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I. Introduction

"The music industry and the NBA are modern day slave ships."[1] After this bold preface, Kanye West published his contract with Roc-A-Fella Records, a division of Universal Music Group ("Universal"), page by page on Twitter (in 114 tweets, no less) for "every lawyer in the world to look at."[2] West's "Twitter rant" was sparked by his frustration over litigation against Universal for the ownership of his master recordings—the original, official and final recording of West's songs from which all copies are later produced.[3]

Recording artists with equal notoriety to West have publicly challenged their record labels for the ownership rights to their master recordings for decades.[4] In the '90s, Prince painted "Slave" on his cheek to protest Warner Music refusing to sell him his master recordings.[5] Almost thirty

[1] Kanye West (@kanyewest), TWITTER (Sept. 14, 2020, 7:53 P.M.), https://twitter.com/kanyewest/status/1305671043097468928.
[2] Shawn Setaro, *What We Learned From Reading Over 100 Pages of Kanye West's Record Contracts*, COMPLEX.COM (Sept. 17, 2020), https://www.complex.com/music/2020/09/kanye-west-record-contracts-what-we-learned; Kanye West (@kanyewest), TWITTER (Sept. 16, 2020, 11:33A.M.), https://twitter.com/kanyewest/status/1306270045354356737.
[3] Murray Stassen, *Kanye West: I Will Buy Universal Music Group For $33BN*, MUSIC BUSINESS WORLDWIDE (Oct. 26, 2020), https://www.musicbusinessworldwide.com/kanye-west-i-will-buy-universal-music-group-for-33bn/; Elizabeth Vulaj, *Singing a different tune: Taylor Swift & Other Artists' Fight for Music Ownership*, 2020 PRINDBFR 0225 (2020).
[4] Vulaj, *supra* note 3.
[5] Lisa Kay Davis, *Prince Fought Big Labels for Ownership, Artistic Control*, NBC NEWS (Apr. 21, 2016, 9:04 P.M.),

years later, pop and country artist Taylor Swift took to Tumblr and Instagram to vent her frustrations with Scooter Braun of Big Machine Label Group and Scott Borchetta of Big Machine Records for refusing to consider selling her master recording copyrights to her.[6]

Recording artists should own the master recording rights to the music they create, but record labels are disincentivized to give them up because a large amount of income earned from the music is earned from licensing the copyrights to them.[7] Moreover, it reasonable to give the record labels an ownership interest in the master recording rights because they undertake an enormous financial risk when they sign new recording artists.[8] However, record labels should not own them indefinitely. The proper balance between the recording artists' and record labels' interests is to initially grant the recording artist the proper ownership of their master recording copyrights but require them to immediately license or assign such rights to the record label, after which the rights would revert to the recording artist.[9]

However, most recording artists do not possess the bargaining power to negotiate such terms into their initial

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https://www.nbcnews.com/news/nbcblk/prince-fought-big-labels-ownership-artistic-control-n560161/.

[6] Vulaj, *supra* note 3.

[7] *Id.* Ben Sisario and Joe Coscarelli, *Taylor Swift's Feud With Scooter Braun Spotlights Musicians' Struggles to Own Their Work*, N.Y. TIMES (July 1, 2019), https://www.nytimes.com/2019/07/01/arts/music/taylor-swift-master-recordings.html. The copyright owner also controls how the music is exploited—the owner decides how, where, and by whom the music can be performed, and which mediums the music will be released through for sale and whether the music can be licensed for use in movies and video games. *Id.* Vulaj, *supra* note 3.

[8] *How Much Money Do Record Labels Spend on Marketing*, INT'L CTR. FOR SETTLEMENT INV. DISPS (Nov. 5, 2021) [hereinafter ICSID], https://www.icsid.org/uncategorized/how-much-money-do-record-labels-spend-on-marketing/. The International Federation of the Phonographic Industry (IFPI) published a study in 2020 that found record labels spend approximately $500,000 to $2,000,000 to break into the music industry. *Id.*

[9] This mirrors the requirements and protections provided to other kinds of artists (e.g., authors) protected by 17 U.S.C. § 203.

contract. While the contract defense of unconscionability is theoretically available to recording artists, no court has ever found a standardized contract for recording artists unconscionable,[10] and only a handful of recording artists have been able to negotiate their master recording rights back from the label after signing a contract that does not provide for reversion of them.[11] Congress has similarly failed to protect recording artists. Section 203 of the 1976 Copyright Act allows artists who created copyrighted "works for hire" to terminate any previous transfers of the copyright interest after a period of thirty-five years.[12] However, recording artists are considered employees of the record label under the statute and do not possess these same termination rights.[13]

Because the legislature and judiciary have failed to protect recording artists' interests, this article proposes that engaging in collective bargaining will re-balance the bargaining positions of the major record labels and recording artists to create a mutually beneficial agreement that gives recording artists a termination of rights clause ("termination clause") that mirrors section 203 of the 1976 Copyright Act. By contracting with a major record label, recording artists are automatically eligible for union membership to the Screen Actors Guild-American Federation of Television and Radio Artists union ("SAG-AFTRA"), who have experience negotiating other collective-bargaining agreements with these record labels.[14] This agreement would provide

[10] Omar Anorga, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 WHITTIER L. REV. 739, 740 (2003).
[11] Tuneen E. Chisolm, *Whose Song Is That? Searching for Equity and Inspiration for Music Vocalists Under the Copyright Act*, 19 YALE J. L. & TECH. 274, 312 (2017).
[12] 17 U.S.C. § 203(a).
[13] 17 U.S.C. § 201.
[14] Elias Leight, *There's a Musicians Union. Many Musicians Are Unaware—or Unable to Join*, ROLLINGSTONE (May 6, 2019, 1:52 PM), https://www.rollingstone.com/music/music-features/theres-a-musicians-union-many-musicians-are-unaware-or-unable-to-join-831574/. The SAG-AFTRA

industry wide benefits that are not necessarily limited to termination rights.[15]

Part II of this article assesses the disparity of bargaining positions between the record label and the recording artist. Part III explains why collective bargaining is the best way for recording artists to gain ownership of their master recording rights. Finally, Part IV concludes the article by discussing the benefits of collective bargaining for both parties.

II. Background

To understand how collective bargaining can help recording artists regain ownership of their music, it is first important to understand the record label-recording artist relationship and the current state of relevant copyright and contract law.

A. The "Major" Record Label Is In A Superior Bargaining Position Relative to the Recording Artist

In 2019, the recorded music industry generated $11.1 billion in revenue in the United States.[16] The recorded

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and the American Federation of Musicians of the United States and Canada ("AFM") are the two largest unions in the United States. Texas Music Office, *The Unions – Getting Started in the Music Business*, STATE OF TEXAS (last visited Nov. 12, 2020), https://gov.texas.gov/music/page/tmlp_unions.

[15] Though the focus of this article is on termination rights, a collective-bargaining agreement could also address a myriad of other issues recording artists face such as ownership of their publication rights, streaming royalties, duration of contracts, etc.

[16] Dan Rys, *US Recorded Music Revenue Reaches $11.1 Billion in 2019, 79% From Streaming: RIAA*, BILLBOARD.COM (Feb. 25, 2020), https://www.billboard.com/articles/business/8551881/riaa-music-industry-2019-revenue-streaming-vinyl-digital-physical. This figure is based on the Recording Industry Association of America's ("RIAA") annual year-end report. *Id.* The report takes only revenue generated from streaming (paid subscriptions, ad-supported on-demand audio/video, and digital and customized radio services), physical products, digital downloads, and synch listening. JOSHUA P. FRIEDLANDER, YEAR-END 2019 RIAA MUSIC REVENUES REPORT 1 (Recording Industry Association of America ed., 2020), https://www.riaa.com/wp-content/uploads/2020/02/RIAA-2019-Year-End-Music-Industry-Revenue-Report.pdf. This figure does not take other forms of music revenue into account

music market is currently controlled by only three "major" record label companies: Sony Music Entertainment, Universal Music Group, and Warner Music Group.[17] Larry Miller, director of New York University's music business program, likened these three record labels to venture capitalists.[18] These record labels pay for all of the initial costs associated with creating recordings and their subsequent marketing and distribution.[19] In 2020, the IFPI estimated that major record labels invest up to $2 million in each new performance act they signed.[20] As former head of the Recording Industry Association of America ("RIAA") explains, the record labels "take huge financial risks that help advance artists' careers—risks that few artists are willing to take on their own."[21] Accordingly, the record label owns the master recordings rights in exchange for making an investment in unproven talent.[22]

Artists who want record label representation but want to forego major labels can opt to sign with an independent ("indie") record label.[23] However, indie labels do not generally have the same investment capital or

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such as revenue made from publishing, performances, merchandise, etc. *Id.* Of the $11.1 billion dollars, 79.5% was generated form streaming revenue which includes paid subscriptions (Spotify Premium, Tidal), ad-supported on-demand audio and video (Vevo, YouTube, and ad-supported Spotify), and digital and customized radio services (SiriusXM and Pandora). *Id.*

[17] Chisolm, *supra* note 11, at 305. Independent record labels that are not affiliated with the "major" record labels exist, but they are not the subject of this article because the recording artist is in a better position to acquire their master recording rights from a "minor" record label. *See id*. at 306.

[18] Sisario and Cocarelli, *supra* note 7.

[19] Steven Bolaños, *"Knock, Knock, Knockin' on (Congress's) Door": A Plea to Congress to Amend Section 203 of the Copyright Act of 1976*, 41 W. ST. U. L. REV. 391, 397 (2014).

[20] ICSID, *supra* note 8.

[21] Chuck Phillips, *Record Label Chorus: High Risk, Low Margin*, L.A. TIMES, (May 31, 2001, 12:00 A.M.), https://www.latimes.com/archives/la-xpm-2001-may-31-mn-4713-story.html.

[22] Sisario and Cocarelli, *supra* note 7.

[23] Chisolm, *supra* note 11, at 306.

distribution and marketing power that major labels do.[24] Additionally, the rise of social media and technology slightly lessened the power of major record labels because artists can produce, promote, and digitally distribute their music more efficiently than before.[25] However, without the distributing and marketing saturation major record labels provide, indie recording artists cannot achieve the same success as their represented counterparts.[26]

B. The Recording Artist Must Accept Unfavorable Contract Terms or Risk Not Being Represented

Regardless of their notoriety, few artist hopefuls have the capital to create, market, and distribute their music on their own.[27] The major record labels take advantage of potential recording artists—especially those who are more vulnerable due to their age who may be easily goaded into signing contracts with one-sided terms—in exchange for the chance of fame and fortune.[28] While each is different, most recording contracts contain the following standard terms:

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[24] *Id*. at 306.

[25] Anna S. Huffman, *What the Music Modernization Act Missed, and Why Taylor Swift Has the Answer: Payments in Streaming Companies' Stock Should Be Dispersed Among All the Artists at the Label*, 45 J. CORP. L. 537, 552 (2020). "Thanks to a series of technological developments ranging from widespread use of the internet, the development of web-based marketplaces, social media, and, of course, digital music formats, signing with a major record label is no longer the *sole* path to becoming as recording artist." Chisolm, *supra* note 13, at 306.

[26] Bolaños, *supra* note 19, at 397.

[27] Chisolm, *supra* note 11, at 320.

[28] Vulaj, *supra* note 3. Singer Jojo was twelve years old when she signed with Background Entertainment in 2004. *Id.* In 2019, of the top twenty solo artists of the Billboard 200 album chart, fifteen were under the age of thirty, and five were under twenty-five. Tatiana Cirisano, *Why Are Today's Top-Charting Music Stars So Young?*, BILLBOARD (Sep. 12, 2019), https://www.billboard.com/articles/business/8529105/young-top-charting-music-stars-streaming-analysis/. Since 2000, the average age of Billboard 200 solo artists continues to trend downward. *Id.* Recording artists may also suffer from mental health conditions that make them more vulnerable to predatory agents and record label executives. *See*, *e.g.*, Zack O'Malley Greenburg, *Kanye's Second Coming: Inside the Billion-Dollar Yeezy Empire*, FORBES (Aug. 31, 2019),

1. Duration

The duration of a recording contract is typically measured in albums, not years.[29] Though the terms may vary, a typical recording contract requires the recording artist to create music exclusively for the record label for the duration of the term.[30] The record label has minimal obligations regarding actually recording the artists' music while simultaneously reserving a number of unilateral options of additional albums from the artist.[31] Put more simply, the record label is usually only obligated to record one album for an artist while at the same time reserving the option to have the artist deliver five to six studio albums.[32]

Additionally, satisfactory delivery of albums turns on whether the artist is required to deliver "commercially satisfactory recordings" or "technically satisfactory recordings."[33] A commercially satisfactory recording is one that the label believes will generate substantial income and is standard for most new artists.[34] A technically satisfactory recording just has to be well made (i.e., in tune with a steady tempo and good technique, etc.).[35] A well-established artist may be able to negotiate a technically satisfactory recording term, but it is usually conditioned on being in the same style as the artist's previous work.[36]

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https://www.forbes.com/sites/zackomalleygreenburg/2019/07/09/kanyes-second-coming-inside-the-billion-dollar-yeezy-empire/amp/?__twitter_impression=true (in an interview, Kanye West admitted he suffered from bipolar disorder).

[29] Chisolm, *supra* note 11, at 309.

[30] *Id,* at 308.

[31] *Id.*

[32] *Id*.; Stella Brown, *It Takes a Village to Make a Difference: Continuing the Spirit of Copyright*, 12 NW. J. TECH. & INTELL. PROP. 129, 135 (2014). This gives the record label time to determine whether the recording artist will be a commercial success and gives them the option to drop the recording artist if they are not determined to be profitable. *Id.* at 136.

[33] Chisolm, *supra* note 11, at 308.

[34] *Id*.

[35] *Id*.

[36] *Id*.

An album is usually ten to twelve songs.[37] Depending on how long it takes the artist to deliver a "satisfactory" recording and how many options the record label exercises, the artist could be bound by the exclusive contract for seven years or more.[38] Unfortunately, "no successful artist can deliver seven albums in seven years [and 'no one expects them to'], especially considering that the record companies usually require an 18-month to two-year gap between releases."[39] This gap between record releases allows the artist to tour and the record label to assess the profitability of the album before deciding whether to exercise another option.[40]

California does not allow for personal service contracts like those held by recording artists, actors, and authors to be for a period of more than seven years.[41] However, there is a statutory exception for recording artists that allows record labels to "recover damages for each phonorecord" the artist fails to deliver.[42] While the constitutionality of California's law has been challenged, ultimately all the lawsuits have settled out of court.[43] Statutory exceptions like these that exclude recording artists from other kinds of creative professionals demonstrate the lobbying power the major record labels possess and can lead to contracts like Kanye West's with EMI Music Publishing that prohibited him from retiring.[44]

2. Compensation

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[37] *Id*. at 308–09.
[38] *Id*. at 309.
[39] *Id*.
[40] *Id*. Brown, *supra* note 32, at 136.
[41] CAL. LAB. CODE § 2855(a) (West 2007).
[42] CAL. LAB. CODE § 2855(b) (West 2007).
[43] Chisolm, *supra* note 11, at 310.
[44] Jem Aswad, *Kanye West's Publishing Contract Does Not Allow Him to Retire*, VARIETY (Mar. 4, 2019, 2:33 PM), https://variety.com/2019/music/news/kanye-west-publishing-contract-does-not-allow-him-to-retire-1203154689/.

Recording artists do not directly earn income from the licensing of their master recordings if they do not own the copyrights.[45] In that instance, recording artists would earn usage-based payments called royalties.[46] Typical contracts allocate 13–16% of wholesale revenue of records to new artists.[47] A new recording artist may renegotiate their royalty rate if their album reaches a pre-determined number of sales, but they still do not usually receive more than 14–15% than the total wholesale sales.[48] Well-established artists can typically negotiate up to a rate of 21% for royalty payments.[49]

Record labels will often give recording artists an advance on the royalties the label anticipates from record sales in order to provide the recording artist with cash flow prior to the music release.[50] This advance is meant to cover the expenses for recording the first album and the remainder is spent at the recording artist's discretion (i.e., living expenses).[51] Most often these advances must be repaid to the record label, meaning that artists can start out millions of dollars in debt without having even made an album.[52] Since the income recording artists earn from their contract with the record label comes from royalties, the record label will often withhold all or part of their royalty payments to the artist until the advance is repaid in full.[53] Artists may go years

[45] Chisolm, *supra* note 11, at 281.
[46] *Id*. at 312. Royalty percentages are based on the wholesale album price (the price the retail store purchases the album from the record label before the album is sold to consumers). *Id.*
[47] *Id*. at 313.
[48] *Id*.
[49] *Id*.
[50] *Id*. at 312.
[51] *Id*.
[52] *Id*. at 312-13. For example, "if you receive a $10 advance and you have a 15% royalty, your music will have to generate about $66.67 in Gross Receipts (total sales), not $10, before you start seeing steady checks from your music." AWAL, *The Ins & Outs of Signing a Record Deal*, AWAL BLOG (May 7, 2019), https://www.awal.com/blog/signing-a-record-deal-decoded.
[53] Chisolm, *supra* note 11, at 312; Sisario and Coscarelli, *supra* note 7.

before receiving any cash flow beyond the advance from the record label.[54]

Since an artist may not actually receive royalty checks from the record label, most of their disposable income is generated from touring, publishing, and merchandise sales.[55] "Three-sixty deals," in which the record label gets a portion of the recording artist's income from all sources whether the record label participated in the generation of revenue or not, have become increasingly popular.[56] Because these kinds of contracts are relatively new, the industry has not yet standardized how much the record label makes off the deals, but the majority fall between 15–35%.[57] These kinds of deals demonstrate how much bargaining power major record labels have has increased recently.

3. Master Recording Rights

Very few artists own their master recording rights.[58] Even highly successful artists that have been in the industry for decades have a difficult time regaining them.[59] Major record labels "claim outright ownership of the master recordings made under a recording contract" either by expressly writing in the contract that the artist assigns all of its copyright interests to the record label in perpetuity or by classifying the sound recordings as "works-for-hire."[60]

C. The 1976 Copyright Act Provides For A Termination Of Rights Remedy But Excepts Recording Artists

[54] *See* Chisolm, *supra* note 11; Sisario and Coscarelli, *supra* note 7.
[55] Huffman, *supra* note 25, at 552.
[56] Chisolm, *supra* note 11, at 314.
[57] *Id*. at 314–15.
[58] *Id*. at 311.
[59] *Id*. at 328.
[60] *Id*. at 311.

Music copyrights are, in theory, initially vested in the work's author.[61] However, copyrights, like any property, are transferable.[62] As explained supra, most record labels require artists to grant them the copyrights to their music as a risk premium for investing in them.[63] section 203 of the 1976 Copyright Act provides that "the exclusive or nonexclusive grant of a transfer or license of copyright or of any right under a copyright . . . otherwise than by will, is subject to termination."[64] This effectively reverts all copyright interests granted from the recording artist to the record label back to the author.[65] In order to effectuate Section 203 termination rights, a living recording artist must give written notice to the record label they are seeking reversion from within thirty-five to forty years from the execution of the copyright to one other than the recording artist or publication of the work.[66] Recordings artists possess this termination right regardless of the express terms in the contractual agreement with the record label.[67]

However, section 201 of the 1976 Copyright Act provides a "work for hire" exception to this rule.[68] A work for hire is:

(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree

[61] 17 U.S.C. § 201(a).
[62] Chisolm, *supra* note 11, at 285.
[63] *See* Vulaj, *supra* note 3; Sisario and Coscarelli, *supra* note 7.
[64] 17 U.S.C. § 203(a).
[65] 17 U.S.C. § 203(b).
[66] 17 U.S.C. § 203(a)(3)–(4).
[67] 17 U.S.C. § 201.
[68] 17 U.S.C. § 201(b).

in a written instrument signed by them that the work shall be considered a work made for hire.[69]

An "employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright."[70] Most major record labels classify albums as "works for hire" in the contract so that the recording artists are considered employees, in which case Section 203 does not apply and the record label is considered the outright owner of the master recording copyrights.[71]

However, just because record labels call recording artists employees in their contracts does not make it so.[72] In Community for Creative Non-Violence v. Reid, the Supreme Court held that agency and labor law determine the employment status of recording artists.[73] If a recording artist qualifies as an employee under the Reid standard, the artist is not entitled to Section 203 termination protection; however, if the recording artist is considered an independent contractor under the Reid standard, they are entitled to

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[69] 17 U.S.C. § 101.
[70] 17 U.S.C. § 201(b).
[71] Bolaños, *supra* note 19, at 406.
[72] Abdullahi Abdullahi, *Termination Rights in Music: A Practical Framework for Resolving Ownership Conflicts in Sound Recordings*, 2012 UNIV. ILL. J.L. TECH & POL'Y 457, 369 (2012).
[73] Community for Creative Non-Violence v. Reid, 490 U.S. 730, 739-40 (1989).

> The Act nowhere defines the terms "employee" or "scope of employment." It is, however, well established that "[w]here Congress uses terms that have accumulated settled meaning under ... the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." In the past, when Congress has used the term "employee" without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by common-law agency doctrine.

Id. (citations omitted).

protection.[74] Thus, under the 1976 Copyright Act, the artists that really need protection are not the ones that have "works for hire" written in their contracts but rather the ones that are considered employees under the common law. Because most recording artists are not aware of the consequences of their employment status when they first sign on, all masters recording litigation is retrospective.[75] More specifically, the recording artist learns later that they will never be entitled to the ownership rights of their master recordings, so they file a Section 203 copyright infringement suit they cannot win because it is too late to change their employment status to be unaffected by Section 201.

An additional wrinkle with Sections 201 and 203 is that even if recording artists have met all of the requirements for a Section 203 termination, the record labels are rejecting the notice of termination on the grounds that it is not the recording artists who are allowed to exercise the reversions but their "loan out" companies.[76] There are currently two

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[74] *Id.* at 751.

> In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party. No one of these factors is determinative.

Id. at 751–52 (citations omitted).

[75] *See generally* Vulaj, *supra* note 3.

[76] Evynne Grover, *Copyright Act 203 Termination of Transfers and Licenses*: *Could More Blockbusters Get Busted?*, COMM. LAW. 23, 28 (2020).

class actions pending that challenge this contention.[77] Both Waite v. UMG Recordings, Inc. and Johansen v. Sony Music Entertainment, Inc. were filed in the Southern District of New York in 2019 and 2020, respectively.[78] However it could take years for this litigation to resolve.

D. Unconscionability Is Not A Practical Contract Defense

The traditional contract defense of unconscionability is also a theoretical judicial remedy available to recording artists. In order to succeed in an unconscionability defense, a party must establish substantive unconscionability and procedural unconscionability.[79] That is, the party must show that there was unfairness in the both the bargaining procedure and in the contract terms.[80] Despite this defense, "no American court has held a standardized music contract unconscionable."[81] This is largely because most major record labels settle with the recording artist prior to trial.[82] It is also because courts generally do not find contracts unconscionable. However, even if this was an effective remedy, it is only available after the fact; it does not prevent the injustice in the first place.

It is reasonable for the record label to demand a license of the recording artists' master recording rights because the recording label is incurring almost all of the risk

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[77] Murray Stassen, *Class Action Lawsuits Filed in New York Against Sony and Universal*, MUSIC BUSINESS WORLDWIDE (Feb. 5, 2019), https://www.musicbusinessworldwide.com/class-action-suits-filed-in-new-york-against-sony-and-universal/.

[78] Waite v. UMG Recordings, Inc., 477 F. Supp. 3d 265, 268 (S.D.N.Y. 2020) (filed June 5, 2019); Johansen v. Sony Music Entertainment, Inc., No. 19-cv-01094 (ER) 2020 WL 1529442 (S.D.N.Y. filed June 26, 2020).

[79] Phillip W. Hall Jr., *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 HASTINGS COMM. & ENT. L.J. 189, 194 (2002) (citing Brian A. Blum, *Contracts: Examples and Explanations* § 13.11.2, 366 (2d ed., Aspen Law & Business 2001).

[80] Hall, *supra* note 80, at 194.

[81] Anorga, *supra* note 10, at 740.

[82] *Id*.

of investing in an artist.[83] However, it is not reasonable for the record label to maintain this license in perpetuity. Thirty-five years is a reasonable amount of time for the record label to recoup their investment while still giving the artist time to benefit from ownership of the master recording rights.

III. Artists Can Use Collective Bargaining To Negotiate A Termination Clause Into Their Recording Contracts

The largest obstacle a recording artist faces when negotiating with a major record label over their recording contract is the uncertainty of the artist's future success.[84] Each recording artist requires a significant amount of investment capital from the major record label, but the potential returns for the label are enormous.[85] The major record labels sign more recording artists who fail than succeed, but the income generated from successful artists is enough to create a surplus.[86] The more recording artists that the major record labels sign, the more probability they signed a successful artist.[87] This strategy has given major record labels the upper hand in contract negotiations until to this point, but it can be weaponized against them if new recording artists join a union.[88]

For centuries, workers in the United States with little individual power have organized into labor unions to prevent their employers from taking advantage of them.[89]

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[83] Vulaj, *supra* note 3.
[84] *See* Sisario and Cocarelli, *supra* note 7.
[85] Ian Youngs, *Music Stars 'Still Need Labels'*, BBC NEWS (Mar. 9, 2010, 2:47 PM), http://news.bbc.co.uk/2/hi/entertainment/8557734.stm.
[86] *See* Sisario and Cocarelli, *supra* note 7.
[87] *See id*.
[88] *Id*.
[89] Joshua Freeman, *The History of Labor in the U.S.*, U.S. DEP'T OF STATE (June 17, 2020, 3:00 P.M.), https://2017-2021.state.gov/briefings-foreign-press-centers/the-history-of-labor-in-the-u-s/index.html. The first labor union in the United States was an association of shoemakers that was founded in 1792 in Philadelphia. *Id.* Labor unions expanded to include other blue-collar

Collective bargaining refers to the "[n]egotiations between an employer and the representatives of organized employees to determine the conditions of employment."[90] The result of the negotiations is a formal contract called a collective-bargaining agreement.[91] Section 157 of the National Labor Relations Act ("NLRA") gives employees the right "to bargain collectively through representatives of their own choosing" and join trade unions.[92] Under the NLRA, employers are required to bargain with union representatives, but neither the union nor the employer are required to agree to anything so long as they bargain in good faith.[93] The NLRA also regulates how the parties may further their bargaining objectives (e.g., strikes, lockouts, picketing).[94]

A. A Collective-Bargaining Agreement Would Be Beneficial to All Parties

Most recording artists have little individual bargaining power over the major record labels during their contract negotiations.[95] Additionally, many recording artists cannot afford to hire an attorney or do not realize that they need one to represent them during this process.[96] By engaging in collective bargaining, recording artists will have a knowledgeable, experienced representative of their choosing who will advocate for their interests despite their inability to afford one or ignorance of the necessity of such a representative. Specifically, their representative could advocate for a termination clause in the collective-

professions throughout the 1800s, and by 1877 unions had gained widespread popularity throughout the U.S. *Id.* Enacted by Congress in 1935, the National Labor Relations Act ("NLRA") officially gave workers the right to form and join unions to bargain collectively. 29 U.S.C.A § 157 (West).

[90] *Collective Bargaining*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[91] *Collective-Bargaining Agreement*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[92] 29 U.S.C. § 157.

[93] 29 U.S.C. § 158.

[94] 29 U.S.C. § 158.

[95] *See* Vulaj, *supra* note 3.

[96] *Id*.

bargaining agreement in way that only a handful of artists have ever been able to do by putting the recording artists with the least amount of earning potential on the same level as those with the most.

Collective-bargaining agreements also provide stability and would protect both the record label and the recording artist. Under the NLRA, employers are prohibited from unilaterally changing the terms and conditions of the collective-bargaining agreement, even after it expires.[97] Additionally, collective-bargaining agreements protect all employees, including non-union members.[98] There are only three major record labels for most of the recording artists in the industry, and it is likely that any union that engages in negotiations with one of them will be able to get the label to agree to extending the terms and conditions of the collective-bargaining agreement, specifically the termination clause, to non-union recording artists.[99] Given the size of the market share of the three major record labels, a collective-bargaining agreement with a termination clause would become the industry standard, even for recording artists who sign to an indie label.[100]

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[97] 29 U.S.C. § 158(a).

[98] In 2003, the Economic Policy Institute found that strong unions set pay standards that non-union employers followed. Matthew Walters, *How Unions Help All Workers*, ECON. POL'Y INST. (Aug. 26, 2003), https://www.epi.org/publication/briefingpapers_bp143/ ("a high school graduate whose workplace is not unionized but whose industry is 25% unionized is paid 5% more than similar workers in less unionized industries"). *See also* Patrick Denice, *What do unions do for non-union workers?*, WORK IN PROGRESS (Dec. 5, 2018) http://www.wipsociology.org/2018/12/05/what-do-unions-do-for-non-union-workers/ ("If unions in the private sector were as strong today as they were in the late 1970s, we estimate that non-union men working full-time would earn over $3,000 more annually than they currently do.").

[99] Taylor Swift, acting individually, was able to get Universal to agree to distribute non-recoupable royalties to all Universal recording artists each time Universal sells Spotify stock. Huffman, *supra* note 25, at 546.

[100] *See* Chisolm, *supra* note 11, at 306–07 ("the recording contracts for . . . independent producer labels closely resemble the major label recording contracts . . . .").

Furthermore, a collective-bargaining agreement would provide more favorable contract terms to recording artists in general, not just regarding termination clauses. A union representative could bargain over other unfair terms recording artists are typically stuck with such as limiting the duration of the contracts to a maximum of seven years and ensuring recording artists are able to see more royalty payments upfront so that they have a continuous cashflow.[101] The parties could also agree to arbitrate any labor disputes, which would provide a cheaper, more efficient alternative to litigation for all parties and maintain confidentiality throughout the proceedings.

Additionally, any lobbying done by unions for recording artists for federal and state statues regarding employment would similarly affect non-union employees.[102] If the record label and union could not agree to a collective-bargaining agreement that included a termination clause, the unions could always lobby Congress to revise the Section 201 provision allowing for the works for hire exception. In this instance, recording artists signed to independent labels would still benefit from the federal statute.

B. Recording Artists Already Have A Union That Could Bargain Collectively On Their Behalf

Critics argue that artists in general are difficult to organize because of their independent dispositions and the

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[101] Publishing rights are not addressed in this article, but they are substantially similar to master recording rights and could also be subject to the collective-bargaining agreement.

[102] Denice, *supra* note 98.

> Unions have been vocal supporters of recent various efforts to raise the minimum wage. For instance, the Service Employees International Union (SEIU) has spent tens of millions of dollars on the Fight for 15 movement, pressuring cities like Seattle and New York City to adopt a $15 per hour minimum wage and yielding pay raises for over 8 million workers.

Id.

remote nature of their work.[103] However, contrary to popular belief, there is already a union available to recording artists. SAG-AFTRA has 160,000 enrolled members, a small percentage of which are recording artists.[104] By signing with Universal Music Group, Sony Music Entertainment, or Warner Music Group, recording artists are automatically eligible for membership to SAG-AFTRA.[105] SAG-AFTRA's Music Department manages the SAG-AFTRA Sound Recordings Code, which governs contracts between recording artists and record labels.[106] The Music Department "negotiates these agreements with the major record labels, signs companies to the agreements and enforces the contracts on behalf of covered performers. This

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[103] Ken Green, *Artists Need Unions, Too: The Role of Organized Labor in Creative Industries*, UNION TRACK (June 4, 2019), https://www.uniontrack.com/blog/artists-unions.

> Artists are naturally individualistic, explains British artist Patrick Brill, better-known as Bob and Roberta Smith. As such, they want to do their own thing, not "jump on other people's bandwagons," Smith says. That spirit of individualism makes it difficult to convince them to join together as a collective . . . . Another key obstacle is the distributed nature of the various artistic professions. Locals by definition represent a centralized area where the union has a physical presence. The remote nature of work for painters, musicians, actors and other artists makes that model of organizing difficult to apply.

Id. See also Scott Timberg, *Can Unions Save the Creative Class?*, SALON (Mar. 18, 2013, 8:25 P.M.), https://www.salon.com/2013/03/18/can_unions_save_the_creative_class/ ("Collective bargaining requires an obedient rank-and-file," [Ted] Gioia says. "But is there a profession more resistant to this than art-making? I'd rather try to put the toothpaste back in the tube than attempt to get artists to march in lockstep.").

[104] *About*, SAG-AFTRA, https://www.sagaftra.org/about (last visited Jan. 15, 2021).

[105] *Sound Recordings*, SAG-AFTRA, https://www.sagaftra.org/production-center/contract/806/getting-started (last visited Jan. 15, 2021).

[106] *SAG-AFTRA is Your Voice in Music – Meet SAG-AFTRA's Music Department*, SAG-AFTRA (Sept. 11, 2017), https://www.sagaftra.org/sag-aftra-your-voice-music-—-meet-sag-aftra's-music-department [hereinafter "Music Department"].

includes filing claims and tracking compliance by the companies."[107] SAG-AFTRA's Government Affairs and Public Policy Department advocates on behalf of recording artists to Congress.[108]

SAG-AFTRA's executive director David White likened SAG-AFTRA membership to "having a legal team at [the artist's] disposal."[109] Presently, SAG-AFTRA negotiated a collective-bargaining agreement with the major record labels that requires them to pay royalty and non-royalty artists a standard rate per hour of vocal session.[110] Payment by the record label must be made to the recording artist within twenty-one days of the session.[111] SAG-AFTRA's collective-bargaining agreement also currently requires the record labels to contribute to its health and retirement funds if it owns the master recording rights to a recording artist's song.[112] If there is a dispute over an existing contract between a record label and recording artist, SAG-AFTRA can provide arbitration.[113]

However, despite the existing and potential benefits of SAG-AFTRA membership, there are several concerns with SAG-AFTRA. First, most recording artists do not realize that they are eligible for SAG-AFTRA membership, and record labels have no incentive to inform them.[114]

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[107] *Id*.
[108] *Id*.
[109] Leight, *supra* note 14.
[110] Music Department, *supra* note 106.
[111] *Id*.
[112] Sideletter from Michael J. Lebowich, Warner Bros. Records, et al., & Duncan Crabtree-Ireland, SAG-AFTRA, on Agreed Interpretations of National Code of Fair Practice for Sound Recordings Relating to Health & Retirement Issues, (Oct. 18, 2018, 10:54 P.M.), https://www.sagaftra.org/files/2018-2020%20Sound%20Recordings%20MOA.pdf.
[113] Leight, *supra* note 14.
[114] *Id*. In 2016, Lady Gaga told Carson Daly on his radio show, "We don't have a union as artists. We're just fighting for ourselves." Francesca Bacardi, *Lady Gaga Continues to Defend Kesha in Dr. Luke Battle, Says She's Being "Publicly Shamed"*, E ONLINE (Mar. 8, 2016, 9:03 A.M.), https://www.eonline.com/news/746788/lady-gaga-continues-to-defend-kesha-

Without this awareness, recording artists cannot come together on a large enough scale required to bargain for their master recording rights. Second, unsigned artists and those signed to independent labels are not privy to SAG-AFTRA's benefits.[115] Thus, even if SAG-AFTRA was able to negotiate a termination clause granting Section 203 termination rights, a very large percentage of recording artists would be left out of the benefit of their bargain.[116] For these reasons, SAG-AFTRA must either expand their representation of recording artists to all labels or recording artists should organize an independent union open to everyone. Once they have organized, the new union can bargain on their behalf.

C. Collective Bargaining Has Been Effective in the Entertainment Industry

SAG-AFTRA has been negotiating collective-bargaining agreements since the 1930s.[117] SAG-AFTRA has experience negotiating specifically with all three major record labels, and it can also enforce the collective-

in-dr-luke-battle-says-she-s-being-publicly-shamed. During an interview with rapper 2 Chainz, former rapper Joe Budden expressed his desire for a hip-hop strike. Joe Budden, *Pull Up Season 2 Episode 2 Featuring 2 Chainz*, YOUTUBE (Feb. 5, 2019), https://www.youtube.com/watch?v=qLn2IWcvpiU. In 2020, Kanye West urged his "brother" musicians to band together to form a union to stand up to record labels over ownership of their master recording rights. Kanye West (@kanyewest), Twitter (Sept. 16, 2020, 8:23 A.M.), https://twitter.com/kanyewest/status/1306207184347299840; Kanye West (@kanyewest), Twitter (Sept. 22, 2020, 12:31 P.M.), https://twitter.com/kanyewest/status/1308443797802508290.

[115] Leight, *supra* note 14.

[116] *See Market Share of Record Companies in the United States From 2011 to 2019, by Label Ownership*, STATISTA (Jan. 8, 2021), https://www.statista.com/statistics/317632/market-share-record-companies-label-ownership-usa/. In 2019, independent record labels comprised about 35% of the U.S. market share. *Id.*

[117] *The History of the Unions During the 1930s*, SAG-AFTRA, https://www.sagaftra.org/about/our-history/1930s (last visited Feb. 11, 2021). SAG negotiated its first collective-bargaining agreement in 1937 on behalf of stunt doubles and stagehands. *Id.* The first national AFRA (the predecessor to AFTRA) collective-bargaining agreement was signed in 1938 between AFRA on behalf of radio talent and NBC and CBS. *Id.*

bargaining agreements.[118] Collective-bargaining agreements contain the rules for how labor unions and the record labels may enforce their objectives, such as labor strikes.[119] Strikes coordinated by labor unions are some of the most effective ways workers can challenge unfair labor practices by their employers.[120] A coordinated labor strike by recording artists against major record labels would be an effective remedy but would require a lot of organization on a national level that only a labor union could provide. But it has worked before.[121]

In 1942, AMF musicians went on strike against the major record companies in the United States seeking royalties to be paid by the record companies for a union fund supporting unemployed musicians.[122] Union musicians did not make recordings for two years.[123] Independent record companies were the first to settle with the unions.[124] Finally in November 1944, all the major record companies came to an agreement.[125]

More recent strikes by other kinds of labor unions in the music industry over collective-bargaining agreements

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[118] *See SAG-AFTRA, Record Labels Reach Tentative Agreement*, SAG-AFTRA (Oct. 19, 2018), https://www.sagaftra.org/sag-aftra-record-labels-reach-tentative-agreement.
[119] 29 U.S.C. § 158.
[120] Ahmed White, *Its Own Dubious Battle: The Impossible Defense of an Effective Right to Strike*, 2018 WIS. L. REV. 1065, 1068 (2018); *Why Strikes Matter*, LABOR NOTES (Oct. 17, 2019), https://labornotes.org/2019/10/why-strikes-matter.
[121] Jim Dorsch, *The American Federation of Musicians Recording Bans of 1942-1944 and 1948*, SPINDITTY (Feb. 27, 2019), https://spinditty.com/industry/Music-The-Recording-Bans-of-1942-1944-and-1948.
[122] *Id*. At the time, the AMF only represented instrumentalists. *Id.* Vocalists were represented by the American Federation of Television and Radio Artists ("AFTRA"), who later merged with the Screen Actors Guild to become SAG-AFTRA. *Id.* AFTRA joined the strike shortly thereafter. *Id*.
[123] *Id*. During this time, record companies continued to release music that had been recorded prior to the strike, but this music was limited. *Id*.
[124] *Id*.
[125] *Id*.

have also proven to be effective. In 2019, the Chicago Symphony Orchestra's seven-week strike led to an increased salary and pension benefits.[126] In 2007, the Local One union was able to negotiate higher wages, daily minimum worker quotas, and better working hours for Broadway stagehands.[127] These union victories are evidence that labor unions are effective in the music industry.

Other kinds of artistic unions have also successfully employed the labor strike. In 2007, the Writers Guild of America and Screen Actors Guild walked out over Hollywood producers refusing to grant union jurisdiction over writing for new media such as Internet series and residual payments for downloaded television shows and movies.[128] Production companies ran reruns and old movies to supplement their empty broadcast and cable network airtime. [129] However, the unions prevailed because they were well-organized, well-funded, had a lot of publicity, and treated "scabs" harshly.[130] In 2014, the National Writers

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[126] Howard Reich, *7-Week CSO Strike Over as Musicians, Board Ratify New Contract*, CHI. TRIB. (Apr. 27, 2019), https://www.chicagotribune.com/entertainment/music/howard-reich/ct-ent-cso-strike-settlement-0428-story.html.

[127] Campbell Robertson, *Stagehands End Walkout on Broadway*, N.Y. TIMES (Nov. 29, 2007), https://www.nytimes.com/2007/11/29/theater/29broadway.html.

[128] Michael Cieply, David Carr & Brooks Barnes, *Screenwriters on Strike Over Stake in New Media*, N.Y. TIMES (Nov. 6, 2007), https://www.nytimes.com/2007/11/06/business/media/06strike.html.

[129] *Id.*

[130] Timberg, *supra* note 103.

> The '07-'08 campaign was also better run than most. Support by high-profile stars – Steve Carell calling in sick to "The Office" – helped, as did enlisting the showrunners who head a television program and often come out of the writers' ranks. "These were people who made a lot of money for the studios, and who were used to working at the highest levels of the networks and studios," says [Howard] Rodman . . . . During a period that cut into many writers' savings, the union offered loans to some, which kept screenwriters' homes from being taken or their medical coverage from being

Union successfully collected unpaid fees from Heart & Soul Magazine on behalf of twelve of its members.[131] Despite the individuality of the writing industry (much like recording artists), authors have a strong union presence that effectuates polices and negotiates with publishing companies on their behalf.[132]

Once a collective-bargaining agreement has been negotiated, SAG-AFTRA can guarantee its enforcement through a large-scale recording artist strike. This would require much organization and solidarity, lots of funding, and swift retaliation against "scabs," but it could be successful in the recording artist-record label context as previous entertainment-related union strikes have proven to be.

D. Current Music Coalition Efforts Are Not Effective

Presently, there are several non-union coalitions that advocate for recording artists' rights.[133] The Artist Rights Alliance specifically advocates for the ownership of master recording rights by recording artists.[134] The Music Artists Coalition, formed in 2019,[135] "lobbies on national

> cancelled . . . . Part of the reason Hollywood strikes can work is that the unions protect their position: Anyone who symbolically crossed the picket line can never be a member.

Id.

[131] Green, *supra* note 103.

[132] *Id*.

[133] These coalitions were formed to counter the RIAA, which lobbies on behalf of over 85% of record labels in the U.S., including Sony Music Group, Universal Music Group, and Warner Music Group. *About RIAA*, RIAA, https://www.riaa.com/about-riaa/riaa-members/ (last visited Jan. 15, 2021).

[134] *Artists' Bill of Rights*, ARTIST RTS. ALL., https://artistrightsalliance.org/about_us (last visited Jan. 15, 2021) ("The Right to Control Our Work – the ability to decide when and on what terms our creative works are performed, reproduced, or distributed, and the ability to assign these rights to partners of our choosing.").

[135] *Artists, Songwriters and Executives Form Music Industry Coalition*, MUSIC CONNECTION (Jul. 30, 2019), https://www.musicconnection.com/artists-songwriters-executives-form-coalition/.

and state levels regarding issues that impact creators" in the digital age.[136] The Recording Academy also "amplifies music's collective voice on Capitol Hill and empowers creators" by "fighting for creators' rights."[137]

However, these coalitions are opposed by the RIAA, the well-funded organization behind passing the Section 201 "works for hire" exception in the first place.[138] Though music coalitions advocating for recording artists eventually prevailed and convinced the RIAA to petition Congress to remove the harmful language from the Copyright Act, there is still residual animosity between recording artist advocates and the RIAA that make it difficult for them to negotiate.[139] A labor union with no history with the RIAA might be easier to negotiate with and would better understand the artists' interests from the collective bargaining negotiations that need to be lobbied in Congress.

IV. Conclusion

Both the record labels and recording artists have compelling reasons for owning the master recording rights, and Section 203 provides a solution that balances these competing interests through the termination of transfers and licenses granted by the recording artist to the record label after thirty-five years. Unfortunately, the parties are not of equal bargaining power, so up until now recording artists have not been able to negotiate such a term into their contract.

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[136] *Mission*, MUSIC ARTISTS COAL., https://www.musicartistscoalition.com/#!/who-we-are (last visited Jan. 15, 2021).

[137] *Helping Music and its Makers Thrive*, RECORDING ACAD., https://www.grammy.com/recording-academy#advocacy (last visited Jan. 15, 2021).

[138] Eric Boehlert, *Four Little Words*, SALON (Aug. 28, 2000, 11:30 P.M.), https://www.salon.com/2000/08/28/work_for_hire/. On November 29, 2000, Congress passed a bill that amended the then existing Copyright Act, 17 U.S.C. 101(e). *Id.* By quietly lobbying to insert "as a sound recording," to the definition of "work made for hire," the RIAA ensured record labels were the sole legal owners of the master recordings rights for their legally copyrightable life—ninety-five years. *Id.*

[139] *Id*.

However, there is strength in numbers, and by organizing into a new or existing union, recording artists can utilize the knowledge and experience of union legal representatives and put pressure on record labels via strikes to create a collective bargaining agreement that vests ownership of the master recording rights in recording artists, the true owners of the works. Sadly, existing contracts would likely not be affected by this collective bargaining agreement. However, it would benefit future recording artists and future agreements for existing recording artists; and hopefully the next Kanye West will own their masters.