.), *aff'd,* [1966] 3 All E.R. 721.

tions to his beneficiaries, while still maintaining, on a *quantum meruit* basis, a claim for compensation for his activities which ultimately prove successful for the beneficiaries.

The alteration made in *Phipps*, appears to be limited to cases where there is prima facie, *bona fides* on the part of the fiduciary.[82] A *quantum meruit* approach is not at all indicative of typical trust law. The trustee owes the beneficiary the highest duty, and possibly, any deviation in trust principles would not occur in the absence of the fiduciary's *bona fides*. Thus, the remedy in *O'Sullivan* may be better viewed as one that is limited only to factually similar cases, rather than one granted in reliance on trust law.

IV. BEYOND THE TRILOGY

With surprisingly little reference made to the trilogy, the Chancery Court of England, almost two years later, embarked on a discussion of substantially the same issues. Although the Chancery Court is a trial court and is bound to follow the decisions of both the Court of Appeal and the House of Lords, it ignored precedent in *Elton Hercules John v. Richard Leon James* (*"Elton John"*).[83]

Both Elton John and Bernie Taupin ("John and Taupin"), unlike the artists in the trilogy, were minors when they entered into a standard form songwriting agreement with Dick James Music ("DJM") in 1967. DJM entered into subpublishing agreements with foreign affiliates to collect non-United Kingdom royalties from John and Taupin's recordings. Royalties that John and Taupin received were calculated as a percentage of DJM's royalties, rather than of those that the local subpublishers received at the source. John and Taupin bound themselves to this agreement for an exclusive period of three years "extendable at the option of either party for a further three years."[84] In addition, the duo had to produce at least eighteen songs acceptable to DJM for each three year period or suffer the extension of the agreement until the prescribed minimum requirement was met. At the same time, John entered into a standard form recording agreement with This Record Co., Ltd., a DJM affiliate, for a five year term. Both the publishing and recording agreements included the same terms as in the trilogy. Three months after the

82. *Id.*

83. Elton Hercules John v. Richard Leon James, High Court of Justice, Chancery Division, 1982 J. No. 15026 (Nov. 29, 1985). A case involving tax issues between John and James was decided shortly thereafter by the same court. *See* John and Others v. James and Others, [1986] Simon's Tax Cases 352 (Mar. 25, 1986).

84. *Elton John*, 1982 J. No. 15026 at 2.

execution of the publishing and recording agreements, in 1968, John entered into a management agreement with DJM. Under the terms of the management agreement, DJM would receive a thirty percent commission to "use its best endeavours to advance and further Mr. John's professional career and interests . . . to secure suitable work and engagements . . . and to conduct all negotiations on his behalf, endeavouring to secure for him at all times the best possible terms"[85] for a five year period. The court noted that "Mr. James's [sic] [of DJM] practice was not to place an agreement before a writer or artist and ask him to sign then and there, but to tell him to take the document away, look through it and return it signed. Only then did Mr. James sign."[86] In this case, since John and Taupin were both minors, they returned their signed agreements along with inducement letters executed by their parents. The court noted particularly that neither John nor Taupin was represented by a solicitor or manager, and that James did not suggest that they seek representation nor did he explain to them the terms of the contracts. For the songwriting duo, "[b]eing offered a contract by Mr. James [the publisher of the Beatles] was 'like a dream come true,' " and "they were both scared, very apprehensive and anxious that Mr. James should like their songs."[87]

By March, 1971, the duo had not returned any significant profit to Mr. James. However, Elton John had just completed demo tapes for an album which Mr. James considered to be "out of the area of experimentation" and "quite outstanding."[88] The court stated:

> So before the album was released and on the strength of his judgment of the tapes, Mr. James offered Mr. John a new recording agreement. Again the terms were not negotiated [but royalties were improved]. . . . [Elton John] regarded the new contract as a very good one, giving him security: he appreciated that the new contract involved extending the term of the existing contract.[89]

In addition, John signed a new management agreement with Mr. Raymond Williams, who had been a longtime confidant of John and Taupin.

In July 1970, John's first album was released in the United States, and John embarked on a promotional tour of America. After his first stop in California, John literally became an overnight superstar. Shortly thereafter, Mr. James exercised his option under the 1967 publishing

85. *Id.* at 6.
86. *Id.* at 18.
87. *Id.* at 17.
88. *Id.* at 24.
89. *Elton John*, 1982 J. No. 15026 at 24.

agreement with John and Taupin and increased their royalties. Following John's rise to stardom, Mr. James expressed a desire to renegotiate all of the existing contracts and told John that he wished him to be represented by solicitors in future dealings.[90] The renegotiation of the management, publishing and recording agreements and a combination of other factors led John and Taupin to bring an action against DJM in 1982. The most significant of these factors included the increasing popularity and prosperity of the duo, the decision of *Instone v. Schroeder Music Publishing Co. Ltd.*, and the advice by American and English counsel that John and Taupin proceed against DJM (in reliance on the appellate *Schroeder* decision) to justify the relative paucity of their publishing royalties and to properly account for royalties received from foreign subpublishers.[91]

John and Taupin claimed that the publishing agreements ought to be set aside on the ground of undue influence, that all copyrights and master recordings be returned to them. Initially, John and Taupin claimed that the agreements were an unreasonable restraint of trade, but later abandoned that claim. The court considered the issues of the duty of good faith, fiduciary duties and undue influence in deciding not to return the copyrights or the recordings, but rather to order that compensation be paid to John and Taupin regarding the defendant's unauthorized profit-taking.

1. Good Faith and The Fiduciary Duty

In *Elton John,* Mr. Justice Nicholls, discussing the recording and publishing agreements, dismissed the argument that DJM undertook a duty to use reasonable diligence in good faith to publish, promote and exploit compositions accepted under the publishing agreements.[92] In the absence of a duty of good faith, he stated that "under the publishing agreements DJM occupied a fiduciary position in respect of any exploitation which it carried out,"[93] and that, "commercially, the arrangement was in the nature of a joint venture, and the writers would need to place trust and confidence in the publisher over the manner in which it discharged its exploitation function."[94] He also noted that any assignee of DJM would assume DJM's fiduciary duty. His decision regarding the recording contracts was based on the same reasoning. Apparently, the

90. *Id.* at 26.
91. *Id.* at 32-35.
92. *Id.* at 37. *See also* Biederman, *supra* note 44.
93. *Elton John,* 1982 J. No. 15026 at 61.
94. *Id.* at 62.

Elton John court has gone further than any of the trilogy courts. Although it did not extend the fiduciary duty of the manager to the publisher and record company, the *Elton John* court determined that the publisher and record company were fiduciaries in their own right. As Jane Tatt suggested in her article on English music contracts, neither an artist nor a publisher (record company) intends such a relationship upon the signing of a publishing (recording) agreement and the music industry is not structured such that a publisher (record company) can return a reasonable profit given such a relationship.[95]

In discussing the appropriate remedy with regard to DJM's breach of its fiduciary duty, the court in *Elton John* adopted the *quantum meruit* approach of *O'Sullivan* by allowing DJM to retain a reasonable percentage of the profits, but it did not, as in *O'Sullivan,* order a return of copyrights and delivery up of master recordings.[96] In considering whether the plaintiffs' claim was time-barred, the court noted that "the relationship between the fiduciary and plaintiff is that of debtor and creditor; it is not that of trustee and cestique trust."[97] This reasoning seems wholly inconsistent with *O'Sullivan's* reliance upon trust law and the *Phipps* case. The only similarity between *O'Sullivan* and *Elton John* is that both courts were reluctant to rely upon traditional trust law to provide a suitable remedy for a most unusual situation.

2. "Dominating Influence"

In deciding whether the plaintiffs were entitled to a return of copyrights and master recordings, based upon their primary claim that the publishing and recording agreements were procured by undue influence, the *Elton John* court expounded on the law and the structure of the music industry. Mr. Justice Nicholls set forth the two elements required for a claim of undue influence (or, as he renamed it, "dominating influence") as follows:

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95. Tatt, *Music Publishing and Recording Contracts in Perspective,* 5 EUROPEAN INTELLECTUAL PROPERTY REPORTER 132, 137 (1987).

The American position is grounded in the *Lady Duff-Gordon* case and its progeny. Recently, the court in the Southern District of New York stated:

> A publisher's obligation to promote an author's work is one founded in contract rather than on trust principles, [and] the "trust elements" in a publisher-author relationship come into play when the publisher tolerates infringing conduct, . . . or participates in it. . . . Ordinarily, however, the express and implied obligations assumed by a publisher in an exclusive licensing contract are not, as a matter of law, fiduciary duties.

Mellencamp v. Riva Music Ltd., 698 F. Supp. 1154, 1157, 1159 (S.D.N.Y. 1988).

96. *Elton John,* 1982 J. No. 15026 at 64-76.

97. *Id.* at 74-75.

> [f]irst, a relationship in which one person has a dominating influence over the other and, secondly, a manifestly disadvantageous transaction resulting from the exercise of that influence. . . . [I]n appropriate circumstances the existence of a dominating influence may be presumed; the Court may also, again in appropriate circumstances, presume that where a dominating influence exists, a manifestly disadvantageous transaction was the result of the exercise of undue influence.[98]

Mr. Justice Nicholls determined that Mr. James had a dominating influence over John and Taupin with respect to the 1967 agreements. He stated that, even though Mr. James acted in good faith and did not intend to act unfairly, he obtained an unfair advantage by exercising a dominating influence since no negotiation took place, no explanation of the terms was provided, and "[John and Taupin] were, as must have been obvious to him, trusting and relying on him that the contractual terms were fair and reasonable."[99] Mr. Justice Nicholls also found the 1967 agreements significantly disadvantageous since, although the royalty rate specified was not unreasonable for an unknown artist, it "made no provision for any improvement in the royalty rate if, as happened here, the artist became a major success."[100] He summarized the economics of the music industry:

> As a rough guide, a recording company will recoup its recording costs with not more than one artist in ten, and it will make a significant profit with not more than one artist in thirty. Bearing this in mind, and that on average a new artist will take three years to become established, a five year tie in this instance may not have been unreasonable [so long as royalty rates are improved when the artist becomes successful].[101]

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98. *Id.* at 93-94.

99. *Id.* at 98.

100. *Id.* at 101-02. In determining that the publishing contracts had been procured by undue influence, Mr. Justice Nicholls also noted that the composers had no right to terminate "if successful publication was not achieved and the writers became aware of another publisher who had more confidence in their songs." *Id.* at 97. Tatt, in arguing in favor of providing the artist with the right to terminate a publishing agreement, suggests that, "the termination provision could, as with other kinds of publishing agreements, be dependent on the failure of the company to publish the works, or a reasonable proportion of them, within a specified time limit. Such provision would, it is submitted, not operate unfairly against the company and would not tie the artist to a disinterested or unsuccessful publisher." Tatt, *supra* note 95, at 136.

101. *Elton John*, 1982 J. No. 15026 at 101. As Tatt points out: "[I]n practice, it is now usual for the royalty rate to be renegotiated if the artist becomes successful. But in [*Elton John*], the review was fortuitous, not made pursuant to a contractual obligation, and thus did

Mr. Justice Nicholls made these comments without appreciating that Elton John (who is, by any measure, an exceptional songwriter and performer) took two and one-half years to produce his first album for sale in the United States and that defendants expended a large amount of money, resources and skill before John attained success. As with the fiduciary duty, Mr. Justice Nicholls found the undue influence that the publishing and recording companies exerted was not the result of a personal management relationship to which the artist was predisposed, but was wholly independent of that relationship.

The court further held that the post-1967 agreements, in which John and Taupin were represented by solicitors, did not cure the undue influence of the 1967 agreements. However, the court denied the claim for reassignment of the copyrights and the master recordings on the grounds of undue delay in bringing the action (again defining the claim as one for debt instead of trust property).[102]

3. Conclusion

In her article, Jane Tatt stated that the *Elton John* court's refusal to reassign the copyrights may indicate the onset of a judicial reluctance toward that remedy. She stated:

> [T]he Court, in refusing the reassignment, tacitly recognised that the Court of Appeal had gone too far in the *O'Sullivan* case and it may be that, although such a remedy is available, . . . courts will in [the] future be more willing to find that the circumstances of a case do not justify (reassignment), particularly in respect of mechanical copyrights.[103]

That Mr. Justice Nicholls tacitly ignored the reasoning in *O'Sullivan* is indisputable. That he tacitly adhered to remnants of archaic law without recognizing the realities of the situation *may* be disputed. Although Mr. Justice Nicholls restrained himself with respect to the appropriate remedy, his reasoning certainly shows no restraint. Finally, since the *Elton John* case has not been appealed, its precedential value is questionable, since either the Court of Appeal or the House of Lords could have reversed Mr. Justice Nicholls' decision. In any event, the trilogy still remains binding precedent on the courts of England.

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not alter the finding that the lack of such an obligation was unreasonable and could lead to oppression by an unscrupulous company." Tatt, *supra* note 95, at 136.

102. *Elton John,* 1982 J. No. 15026 at 74.

103. Tatt, *supra* note 95, at 137.

V. Conclusions and Recommendations

Standard form contracts continue to be used as a matter of course in the entertainment industry today; the cases of *Schroeder, Davis* and *O'Sullivan* (and *Elton John,* to a lesser extent) have had little effect upon what the industry accepts as common agreements and trade practices.[104] In addition, the English music trilogy has granted artists the entitlement to greater protection than they currently receive.

English courts may offer artists protection which exceeds that which the Talent Agencies Act provides. In considering this proposition, one might challenge the efficacy of guidelines protecting artists' rights formulated by courts that completely lack expertise regarding the intricacies of the entertainment industry.[105]

In any event, English courts provide dissatisfied artists with tools to challenge once desirable contractual agreements. Although courts have allowed artists to argue that a contract with a ten year term constitutes an unreasonable restraint of trade, they have made no comments with respect to five and seven year contracts, which are common in the entertainment industry. The California legislature, however, has limited the term of recording contracts by a specific 1987 amendment to section 2855 of the Labor Code, which generally limits all personal service contracts to seven years.[106]

In addition, English courts have implied that when an artist has signed a "take it or leave it" contract, he or she may raise the presumption of undue influence. The English courts fail to realize that the vast majority of contracts in the entertainment industry are "take it or leave it" contracts. If all successful artists are allowed to challenge once desirable contracts, their efforts would undoubtedly yield conflicting and anomalous results. Finally, in providing that management, publishing or recording companies ensure that artists receive independent legal advice, courts have not addressed the issues of the high cost of legal advice, who should bear that cost, and the adequacy of the advice.

English courts have applied general rules of law to ensure against unscrupulous and oppressive conduct with respect to the exploitation of artists' skill. In so doing, they have formulated a set of rules which are unique to the entertainment industry, but which lack clear definition. In

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104. *But see* Tatt, *supra* note 95, at 136.

105. In California, an entertainment commission was set up to advise the Governor on changes to be made to the Talent Agencies Act. The commission included three artists, three agents, three managers and the Labor Commissioner. Hertz, *supra* note 1, at 65-66.

106. CAL. LAB. CODE § 2855 (West 1971 & Supp. 1989). The AF of M By-Laws also limit booking agents' agreements to seven years. *By-Laws of the AF of M,* art. 23, § 9(a)-(b).

contrast, the California legislature has enacted specific, yet inadequate legislation which, by controlling booking agent activities, attempts to prevent oppressive conduct in the representation of artists. California's legislation leaves the activities of the personal manager unregulated, but allows artists to misuse the law by challenging once desirable management agreements.[107]

English courts implicitly use a test of unconscionability in judging the agreements subject to litigation. However, they have erred in two principal respects. First, they neglect to examine the relationships at the point of inception from an economic perspective. Second, they fail to appreciate the crucial role personal managers play, the risks they assume and the returns they require. English courts could better justify their decisions and, in some cases, reach better decisions by using an explicit test of unconscionability. In addition, their approach to the duty of good faith is dated and impractical. American courts realize that agreements in the entertainment industry have little meaning without an implicit duty of good faith. They acknowledge as unrealistic and economically unfounded, the belief that publishing, recording or management agreements are inherently lacking in mutuality.

Instead of applying tests of undue influence, unreasonable restraint of trade, fiduciary duties, and the duty of good faith, an all-encompassing, overt test of unconscionability would provide a simpler and more practical approach.[108] Such an analysis must be tempered by a review of the underlying risks that the manager assumes (which are a function of the prior successes of the artist) and of the returns which the industry requires for assuming those risks. Although the economics of the music industry demands that protection be granted to artists, this protection must be reconciled with current industry practice and concerns of efficiency.

English courts have also attempted to apply trust law to the cases before them. Instead of realizing the inappropriateness of this application of trust law, they bend the laws to reach the "right" results. Thus, they have formulated unclear rules for determining "just" remedies. In-

107. *See supra* notes 16-17 and accompanying text.

108. In California, the basic test of "unconscionability" is "whether, in light of the general background and the needs of the particular case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract." CAL. CIV. CODE § 1670.5 com. 1 (West 1985 & Cum. Supp. 1989). *See also* Chretian v. Donald L. Bren Co., 151 Cal. App. 3d 385, 198 Cal. Rptr. 523 (1984), which applied § 1670.5. The court stated that "unconscionability" included "an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party."

terestingly, both the English courts and the California Labor Commissioner (in applying the Talent Agencies Act) have adopted a *quantum meruit* approach in ordering managers to account for excessive profits resulting from oppressive contracts. This approach has allowed them to apply a "damages-like" remedy to a suit framed in equity.[109] Perhaps they realize that a strict reliance on trust law in ordering the manager to account for all profits received through his efforts, as well as delivering master recordings and reassigning copyrights, is too harsh a remedy and does not recognize the sometimes invaluable contributions of the manager.[110]

In our view, the most sensible approach for a court to take employs a test of unconscionability coupled with a remedy of damages and the possible return of copyrights and reassignment of mechanical copyrights. Although courts in the past have not allowed affirmative suits for damages based on unconscionability,[111] at least one author has suggested that unconscionability should be actionable as a tort providing damages as an available remedy.[112] A test of unconscionability would be consistent with the rationale that courts have increasingly applied in entertainment industry cases.[113] In a recent California Supreme Court case, the defense

109. A suit in equity is inconsistent with a claim for damages. Thus, a court which orders equitable relief in the form of an accounting of profits, while allowing the breaching party to retain a reasonable percentage of the profits, the copyrights and master recordings, is really providing the nonbreaching party with the inappropriate remedy of damages. For a discussion of remedies in law and remedies in equity, *see* E. ALLAN FARNSWORTH, CONTRACTS, 818-23 (8th ed. 1982). *See also infra* note 114.

110. O'Sullivan v. Management Agency and Music Ltd., [1984] 3 W.L.R. 448, 476.

111. *See* Pearson v. National Budgeting Sys., Inc., 31 A.D.2d 792, 297 N.Y.S.2d 59 (1969); Corwin Equip. Co. v. General Motors Corp., 734 F.2d 1581 (11th Cir. 1984); Best v. United States Nat'l Bank, 78 Or. App. 1, 714 P.2d 1049 (1986), *aff'd*, 303 Or. 557, 739 P.2d 554 (1987). These cases all dealt with section 2-302 of the Uniform Commercial Code, which governs sale of goods contracts and from which the wording of California Civil Code section 1670.5 was adopted.

112. *See* King, *The Tort of Unconscionability: A New Tort for New Times*, 23 ST. LOUIS U.L.J. 97, 115-18 (1979).

113. In applying tests of unconscionability, American courts have examined standard form agreements much more closely than negotiated ones; *see, e.g.*, In re Hamby, 19 Bankr. 776 (N.D. Ala. 1982). In addition, American courts have been particularly quick to find unconscionability in "take it or leave it" contracts; *see, e.g.*, Neal v. State Farm Ins. Co., 188 Cal. App. 2d 690, 10 Cal. Rptr. 781 (1961). However, California courts have held that an "adhesion contract," which is a "standardized contract imposed and drafted by the party of superior bargaining strength and which relegates to the subscribing party only the opportunity to adhere to the contract or reject it," is enforceable, unless it is unduly oppressive or unconscionable; *see, e.g.*, Izzi v. Mesquite Country Club, 186 Cal. App. 3d 1309, 231 Cal. Rptr. 315 (1986). Thus, a standard form contract or a contract offered on a "take it or leave it" basis is not necessarily unenforceable. Such a result is consistent with the English approach; *see, e.g.*, A. Schroeder Music Publishing Co., Ltd. v. Macaulay, [1974] 3 All E.R. 616, 624. *See also* notes 48-49 and accompanying text.

of unconscionability was successfully asserted where an inequality of bargaining power existed between the parties. The contract, which was a standard form AF of M agreement between a musician and a promoter and which imposed an arbitration clause on the promoter on a "take it or leave it" basis, failed in the court's opinion, to meet the standards of integrity appropriate for a fair arbitration.[114] Since California courts have already applied unconscionability to a case involving an oppressive contract imposed by an artist, they should have little difficulty finding it in cases involving oppressive management, publishing or recording agreements.

California courts, if and when confronted with questionably oppressive management, recording or publishing agreements, will have to make sense of the English music trilogy and the *Elton John* case, and then determine their applicability. The courts may also face issues arising under the Talent Agencies Act and thus, will have to carefully reconcile the Act and the common law.

114. Graham v. Scissor-Tail, Inc., 28 Cal. 3d 807, 171 Cal. Rptr. 604, 613 P.2d 165 (1981).