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Risky Business: Rejecting Adherence to Industry Standards in Exclusive Songwriter Agreements

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RISKY BUSINESS: REJECTING ADHERENCE TO INDUSTRY STANDARDS IN EXCLUSIVE SONGWRITER AGREEMENTS

INTRODUCTION

Since before songwriters and piano players converged on Tin Pan Alley[1] to market their wares, songwriters' creative efforts have been protected. The Founding Fathers saw the expediency in placing a guarding hand over the creative labors of the citizens of the United States through the Constitution.[2] Further, the intellectual property of composers, authors, artists, and inventors is protected by The Copyright Act of 1976.[3] Unfortunately, these safeguards do not protect creative persons from unconscionable contractual terms that have had a long history and tradition in the music industry.[4]

Recent cases in both the United States and England have rejected adherence to either custom and usage or industry practices in personal services contracts used in a variety of entertainment industries.[5] The courts should follow the guidance of these decisions and apply the doctrine of unconscionability to exclusive songwriter agreements to find the unbargained for terms unconscionable.

Unconscionability is a relatively new contract theory.[6] American courts have been reluctant to utilize this theory to strike down uncon-

1. *See* H. WILEY HITCHCOCK, MUSIC IN THE UNITED STATES: A HISTORICAL INTRODUCTION 187-88 (1969). During the early 1900s Tin Pan Alley, located in New York City, was the center of popular music. *See id.*

2. *See* U.S. CONST. art. I, § 8, cl. 8. Congress has the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." *Id.*

3. *See* 17 U.S.C. § 102 (1988 & Supp. V 1993) (Copyright Act of 1976). Eight broad categories are protected under the Copyright Act. *See id.*

4. For one of the earliest cases dealing with unconscionable songwriter contracts, see *M. Witmark & Sons v. Peters*, 149 N.Y.S. 642, 644 (N.Y. 1914), where the court refused to enforce an exclusive songwriter agreement which was inequitable and disproportionate to the songwriter. *See also infra* Part I.A.

5. *See generally* DONALD E. BIEDERMAN ET AL., LAW AND BUSINESS OF THE ENTERTAINMENT INDUSTRIES § 5.5 (3d ed. 1996) (surveying caselaw on both unconscionable and adhesion contracts in the entertainment industries). *See, e.g.*, Buchwald v. Paramount Pictures Corp., 90 Daily Journal D.A.R. 14482 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal) (*Buchwald II*), *reprinted in* BIEDERMAN ET AL., § 5.5 at 451-52; O'Sullivan v. Management Agency & Music Ltd., 3 All E.R. 351 (C.A. 1985); Clifford Davis Management Ltd. v. WEA Records Ltd., 1 All E.R. 237 (C.A. 1975); A Schroeder Music Publ'g Co. v. Macaulay, 3 All E.R. 616 (H.L. 1974).

6. The theory of unconscionability was introduced in the 1948 draft of U.C.C. § 2-302 and was adopted in 1952. Prior to the edition of the concept in the U.C.C. and general use of the doctrine in contractual cases, equity courts applied similar concepts to reach a just and right result. *See* discussion *infra* Part I.A.

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scionable terms of exclusive songwriter agreements.[7] Adherence to industry standards is not a sufficient reason to enforce unconscionable terms of an exclusive songwriter agreement. The court would only have to "re-write" the agreement once between the parties, and/or strike down certain provisions, and the industry, as a whole, would reform its practices. This reformation would provide an equal footing between songwriters and publishers, while promoting an atmosphere more conducive to creativity. Music publishing is a big business and every participant in the industry bears a risk—winners and losers. In 1993 alone, music publishing revenues surpassed the $5 billion mark.[8] And, although total revenues are high, they are spread disproportionetly in favor of those with the most bargaining power. Thus, the issue of why courts should break from the industry norm and carve out a new standard needs to be addressed in order to furnish the judiciary with alternative modes of analysis to be used when examining the area of unconscionability in personal services contracts.

Part I of this Comment addresses the formation of the doctrine of unconscionability. Part I also covers the nature of exclusive songwriter agreements and how the doctrine of unconscionability can be utilized to level the playing field between songwriters and music publishers. Part II analogizes other areas within the entertainment industry where the courts have rejected adherence to industry standards and reformed the contractual agreements between the parties. This section's primary focus will be the court's reasoning in Phase II of *Buchwald v. Paramount Pictures Corp.* (*Buchwald II*)[9] and how that court's analysis can be applied to exclusive songwriter agreements. Although *Buchwald II* is unpublished, the case is cited by commentators when addressing what they believe should be the appropriate analysis regarding unconscionability in contracts.[10] The decision in

7. *See* Croce v. Kurnit, 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984). *But see* M. Witmark & Sons v. Peters, 149 N.Y.S. 642 (N.Y. 1914). The decision in *M. Witmark & Sons* was reached prior to the Uniform Commercial Code adoption of unconscionability in 1952 or wide spread use of the doctrine at common law.

8. *See* Irv Lichtman, *Publishing Revenues Hit $5 Billion—1993 Total Is Up 6%, Worldwide Survey Says*, BILLBOARD, Sept. 16, 1995, *available in* LEXIS, News Library.

9. 90 Daily Journal D.A.R. 14482 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal). The trial court issued three Statements of Decision. The First Phase, issued on January 8, 1990, concluded that the movie was based on the idea of Buchwald, the plaintiff. The Second Phase, cited above and issued on December 21, 1990, concluded that certain terms in the net profits participation agreement were unconscionable. The Third Phase, issued on March 16, 1992, decided the amount of damages due Bernheim and Buchwald on the reformed contract. All three decisions are reprinted as appendices in PIERCE O'DONNELL & DENNIS MCDOUGAL, FATAL SUBTRACTION: HOW HOLLYWOOD REALLY DOES BUSINESS (1992).

10. *See, e.g.*, BEIDERMAN ET AL., *supra* note 5, at 450; Theresa E. Van Beveren, *The Demise of the Long-Term Personal Services Contract in the Music Industry: Artis-*

Buchwald II will be contrasted with decisions reached in other areas of the entertainment industry in the United States and the cases that have become known simply as the "English Music Trilogy."[11] The conclusion of this Comment will include both legal and policy arguments as to why adherence to current industry standards in exclusive songwriter agreements is a disservice to both parties of the contract.

I. Background

A. *History of Unconscionability*

Unconscionability[12] has been defined as "an absence of meaningful choice on the part of one of the parties together with contract terms that are unreasonably favorable to the other party."[13] Some commentators believe that this theory is hard to reconcile with the bargain principle that is grounded in the freedom to contract.[14] As the use of this doctrine becomes more frequent, it is evident that the courts are reaching their own reconciliation between upholding the underlying principles of contract law and the evolving doctrine of unconscionability.[15]

The doctrine has worked its way into the common law as a means to alleviate unfairness of terms and overreaching by parties.[16] Initially, the doctrine was utilized in courts of equity[17] and in courts of law

tic Freedom against Company Profit, 3 UCLA ENT. L. REV. 377, 417 (1996). *But see* Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459 (1995) (disagreeing with the analysis used in *Buchwald II*).

11. *See* O'Sullivan v. Management Agency & Music Ltd., 3 All E.R. 351 (C.A. 1985); Clifford Davis Management Ltd. v. WEA Records Ltd., 1 All E.R. 237 (C.A. 1975); A Schroeder Music Publ'g Co. v. Macaulay, 3 All E.R. 616 (H.L. 1974).

12. For a thorough discussion of the history of unconscionability and contrasting views on analysis of the doctrine see E. ALLAN FARNSWORTH, CONTRACTS § 4.28 n.4 (2d ed. 1990). *See also* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485 (1967); Melvin Aaron Eisenberg, *The Bargain Principle and its Limits*, 95 HARV. L. REV. 741 (1982); Prince, *supra* note 10.

13. Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

14. *See generally* Eisenberg, *supra* note 12, at 799 (working through the reconciliation process and reaching the conclusion that unconscionability "explains and justifies the limits that should be placed upon the bargain principle").

15. *See generally id.* at 748-55 (discussing the principle of unconscionability and its increased use by the courts that are looking at more than unfair surprise).

16. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1979). The comment to the Restatement states that

> [i]f a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Id.

17. *See* Campbell Soup Co. v. Wentz, 172 F.2d 80 (3d Cir. 1948) (disallowing equitable relief to the buyers of carrots when the agreement was so inequitable to the sellers of carrots); M. Witmark & Sons v. Peters, 149 N.Y.S. 642, 644 (N.Y. 1914)

under the disguise of some other theory of recovery.[18] Today, the doctrine has been codified in section 2-302 of the Uniform Commercial Code.[19] The purpose behind the 1948 initial draft of section 2-302 was to provide the courts with a way to strike terms they found unconscionable.[20] Section 2-302 provides guidance and congruence[21] in the application of the doctrine, even though the term *unconscionability* has remained undefined in the code.[22] The test under section 2-302 is similar to the one at common law.[23] The court must decide, "in light of the general commercial background and the commercial needs of the particular trade or case, [whether] the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[24] Decisions made under this section serve as guidance for cases not governed by the Uniform Commercial Code.[25]

In 1967, in order to balance the concept of unconscionability with the traditional principles of contracts, Professor Arthur A. Leff divided unconscionability in two categories—procedural and substantive.[26] Procedural unconscionability refers to the "process of contracting,"[27] while substantive unconscionability refers to the resulting *outcome* of the contract.[28] Whether both elements need to be present for a successful claim depends on the jurisdiction.[29] An adequate showing of each would present a stronger argument that the agreement was unconscionable. Some courts will allow claims in

(refusing to enforce in equity a contract in which "the benefits accruing to the plaintiff are so palpably disproportioned to the services required to be performed by [defendant, the breaching party] . . . ."). *See also* FARNSWORTH, *supra* note 12, § 4.27; Prince, *supra* note 10, at 467-69.

18. *See* Prince, *supra* note 10, at 467-69; FARNSWORTH, *supra* note 12, § 4.27.

19. U.C.C. § 2-302 (1977) (providing no definition of unconscionability). *See also* UNIF. CONSUMER SALES PRACTICE ACT § 4(c)(2), 7A U.L.A. 241 (1985); UNIF. RESIDENTIAL LANDLORD AND TENANT ACT § 1.303, 7B U.L.A. 444 (1985) (explaining additional uniform codes that recognize unconscionability).

20. *See* U.C.C. § 2-302 cmt. 1 (1990); Prince, *supra* note 10, at 468-71.

21. *See* U.C.C. § 2-302 cmt. 1 (1990).

22. *See* FARNSWORTH, *supra* note 12, § 4.28. "That the term is incapable of precise definition is a source of both strength and weakness." *Id.*

23. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979).

24. U.C.C. § 2-302 cmt. 1 (1990).

25. *See* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1979); FARNSWORTH, *supra* note 12, § 4.28.

26. *See* Leff, *supra* note 12, at 487. *But see* Eisenberg, *supra* note 12, at 752-54 (arguing that distinguishing between procedural and substantive unconscionability is too stringent to allow development of the doctrine).

27. Leff, *supra* note 12, at 487 (discussing section 2-302 of the U.C.C.).

28. *See id.*

29. *See* Prince, *supra* note 10, at 472-73 nn.64-66 (1995) (providing a comprehensive look at the various jurisdictional requirements across the United States).

which there is a substantially greater showing of one element over the other element.[30]

Procedural unconscionability may take the form of oppression or unfair surprise.[31] Oppression is "inequality of bargaining power [that] results in no real negotiation and an absence of meaningful choice"[32] while unfair surprise is the result of misleading bargaining conduct.[33]

The courts, in varied types of contractual situations, have found oppression in a contract where a party may fully understand the terms but has no meaningful choice outside the acceptance of the agreement.[34] This is the situation that many songwriters face, and is the reason why courts need to move away from current standards in the music industry. In *Graham v. Scissor-Tail, Inc.*,[35] Bill Graham was a prominent concert promoter who was instructed to "sign on the dotted line" on a union contract in order to present a Leon Russell concert.[36] When a dispute arose under the contract, a clause in the contract required Graham to submit to mandatory arbitration.[37] The court found the arbitration portion of the contract to be boilerplate, non-negotiable, and forced upon Graham if he wished for the concert to take place.[38] Graham, having been in the concert promotion business for some years, could not assert procedural unconscionability under the theory of unfair surprise because he was well aware of the terms of the agreement.[39] The court found the requirement for procedural unconscionability was met by the oppressive nature of the agreement even though the terms met the reasonable expectations of the parties.[40]

Substantive unconscionability was also found in *Graham*. The court looked to the unfairness of the arbitration clause to which Graham was a party.[41] This clause allowed partiality on the part of an arbitra-

30. *See* Vockner v. Erickson, 712 P.2d 379 (Alaska 1986) (allowing the concept of unconscionability). *See also* FARNSWORTH, *supra* note 12, § 4.28; Prince, *supra* note 10, at 473.

31. *See* Prince, *supra* note 10, at 474.

32. *See* Buchwald v. Paramount Pictures Corp., 90 Daily Journal D.A.R. 14482, 14484 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal).

33. *See* Prince, *supra* note 10, at 474.

34. *See* Graham v. Scissor-Tail, Inc., 623 P.2d 165, 171-73 (Cal. 1981).

35. *Id.*

36. *See* O'DONNELL, *supra* note 9, at 390.

37. *See Graham*, 623 P.2d at 173.

38. *See id.* at 176. Specifically, the court stated, "[I]n such cases as this, the agreement to *arbitrate* is essentially illusory. Here, clearly, 'minimum levels of integrity' are not achieved, and the 'agreement to arbitrate' should be denied enforcement on grounds of unconscionability." *Id.*

39. *See id.* at 173 (stating that the contract was not contrary to the reasonable expectations of plaintiff Graham since he admitted to being party to many such agreements in the past).

40. *See id.*

41. *See id.*

tor.[42] It is easy to imagine, if someone with the status of Bill Graham "could have a take-it-or-leave-it contract forced down his throat,"[43] that a party to a contract with little or no experience in an industry would have no opportunity for negotiation.[44]

Some jurisdictions have analogized Leff's theory to the Restatement (Second) of Contracts section 208. For instance, in *Vockner v. Erickson*,[45] the Alaska Supreme Court dissected section 208 in much the same way Leff divided Uniform Commercial Code section 2-302.[46] The court viewed the setting of how and why the contract was made, along with the factors of oppression and unfair surprise.[47] In relying upon Restatement (Second) section 208 and the Uniform Commercial Code section 2-302, the court applied the underlying principle of unconscionability.[48] Generally, courts should not disturb the allocation of risks because of superior bargaining power of one party if the contract does not meet the factors of substantive unconscionability.[49] In *Vockner*, the Alaska Supreme Court affirmed the lower court's holding that both procedural and substantive unconscionability existed in the contract.[50] The Alaska Supreme Court would not interfere with the lower court's finding.[51] Further, the court stated in dicta that substantive unconscionability alone could be enough to support a finding of unconscionability in a contract.[52] Courts that recognize either a sliding scale as to procedural and substantive unconscionability, or those that would allow a claim to lie on a showing of substantive unconscionability alone, have allowed the doctrine to progress beyond its initial limits of unfair surprise and oppression.[53]

Returning to the bargain principle, which undergirds one's ability to contract freely, courts have been reluctant to utilize unconscionability for fear of disturbing the foundation of contract law.[54] In acknowledgment of this fear, Professor Farnsworth stated, "On the whole, judges have been cautious in applying the doctrine of unconscionabil-

42. *See id.* at 173-74. *But see* Prince, *supra* note 10, at 511-12. Prince argues that the court did not find sufficient unfairness and that this decision was the beginning of what he views as California's "problematic unconscionability decisions." *Id.* at 512.
43. O'DONNELL, *supra* note 9, at 391.
44. *See id.*
45. 712 P.2d 379 (Alaska 1986).
46. *See id.* at 381-82.
47. *See id.*
48. *See id.*
49. *See id.* at 382 n.3 (applying RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981)).
50. *See id.* at 383 n.8.
51. *See id.*
52. *See id.* Specifically, the court stated in dicta that "there have been exceptional cases where a provision of the contract is so outrageous as to warrant holding it unenforceable on the ground of substantive unconscionability alone." Gillman v. Chase Manhattan Bank, 534 N.E.2d 824, 829 (N.Y. 1988) (citations omitted).
53. *See* Eisenberg, *supra* note 12, at 752-53.
54. *See* FARNSWORTH, *supra* note 12, § 4.28.

ity, recognizing that the parties often must make their contract quickly, that their bargaining power will rarely be equal, and that courts are ill-equipped to deal with problems of unequal distribution of wealth in society."[55]

The doctrine of adhesion is often discussed side-by-side with the doctrine of unconscionability. An adhesive contract is usually a standardized contract in which the weaker party has two options—take it or leave it.[56] A finding of adhesion is only "the beginning and not the end of the analysis insofar as enforceability of [the contract's] terms is concerned."[57] Unconscionability must be found in addition to the contract's adhesive nature.[58]

B. *What Are Exclusive Songwriter Agreements?*

The crux of an exclusive songwriter agreement[59] ("ESA") is the assignment by the songwriter of all of his interest in the copyright for songs that he will write during the term of the agreement.[60] The term usually consists of an initial one-year period followed by several one-year renewal options.[61] Although the copyright is transferred to the publisher, the writer retains fifty percent of the income—"the writer's share"[62]—generated from performance, mechanical and other royalty sources.[63]

In the "English Music Trilogy" cases, the terms of the agreements were for five years with a renewal option available to the publisher/manager for an additional five years.[64] This extended term, combined

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55. *Id.*

56. *See* Graham v. Scissor-Tail, Inc., 623 P.2d 165, 171 (Cal. 1981); FARNSWORTH, *supra* note 12, § 4.28.

57. *Graham*, 623 P.2d at 172 (citation omitted).

58. *See id.* at 172-73.

59. In addition to exclusive songwriter agreements, single song agreements are prevalent in the music publishing industry. *See generally* 2 ALEXANDER LINDEY ET AL., LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 7.01[1][b] (2d ed. 1996). This Comment will not focus on the use of single song agreements. Single song agreements are signed between a songwriter and publisher for individual songs rather than for songs written during a set period of time. *See id.* When an ESA is not involved, there is no requirement of exclusivity on the part of the songwriter, nor is there a term of years. *See* AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 104 (2d ed. 1996). A songwriter may sign single song agreements when under an ESA for record keeping purposes, or a songwriter without an exclusive agreement can use the single song agreement to get a foot in the door with several different publishing companies. *See id.*

60. *See* 2 LINDEY ET AL., *supra* note 59, § 7.01[1][b].

61. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 24.02[A] (1995) [hereinafter NIMMER ON COPYRIGHT].

62. *Id.* at § 24.02[D].

63. *See id.*; 2 LINDEY ET AL., *supra* note 59, § 7.01[1][b].

64. *See* O'Sullivan v. Management Agency & Music Ltd., 3 All E.R. 351 (C.A. 1985); Clifford Davis Management Ltd. v. WEA Records Ltd., 1 All E.R. 237 (C.A. 1975); A Schroeder Music Publ'g Co. v. Macaulay, 3 All E.R. 616 (H.L. 1974). *See also* discussion *infra* Part II.A.

with the one-sidedness of the agreements in favor of the publisher and the fact that the music publisher had no duty to use his best efforts to exploit the songs, led each court to hold the agreements void as restraints on trade.[65] An extended term is not as prevalent today in United States agreements. Also, in California there is a seven-year limit on personal service contracts of employees.[66]

The term of the ESA ties the writer to the publisher for a set period. Reversion of rights, or lack thereof, ties the song to the publisher. Two types of reversions are normally considered. First, there may be certain conditions[67] that the publisher must fulfill in the ESA or the copyright reverts, or, in more appropriate language, is reassigned to the writer from the publisher.

The second manner in which a reversion occurs is not found in the ESA but in The Copyright Act of 1976 ("The Act").[68] The Act sets forth a manner in which the publisher's rights are terminated and the copyright reverts to the writer or other persons owning the termination interests.[69] This termination occurs "thirty-five years from the date of publication of the work under the grant or at the end of forty

65. *See generally O'Sullivan*, 3 All E.R. at 351 (stating that the agreements were void because there had been undue influence and unreasonable restraint of trade); *Davis*, 1 All E.R. at 237 (holding that the agreements made between the plaintiff and defendant were unenforceable as a result of inequality in bargaining power); *Macaulay*, 3 All E.R. at 616 (stating that a lack of obligation on the part of a defendant and a total commitment from a plaintiff to his detriment will lead a contract to be void as an unreasonable restraint of trade).

66. *See* CAL. LAB. CODE § 2855 (1989). "A contract to render personal service . . . may not be enforced against the employee beyond seven years . . . ." *Id.* The key word in the statute is *employee*. Independent contractors are not protected by section 2855. *See* Ketcham v. Hall Syndicate, Inc., 236 N.Y.S.2d 206 (N.Y. Sup. Ct. 1962), *aff'd*, 242 N.Y.S.2d 182 (1963). The plaintiff was the creator of the "Dennis The Menace" cartoon character and strip. *See id.* at 207. Because the defendant did not control the creativity of the artist or withhold income taxes or social security, the court found that section 2855 was inapplicable. *See id.* at 212. *See also* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740-41 (1989) (analyzing the general common law of agency in determining whether an employment relationship existed for copyright purposes); Don E. Tomlinson, *Everything that Glitters is not Gold: Songwriter-Music Publisher Agreements and Disagreements*, 18 HASTINGS COMM. & ENT. L.J. 85, 102-03 (distinguishing the term employee from independent contractor in exclusive songwriter agreements). Many songwriters do not fall into the category of employees but rather have the status of independent contractors. *See id.*

67. This type of clause in an ESA is generally found in agreements in which the writer has substantial bargaining power, i.e., probably not what would be termed an unconscionable agreement. Normally these clauses require the publisher to secure a recording or at least a hold on a song by a major recording artist within six months to one year of creation of the work or the copyright in the work is reassigned to the songwriter. *See* KOHN, *supra* note 59, at 108-09; Tomlinson, *supra* note 66, at 139-41. *See also Macaulay*, 3 All E.R. at 616. Subsequent to *Macaulay*, many English publishers have added a reversion clause to take effect two years after the end of the ESA term if the song has not been exploited. *See* BIEDERMAN ET AL., *supra* note 5, at 547.

68. *See* 17 U.S.C. § 203 (1988 & Supp. V 1993).

69. *See id.* This section does not apply to "works made for hire." Works for hire are defined in 17 U.S.C. § 101. *See also* Tomlinson, *supra* note 66, at 94.

years from the date of execution of the grant, whichever term ends earlier."[70] Although this section of The Act allows the writer, his heirs, or assigns to *re-capture* the copyright, in effect this creates a long-term agreement between the writer and publisher that extends past the actual term of the ESA. The writer will continue to look to this publisher for exploitation of the work and any royalties earned and payable after the ESA term has expired. Most writers overlook the totality and duration of the copyright conveyance. Once a standard ESA is signed, the writer has little or no input as to who records his songs or how his songs are exploited.[71]

In addition to language regarding the term of the agreement and reversion of rights, most ESAs also include a clause in which the writer has a minimum commitment of songs that must be submitted and approved by the publisher each year.[72] In some agreements, if the minimum commitment is not met, the term will continue until the requisite number of songs have been completed and accepted.

In sum, the songwriter agrees to write songs exclusively for the publisher for an initial term that is normally followed by several one-year options. The initial step towards getting a song "cut" by an artist is having a quality demonstration recording ("demo").[73] It is important to a songwriter that there is a clause in the agreement that the publisher agrees to "quality productions" of the song. The demo clause may or may not require the songwriter to pay his pro-rata share of the cost as a recoupment from royalties earned.[74] In return, what is the publisher's commitment to the writer? The goal of the publisher and songwriter is to make money. In order to do this, the songs must be recorded, released, and earn royalties. The publisher must work on a creative level with the writer in addition to promoting and protecting the copyrights.[75]

In addition to demos, the publisher should be obligated to exploit the songs.[76] Exploitation is an ethereal description. The obligation in these and other personal service contracts is one of best efforts.[77]

70. 17 U.S.C. § 203(3).

71. *See* KOHN, *supra* note 59, at 130-32 (listing provisions a songwriter should try to include in an ESA). *See also* NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, THE ESSENTIAL SONGWRITER'S CONTRACT HANDBOOK 78-80 (1994) [hereinafter NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL].

72. *See* Tomlinson, *supra* note 66, at 118.

73. *See* SIDNEY SHEMEL & M. WILLIAM KRASILOVSKY, THIS BUSINESS OF MUSIC 262-64 (5th ed. 1985).

74. *See id.* at 263-64.

75. *See* BIEDERMAN ET AL., *supra* note 5, at 535.

76. *See* 2 LINDEY ET AL., *supra* note 59, § 7.01[a].

77. *See* Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214 (N.Y. 1917) (holding that reasonable efforts were implied from the language and nature of the contract). *See also* Tomlinson, *supra* note 66, at 161-62 (stating that the publisher is obliged to use its reasonable best efforts).

Within the section pertaining to exploitation the writer should request a "key-man"[78] clause.

Following the duty of exploitation is the duty to account and pay royalties to the songwriter.[79] If the writer wrote 100% of the composition, he is typically entitled to fifty percent of the earnings from performance, mechanical and synchronization royalties and, normally, a set royalty on sheet music sales.[80] A future technology clause should be included that allows the writer to share in fifty percent of income from those sources.[81] Writers normally collect a weekly draw from their publisher. This is an advance against future earnings that is recoupable from royalties earned.[82] An audit clause is often found which allows the songwriter, within a set number of years or accounting periods, to audit the records of the publishing company.[83]

Unconscionability in contacts arises from both the lack of a duty of exploitation by the publisher and the accounting provisions within the contract. It is important that the songwriter push the publisher to provide a clear and concise accounting statement. The writer needs to understand the full implication of what is being charged against his royalties as advances.

78. SHEMEL, *supra* note 73, at 93. A key-man or person is normally the song "plugger" who is employed by the publisher to pitch the songs to the recording artists, producers and record labels. *See* BIEDERMAN ET AL., *supra* note 5, at 536. A close relationship is usually developed between the song "plugger" and writer. Writers with bargaining power are able to tie the life of their ESA to the employment of one person at the publishing company. *See* NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, *supra* note 71, at 82-84.

79. *See* BIEDERMAN ET AL., *supra* note 5, at 548.

80. *See generally* 4 NIMMER ON COPYRIGHT, *supra* note 61, § 24.02[D]. For example, in a typical situation, the writer's share is equal to that of the publisher. If there is only one publisher, but more than one songwriter, the songwriters will divide the writer's share.

81. In 1992 Congress passed the Audio Home Recording Act, now known as the Digital Audio Recording Technology Act. *See* 17 U.S.C.A § 1001 (West 1996). This legislation allows songwriters and music publishers to collect a royalty from the sale of all digital software and hardware. *See* NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, *supra* note 71, at 42-46. Digital technology is relatively new. For example, a songwriter who signed an ESA ten years ago that did not include a future technology clause, may be unable to collect the royalties earned by his publisher from the Audio Home Recording Act.

82. *See* KOHN, *supra* note 59, at 109, 143-44; NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, *supra* note 71, at 33-35; SHEMEL, *supra* note 74, at 175-76. Publishers normally account and pay their songwriters semi-annually. Statements and checks are issued in February for the period ending in December of the preceding year and in August for the period ending June of that year. *See id.* If a songwriter was advanced $100.00 per week, in one year his recoupable balance would be $5,200.00. Assuming the songwriter's account was credited $5,000.00 by December 31 of his first year, he would still have a recoupable balance of $200.00. *See id.* The songwriter would receive a credit but no actual payments until the royalties exceed the advance balance. *See id.*

83. *See* SHEMEL, *supra* note 73, at 175-76.

Other general terms in the ESA include representation and warranty clauses, indemnification and forum clauses, and language regarding waiver and modification of the agreement.[84]

C. *Unconscionability and the Exclusive Songwriter Agreement*

The courts have viewed ESAs as hard bargains that may be entered into by a party that has no bargaining power, but adherence to industry norms removes the contract from the realm of unconscionability.[85] The standardized agreements may be, in effect, viewed as adhesive, but United States courts have not taken steps beyond this initial inquiry to find unconscionability. Courts, in reviewing these agreements, should reject the current industry standard that allows the enforcement of unconscionable contractual terms in music industry contracts.

Courts have always based their examination of unconscionability against the background of the contract's setting.[86] Thus, terms standing on their own in one industry may be unconscionable, but when introduced in a contract in another industry, the court will uphold these seemingly unconscionable clauses.

The standard terms of an ESA and their application seem relatively fair and impartial.[87] It is the variation on those terms that has become the standard industry practice that creates the unconscionable nature of an ESA. Procedural unconscionability and substantive unconscionability are present in what has become the standardized agreement that is followed by most publishers when dealing with unestablished songwriters. The lack of bargaining power that most songwriters face qualifies for the procedural unconscionability aspect,[88] whereas substantive unconscionability stems from the lopsided terms found in the agreement that are unreasonably favorable to one party—normally the party drafting the contract.[89] The specific portions of the ESA that lend itself to unconscionability can be found when there is no requirement that the publisher exploit the songs and in the accounting and administration procedures followed by music publishers.[90]

Why, when it seems so obvious that ESAs tend to include unconscionable terms, are there not more lawsuits filed in the United States challenging these agreements? The answer is simple: money.[91] The

84. *See* 4 NIMMER ON COPYRIGHT, *supra* note 61, § 24.02[D]. For an example of an ESA, see form 24-4, discussing various terms included within such an agreement. *See id.*

85. *See* Croce v. Kurnit, 565 F. Supp. 884, 893 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).

86. *See id.*

87. *See supra* Part I.B.

88. *See* Tomlinson, *supra* note 66, at 176.

89. *See* Leff, *supra* note 12, at 512-15.

90. *See infra* Part II.

91. *See* Tomlinson, *supra* note 66, at 178.

unestablished songwriter needs an exclusive writing agreement to make ends meet. Thus, without that agreement, there is no money flowing in that can be used to finance a lawsuit. Further, songwriters fear alienation from the songwriting community.[92] An unestablished songwriter may risk his whole career if he brings suit against a publisher.[93] The songwriter and/or recording artist that has reached some level of success is more prone to file suit against the publisher or record label and actually have a fair chance of reaching trial. Unfortunately, courts avoid finding unconscionability in a contract when a party has benefited from an agreement,[94] even though the benefits are not what they could have been had portions of the agreement not been unconscionable.

Songwriters sign these agreements because they have a creative product that requires the money and marketing ability of a music publisher.[95] The music publishing marketplace is one in which most publishers present the same agreement to new writers, and the supply of songwriters is always greater than the demand.[96]

The flip-side of the songwriter's argument is the assertion by the publisher that she is bearing all the risk by signing the unknown songwriter.[97] By itself, the lack of a promotional guarantee clause in the contract will normally not suffice to declare the contracts illusory.[98] Any advances paid normally constitute adequate consideration.[99] The publisher will probably pay an advance against royalties and the initial payment of demo costs. These expenses are recoupable from the songwriter's royalties and are not refundable from the songwriter personally.[100] If songs written while under the ESA never generate royalties, the publisher has lost her front money.

Even with an agreement that extends to three years, it is very unlikely that the first taste of success will appear in a monetary fashion

92. *See* SHEMEL, *supra* note 73, at 168.

93. *See* Jack Mathews, *Who Laughs Last? After the Buchwald vs. Paramount Rulings, All Parties Put on their Best Faces, but the Winner was the Status Quo*, L.A. TIMES, Mar. 22, 1992, at 6. "[W]ho's going to risk whatever future they might have in a tight-knit company town on the chance that they might win enough to buy a new word processor?" *Id.* The comments made by the article are applicable to the music industry as well as the film industry.

94. *See* Croce v. Kurnit, 565 F. Supp. 884, 893 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984). The court found the actions of Jim Croce's manager/publisher did not rise to the level of unconscionability when Croce made millions under the contract. *See id.*

95. *See* Tomlinson, *supra* note 66, at 91.

96. *See id.* at 176-77.

97. *See Croce*, 565 F. Supp. at 893; O'DONNELL, *supra* note 9, at 381-82, 400-01.

98. *See* Bonner v. Westbound Records, Inc., 394 N.E.2d 1303, 1308-09 (Ill. App. Ct. 1979).

99. *See id.*; KOHN, *supra* note 59, at 137.

100. *See* Tomlinson, *supra* note 66, at 120-21.

until years later.[101] Loss of money can also be accounted for in loss of time and energy spent by the song "plugger" and the administrative staff on songs that are not successful. The time, energy, and money could have been spent more effectively on other songs and songwriters.[102] How successful a songwriter or publisher will become cannot be measured from the outset. "Judgment, taste, skill[,] and luck far outweigh the time spent or the capital expended on any particular recording [or song]."[103] Success of an artist or songwriter is normally viewed from the end result, whereas unconscionability of a contract should be analyzed at the time the contract was made.[104]

II. Analysis

Although in many instances, reviewing contracts based on the setting in which they were made is beneficial, this method of analysis should not be used to allow the court to continue to adhere to unconscionable industry standards. A court's persistent reliance upon unconscionable industry standards allows a vicious cycle of oppression to be maintained against inexperienced and unestablished songwriters. The unconscionable clauses are found within the duty, or lack thereof, of a publisher to exploit the writer's songs and within the accounting and administration procedures. Each of the cases in the analysis section focus on one or more of these elements and addresses why these terms are unconscionable. While both American and English courts have dealt with songwriter suits against publishers, looking specifically at the contract, each court has focused on different arguments. Yet, in each case, the fact patterns are similar. In American courts, plaintiffs have used the theory of unconscionability, focusing on the terms in the contract. English courts, on the other hand, have seen restraint of trade arguments made by songwriters against publishers.

Part A of the analysis section will briefly focus on cases that have become known as the "English Music Trilogy,"[105] while Part B will address the error in the holding of *Croce v. Kurnit*.[106] The decision in *Buchwald II*[107] will be analogized and applied in Part C to offer courts

101. *See* O'Donnell, *supra* note 9, at 408. Paramount Pictures paid $1 million for the film rights to the stage production of *Evita* in 1982. *See* Joe Morgenstern, *Film: New Takes on 'Evita,' a Great Dane and Others*, Wall St. J., Dec. 26, 1996, at 4. The motion picture was not released until December 1996. *See id.*

102. *See* Tomlinson, *supra* note 66, at 90-91.

103. Croce v. Kurnit, 565 F. Supp. 884, 889 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).

104. *See* U.C.C. § 2-302(1) (1990).

105. *See* O'Sullivan v. Management Agency & Music Ltd., 3 All E.R. 351 (C.A. 1985); Clifford Davis Management Ltd. v. WEA Records Ltd., 1 All E.R. 237 (C.A. 1975); A Schroeder Music Publ'g Co. v. Macaulay, 3 All E.R. 616 (H.L. 1974).

106. 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).

107. 90 Daily Journal D.A.R. 14482 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal).

guidance on how to address the current unconscionable industry standards in music industry agreements.

A. *The "English Music Trilogy"*

The three cases in England relating to music publishing and artist management agreements that struck down what would be considered *unconscionable* terms in the United States are often referred to as the "English Music Trilogy."[108] The cases were not decided on the doctrine of unconscionability, but rather, the theory of unreasonable restraint of trade.[109] The court found the agreements in *A Schroeder Music Publishing Co. v. Macaulay*,[110] *Clifford Davis Management Ltd. v. WEA Records Ltd.*,[111] and *O'Sullivan v. Management Agency & Music Ltd.*,[112] void as against public policy.

In *Macaulay*, the songwriter agreed to a five year ESA.[113] The publisher presented the songwriter with a standard form agreement that did not require the publisher to exploit the writer's songs in any manner.[114] The agreement further allowed the publisher to revoke the agreement at any time, while not providing the corresponding right to the writer.[115] The publisher could also invoke a five year renewal after the end of the initial term.[116] The court disagreed with the publisher's argument that the contract should be upheld because the "agreement is in standard form, that it has stood the test of time, and that there is no indication that it ever causes injustice."[117]

The facts of *Davis* are similar to those found in *Croce v. Kurnit*.[118] In *Croce*, the defendant also had the dual role of artist manager and music publisher.[119] The defendant in *Davis* was the manager of the recording group Fleetwood Mac and the publisher for Christine McVie and Robert Welch, two of the group's other members.[120] The English court rejected industry standards in *Davis*.[121] The court found that not only was the ten year term unreasonable, but that Davis had a

108. *See O'Sullivan*, 3 All E.R. at 351; *Davis*, 1 All E.R. at 237; *Macaulay*, 3 All E.R. at 616.
109. *See* Tomlinson, *supra* note 66, at 96.
110. 3 All E.R. 616 (H.L. 1974).
111. 1 All E.R. 237 (C.A. 1975).
112. 3 All E.R. 351 (C.A. 1985).
113. *See Macaulay*, 3 All E.R. at 616.
114. *See id.*
115. *See id.* at 617.
116. *See id.* at 620.
117. *Id.* at 622.
118. 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).
119. *See Croce*, 565 F. Supp. at 892.
120. *See* Clifford Davis Management, Ltd. v. WEA Records, Ltd., 1 All E.R. 237, 238 (C.A. 1975).
121. *See Davis*, 1 All E.R. at 237.

substantial conflict of interest in representing the group and its individual members in more than one capacity.[122]

Multiple hats were also worn by the defendant in *O'Sullivan*. Singer and songwriter Gilbert O'Sullivan successfully had the recording, publishing, and management contracts with the defendant declared void.[123]

However, the English court has been unwilling to utilize the restraint of trade theory to void a contract when an artist, at the time of making the contract, has a sufficiently established track record.[124] Pop superstar George Michael settled out of court after the English Limited High Court dismissed his claims against Sony Music Entertainment for unreasonable restraint of trade and unfair competition.[125] The court found that Michael was adequately represented and had the influence to negotiate his contract.[126]

Subsequent to these decisions, the English music industry revamped the term of personal services contracts and re-allocated the risk to both parties by requiring, at a minimum, that the publisher use her best efforts in promoting the songwriter's works.[127] The English courts were aware not only of the unequal bargaining power of the songwriters and artists, but also realized that rejection of industry standards would allow for new, more equal, standards to be implemented. United States courts have yet to implement the analysis of the "English Music Trilogy" decisions.

B. Croce v. Kurnit

Croce v. Kurnit[128] is one of the few United States cases to discuss what constitutes industry norms in the music publishing industry.[129] Jim Croce's widow, Ingrid, sued her late husband's personal manger and publisher for several causes of action including unconscionability in the management and publishing agreements.[130] Croce signed all

122. *See id.* at 237, 239 (stating that the ten year term "tied [Davis's] hand and feet to the publisher.").

123. *See* O'Sullivan v. Management Agency & Music, Ltd., 3 All E.R. 351, 354 (C.A. 1985).

124. *See* Panayiotou v. Sony Music Entertainment (UK) Ltd., 13 Tr. L. 532 (Ch. 1994).

125. *See id.*

126. *See id.*

127. *See* BIEDERMAN ET AL., *supra* note 5, at 547.

128. 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).

129. *See id.* at 893. Compare "The English Music Trilogy" cases discussing how the English courts have addressed industry norms in the publishing business by declining to uphold contracts as restraints on trade. *See* discussion *supra* Part II.A.; *infra* Part II.C.3.

130. *See Croce*, 565 F. Supp. at 885, 886. *Croce* is most often cited for its discussion regarding the fiduciary duty or lack thereof that a personal manager owes to a recording artist which he represents. *See, e.g.*, H.G. Heine v. Colton, Hartnick, Yamin & Sheresky, 786 F. Supp. 360 (S.D.N.Y. 1992) (holding that an attorney may owe a fiduciary duty to someone with whom there is no formal attorney-client relationship);

agreements that were the subject of the lawsuit without prior consultation with independent counsel.[131] In 1968, the time of the signing of these contracts, Croce had not known success as an artist or songwriter.[132] There were a few minor changes made to the contract, but there was no negotiation.[133]

The publishing contract granted all rights to the publishing company and could be extended through a seven-year period.[134] Only two duties were placed upon the publisher: (1) to pay each of the Croces $600.00 per year, and (2) to pay royalties if any records were sold.[135] Ingrid found unfavorable certain aspects of the contract, including the royalty provision, reversion of the copyrights, and the time for objecting to royalty accounting.[136] The court looked at these issues and found that the clauses were really no different from the standard forms published by entertainment industry organizations.[137]

The court in *Croce* divided its unconscionability discussion into substantive and procedural components. In its discussion of substantive unconscionability, the court conceded that "the contracts were hard bargains, signed by an artist without bargaining power, and favored the publishers."[138] The court continued its analysis by simply stating that the contracts did not "shock the conscience or differ[ ] so grossly from industry norms as to be unconscionable by their terms."[139] In finding the situation surrounding the signing of the contracts was not one of haste and high pressure, coupled with the fact that Jim Croce benefited from the contracts, the court held the contracts lacked procedural unconscionability.[140] The court's opinion does not discuss whether or not it analyzed each contract or specific contract terms individually. A more effective mode of interpretation would have consisted of separating each contract and looking at the individual terms.

In *Croce*, it was enough for the court that the contracts signed by Jim Croce were no different from the standardized agreements used throughout the industry to hold that there was no showing of unconscionability. Arguably, this decision would be, and should be, differ-

McLaughlin v. Biasucci, 688 F. Supp. 965 (S.D.N.Y. 1988) (holding that absent an express attorney-client relationship, a lawyer may owe a fiduciary duty to people they deal with).

131. *See id.* at 887.
132. *See id.*
133. *See id.*
134. *See id.*
135. *See id.*
136. *See id.* at 888.
137. *See id.* at 888, 893.
138. *Id.* at 893.
139. *Id.*
140. *See id.*

ent today if unconscionability were analyzed in the manner set forth in *Buchwald II*.[141]

C. Buchwald v. Paramount Pictures Corp.

1. Factual Background and Procedural History

Art Buchwald is one of America's best known humorists. He writes a syndicated column that is published in over 550 newspapers world wide and holds a Pulitzer Prize for commentary.[142] Buchwald tried his hand at a screen proposal based on a scene he personally witnessed when the Shah of Iran visited the White House to meet President Jimmy Carter.[143] Buchwald submitted his idea to long time friend Alain Bernheim. A two and one-half page screen treatment was submitted to Paramount entitled *It's a Crude, Crude World*[144] that was sold to Paramount Pictures in 1983 for their superstar Eddie Murphy and renamed *King for a Day*.[145] Paramount supposedly dropped the idea,[146] and Bernheim pitched the idea to Warner Bros. Studio who picked up Bernheim's option.[147] Warner Bros. decided not to produce the project when Paramount released a movie substantially similar to Bernheim's idea entitled *Coming to America*,[148] starring Eddie Murphy.[149] *Coming to America* grossed over $350 million.[150]

Buchwald and Bernheim sued Paramount Pictures Corp. not only for breach of contract for using their idea without paying, but also under the theory of unconscionability.[151] The court divided the *Buchwald* trial into three phases. In Phase One, the court found that Paramount's film *Coming to America* was based on the screen treatment

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141. 90 Daily Journal D.A.R. 14482 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal). Although the judgment in *Buchwald* has been set aside, the court's analysis on the issue of unconscionability serves as an excellent starting point for reviewing unconscionability in ESAs. *See supra* note 9. (explaining the *Buchwald* case history). *See also* Robert W. Welkos, *Buchwald, Paramount Settle Film Dispute*, L.A. TIMES, Sept. 13, 1995, at D. In settlement of the case, Buchwald and Bernheim received $825,000 and the judgment against Paramount was vacated. *See id.* It is estimated that over $12 million was spent by all parties on the lawsuit. *See id.*

142. *See* O'DONNELL, *supra* note 9, at xv, xxiii.

143. *See id.* at xv.

144. *See id.* at xxv.

145. *See id.* Based on the agreements signed with Paramount, Buchwald was to receive $65,000, 1.5% of the net profits, and a screen credit if Paramount made the film. *See id.* As the producer, Alain would receive $200,000 plus 40% of net profits, reducible to 17.5% under a studio formula if stars, directors and/or writers were cut in on the profit pie. *See id.*

146. *See* Buchwald v. Paramount Pictures Corp., No. C706083, 1990 WL 357611, at *5 (Cal. Super. Ct., L.A. County, Jan. 8, 1990) (Phase I) (vacated pursuant to settlement on appeal) (*Buchwald I*).

147. *See id.* at *6.

148. COMING TO AMERICA (Paramount 1983).

149. *See Buchwald I*, 1990 WL 357611, at *6.

150. *See* Larry Rohter, *Judge Rejects Paramount Request, but Buchwald Hasn't Won Yet*, N.Y. TIMES, Apr. 2, 1991, at C11.

151. *See* BIEDERMAN ET AL., *supra* note 5, at 450.

written by Buchwald and pitched by Bernheim.[152] After reaching the conclusion that Paramount had breached its contract with Buchwald and Bernheim,[153] Buchwald sought and effectively persuaded the court in Phase II (*Buchwald II*) of the trial that portions of the contract signed with Paramount were unconscionable.[154] In Phase Three of the trial, the court determined the damages based upon finding the net profits terms unconscionable.[155]

2. Net Profits Clause

In addition to receiving an up-front fee for the idea, Buchwald's contract with Paramount also included a 1.5% for payment of net profits.[156] Net profits are generally defined as "gross receipts reduced by distribution fees and expenses and the direct and indirect production costs"[157] of the film. "These offsets are substantial; thus, the 'net profits' figure is usually far smaller than the gross receipts figure."[158] Gross receipts encompass the total revenue a film receives.[159] Even though the movie grossed $350 million, Paramount's accountants claimed the movie actually had no net profits and lost $18 million based on the standardized net profits clause found in Buchwald's contract.[160] Buchwald's calculation of Paramount's net profit was $39,800.[161]

152. *See Buchwald I*, 1990 WL 357611, at *14.

153. *See id* at *15.

154. *See generally* Buchwald v. Paramount Pictures Corp., 90 Daily Journal D.A.R. 14482 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal). The net profit provisions named unconscionable included a (1) fifteen percent overhead on Eddie Murphy Productions Operation allowance, (2) ten percent advertising overhead not in proportion to actual costs, (3) fifteen percent overhead not in proportion to actual costs, (4) charging interest on negative cost balance without credit for distribution fees, (5) charging interest on overhead, (6) charging interest on profit participation payments, and (7) charging an interest rate not in proportion to the actual cost of funds. *See id.* at 14487.

155. *See* Buchwald v. Paramount Pictures Corp., No. C706083 (Cal. Super. Ct., L.A. County, Mar. 16, 1992) (Phase III) (vacated pursuant to settlement on appeal) (*Buchwald III*).

156. *See* O'DONNELL, *supra* note 9, at xxv.

157. Mary Lafrance, *Trouble in Transamerica: Deferred Compensation, Contingent Debt, and Overstated Basis*, 15 VA. TAX REV. 685, 737 n.17 (1996).

158. *Id.*

159. *See id.*

160. *See* O'DONNELL, *supra* note 9, at 392. *See also* ENTERTAINMENT INDUSTRY CONTRACTS, NEGOTIATING AND DRAFTING GUIDE, ch. 28 (Donald C. Farber ed. 1990) (giving examples of net profit definitions used by several major studios and a detailed analysis of those terms). Buchwald is not the first person to challenge the net profit's language. James Garner, the star of *The Rockford Files* made a $12 million settlement with Universal Studios; Jane Fonda received an undisclosed settlement from Universal for her role in *On Golden Pond*; and the stars of *Hart To Hart* settled for approximately $5 million from Columbia Pictures Industries. *See* Dana Wechsler, *Profits? What Profits (Hollywood's New Profit Contracts)*, FORBES, Feb. 19, 1990, at 38.

161. *See* O'DONNELL, *supra* note 9, at 392.

3. Procedural & Substantive Unconscionability

Thus, the court's analysis of unconscionability turns on how and why this net profits clause is included in Buchwald's and Bernheim's contract.[162] The court took the initial step in finding the net profits participation agreement an adhesion contract.[163] Even though both Bernheim and Buchwald were represented by highly regarded talent agents, and both men were well-versed in contractual relationships and well aware of their duty to uphold the agreements,[164] the net profits portion was non-negotiable with Paramount. The court found that only parties with *clout* could negotiate the net profits clause.[165] "Clout" was not defined by the court. From the tenor of the court's language, it can be inferred that "clout" means power or influence.[166] Without the required clout, the agreements were presented on a take it or leave it basis and this was the mode of operation throughout the film industry.[167] Buchwald did not have a meaningful choice at Paramount or any other studio that he might present with his idea.[168] Mass modifications of clauses in these types of agreements only occur when one studio revises a provision and the other studios then fall in line.[169] Finding that the contract was one of adhesion was only the first step. The court also found both procedural and substantive unconscionability.[170]

As in *Graham v. Scissor-Tail, Inc.*,[171] Buchwald could not claim unfair surprise because the net profits language was an industry norm.[172] Although unfair surprise is deemed unconscionable under the doctrine of unconscionability, oppression is also considered unconscionable under this doctrine.[173] The court found the non-negotiation, the

162. The opinion issued in Phase II speaks directly to Bernheim's agreement.

163. *See generally* Buchwald v. Paramount Pictures Corp., 90 Daily Journal D.A.R. 14482 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal). The court in Phase II directly addressed the Bernheim agreement. *See id.* at 14482-83. The two agreements, Buchwald's and Bernheim's, were tied together with Bernheim as the producer and Buchwald as the creator of the idea. *See id.*

164. *See* O'DONNELL, *supra* note 9, at 390-91. (comparing Graham v. Scissor Tail, Inc., 623 P.2d 165, 171 (Cal. 1981), with *Buchwald II* and finding the terms of the agreement unconscionable even though Graham had clout in the music industry along with the fact that Buchwald and Bernheim had only limited stature in the film industry).

165. *See Buchwald II*, 90 Daily Journal D.A.R. at 14483.

166. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 251 (9th ed. 1983).

167. *See Buchwald II*, 90 Daily Journal D.A.R. at 14482-83. The net profits agreements were so un-negotiable as to be pre-printed and bound in tablet form for ease of the studio in generating contracts. *See* O'DONNELL, *supra* note 9, at 407.

168. *See* O'DONNELL, *supra* note 9, at 386.

169. *See Buchwald II*, 90 Daily Journal D.A.R. at 14483.

170. *See id.* at 14484.

171. 623 P.2d 165 (Cal. 1981).

172. *See Buchwald II*, 90 Daily Journal D.A.R. at 14484.

173. *See* U.C.C. § 2-302 cmt. 1 (1990); Prince, *supra* note 10, at 473.

lack of choice and Buchwald's general inability to bargain, even with representation, rose to the level of procedural unconscionability.[174] The court recognized that contracts are a matter of risk allocation. Under a substantive unconscionability analysis, the court will look closely to find whether the terms are so disproportionate as to place the risk of the bargain to one party "in an objectively unreasonable or unexpected manner."[175] The court also found the greater the inability to bargain (procedural unconscionability), the less toleration it will have for lopsided terms.[176] In essence, the court applied a sliding-scale analysis where a greater showing of procedural unconscionability will compensate for a weaker finding of substantive unconscionability.[177]

4. Applying *Buchwald II* to the ESA

a. Croce v. Kurnit *Revisited*

The analysis used in *Buchwald* should be followed in future ESA cases litigating the issue of unconscionability. Although the facts in the *Buchwald* cases are somewhat distinguishable from *Croce*, the *Croce* court would have been well served if they had applied an analysis similar to that used later in *Buchwald II*.

The most impressive action taken by the court in *Buchwald II* was its rejection of industry norms when those standards of operation were unacceptable. The court moved past the element of surprise where arguably the court in *Croce* would not make further analysis after finding the contracts "were not formulated so as to obfuscate or confuse the terms."[178] The *Croce* court combined its substantive unconscionability analysis and procedural unconscionability analysis when addressing the standardized agreements and risk allocation between the parties. Thus, the *Croce* court found the risk allocation was greater on the defendant's side because there was no adequate way to determine who or what will become a success.[179] The court in *Croce* also focused on the facts that the contracts were not signed under pressure and that Jim Croce eventually made millions under the agreements.[180]

The *Croce* court did not review the contract for unconscionability from the time of the making of the contract or the bargaining process, but rather looked at the outcome in making its decision. In *Buchwald*

174. *See Buchwald II*, 90 Daily Journal D.A.R. at 14484-85.
175. *Id.* at 14484.
176. *See id.* at 14484-85.
177. *But see* Prince, *supra* note 10, at 526-31 (Prince believes that the court's decision was incorrect and that there was not a thorough analysis of both procedural and substantive unconscionability).
178. Croce v. Kurnit, 565 F. Supp. 884, 893 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).
179. *See id.*
180. *See id.* at 893-94.

II, the court did not look at the end result that *Coming to America* grossed more than $350 million. That option was removed and Paramount decided to drop its risk allocation defense when the court presented its own expert to review Paramount's records on profitability.[181] Paramount initially argued that, because the studio bore such expansive risk by purchasing the option, producing the film, and marketing the project, it should receive a greater portion of the profits to compensate for films that fail.[182] "The Court interpreted [that argument] to mean that Paramount was attempting to justify its net profit formula on the ground that this formula was necessary for [its and most all other studios] survival."[183]

Assuming that all parties to a contract used good faith and best efforts, and a song is written but never recorded by an artist, or a movie idea is optioned by a studio but never produced, under either *Croce* or *Buchwald II* a lawsuit would not be necessary because all parties would have performed under the contract. Thus, the court's review of the benefit that Croce received is misplaced. Whether or not a party to the contract makes some money or receives some benefit from the contract should have no bearing on how a court reviews the making of the contract.[184] The court in *Croce* attempted to justify its decision by stating that the contracts provided benefits to both parties.[185] The net profits agreement in *Buchwald II* also provided benefits to all parties, but the problem was that the actual application of the clause providing the benefits was unconscionable in and of itself. Some benefit to each party will not remove a contract from the realm of unconscionability[186] just as some ability to negotiate will not render a contract "unadhesive."

b. *Accounting & Administration Procedures*

Paramount attempted to persuade the court that providing "upfront" money to Buchwald for the idea and additional money if the movie was produced was sufficient compensation and all that really mattered to the plaintiffs.[187] With most creative people, getting the project off the ground and then receiving compensation for that suc-

181. *See Buchwald II*, 90 Daily Journal D.A.R. at 14485.

182. *See id.*

183. *Id.*

184. *See generally* A Schroeder Music Publ'g Co. v. Macaulay, 3 All E.R. 616 (H.L. 1974) (reviewing the contract from the time of making and striking down the songwriter agreement as a restraint on trade rather than under the doctrine of unconscionability).

185. *See Croce*, 565 F. Supp. at 893-94.

186. *See Buchwald II*, 90 Daily Journal D.A.R. at 14486. "[T]he doctrine of unconscionability would be rendered nugatory if a contracting party could escape its application by negotiating some monetary provisions, while at the same time imposing unjustifiably onerous provisions with respect to other contract provisions." *See id.*

187. *See id.*

cess is also of great importance.[188] The up-front money can be compared to advances that are received by songwriters. Advances are recoupable whereas up-front fees are not.[189] Yes, the advance is important for weekly living, but if a songwriter is successful, his weekly advance in most situations is not as lucrative as the royalties he will earn.[190] All of the various minutiae that stood in the way of Buchwald collecting his net profits often stand in the way of a songwriter collecting his royalties apart from performance income.[191]

To calculate the net profits amount, Paramount's contract charged various overhead costs and spending allowances against the gross earnings.[192] These types of expenses occur in the publishing industry as administration fees.[193] Administration is "the nuts and bolts of publishing."[194] The party holding this right can execute licenses and contracts and collect the royalties generated from those agreements.[195] Often, fifteen to twenty percent is deducted from the gross income received by the publisher before distribution of the songwriter's share.[196] The court in *Buchwald II* found that it was appropriate to account for overhead expenses, but a flat fee that in no way relates to actual costs may be unconscionable.[197] The issue from the perspective of the publisher is, by the time actual costs are determined, whether their effort will have exceeded the percentage withheld for administration.

The songwriter should also be aware of doubled administration fees. Today, most independent publishers[198] have co-publishing or ad-

188. *See id.*

189. *See* NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, *supra* note 71, at 30-35 (stating that songwriters receive recoupable but non-refundable advances against royalties). Bernheim received an up-front fee from Paramount for the idea that eventually became the film *Coming To America*. *See* O'DONNELL, *supra* note 9, at xxv.

190. *See* NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, *supra* note 71, at 33.

191. *See* 4 NIMMER ON COPYRIGHT, *supra* note 61, § 24.02[A]. Performance income is paid directly to the songwriter from his performance rights society. *See id.*

192. *See Buchwald II*, 90 Daily Journal D.A.R. at 14487.

193. *See* NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, *supra* note 71, at 23. Administration fees usually cover the time spent by the publisher in processing incoming royalty statements from record labels, postage fees and copyright registration fees. *See id.* at 46-49. Songwriters should be aware that publishers may often deduct demo costs and copyright fees from their royalties while also including these expenses under the percentage withheld for administration costs. *See id.*

194. *Id.* at 25.

195. *See id.*

196. *See* BIEDERMAN ET AL., *supra* note 5, at 530. Biederman presents the administration agreement as one where the songwriter is in effect his own publisher. *See id.* That scenario is found where the songwriter has no need for the creative services of a publisher. Often, publishers contract with other companies to provide the administration services while they provide the creative factor the songwriter desires. *See id.*

197. *See Buchwald II*, 90 Daily Journal D.A.R. at 14487.

198. *See generally* BEIDERMAN ET AL., *supra* note 5, at 527-28 (stating that independent publishers ("Indies") are not subsidiaries of major publishers). Indies may

ministration deals with larger or *major* publishers.[199] The major/administering publisher will usually charge a percentage fee. If both the publisher's and writer's shares are paid directly to the independent publisher, the independent publisher may also charge a fee for issuing the songwriter's check. When a copyright administration company is involved, most songwriters have no knowledge that an administration fee is deducted from their share of the earnings. The deduction often is not accounted for on the writer's statement nor is language regarding this deduction found in the songwriter's agreement with his publisher.[200]

Publishers often enter into agreements with foreign publishers to collect royalties in specific foreign territories.[201] This sub-publishing agreement allows the foreign publisher to retain up to twenty-five percent of the collection as payment for services.[202] It is standard industry practice for the United States publisher to divide only the remaining seventy-five percent with the songwriter.[203] These practices further reduce the songwriter's share of royalties.[204] Only an established songwriter with a great deal of bargaining power can negotiate his contract so that the division is based on the amount of royalties *earned* at the source.

The *Buchwald II* court found that, while Paramount calculated expenses on an accrual basis, income was calculated on a cash basis.[205] There was never a cutting off point for expenses that would allow an accounting to be made for a set period of time. Songwriters should also be aware of this method of accounting. Advances are normally issued weekly, whereas royalty accounting periods occur quarterly or semi-annually.[206] If the advance period and demonstration fees are not calculated simultaneously with the royalty earned period, it will be

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or may not be small companies based on the number of writers and the amount of income generated. *See id.* Major publishers include Warner/Chappell Music, EMI Music, MCA Music, Sony Music, BMG Music Publishing and PolyGram Music. *See id.*

199. *See id.*

200. *See* SHEMEL, *supra* note 73, at 171-72 (stating that songwriters should read and attempt to understand their royalty statements).

201. *See* NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, *supra* note 71, at 49-50. *See generally* KOHN, *supra* note 59, at 299-387 (devoting a complete chapter to the topic of sub-publishing).

202. *See generally* NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, *supra* note 71, at 49-50.

203. *See* KOHN, *supra* note 59, at 324-25; SHEMEL, *supra* note 74, at 230.

204. *See* BIEDERMAN ET AL., *supra* note 5, at 466. The court in *Macaulay* highlights the sections of Macaulay's publishing agreement allowing the publisher's subsidiaries to enter into various levels of sub-publishing agreements, thus continuing to reduce the portion that should be payable to the songwriter due to each sub-publishers' fee. *See* A Schroeder Music Publ'g Co. v. Macaulay, 3 All E.R. 616, 618-19 (H.L. 1974).

205. *See* Buchwald v. Paramount Pictures Corp., 90 Daily Journal D.A.R. 14482, 14487 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal).

206. *See* SHEMEL, *supra* note 73, at 175-76.

difficult for a struggling or moderately successful writer to ever move to the plus column.[207]

Writers should be aware of the effect of cross collaterallization.[208] This accounting practice is discussed in *Buchwald II* under the winners must pay for losers theory. Paramount asserted that the industry's survival was dependent on this method of accounting.[209] This can occur when a publisher recoups demo expenses from all royalties earned and not just the royalties relating to the specific song that was "demoed,"[210] or when the songwriter signs more than one type of agreement with the publisher. Very often, as was found in *Croce*,[211] the writer looks to one person as his publisher, manager, and producer.[212] It is in the publisher's best interest to integrate the contracts so that all earnings apply to the total outstanding advance.[213] Risk allocation is exercised when a publisher has several writers signed to ESAs. Even though the publisher does not charge one writer for the expenses of another, the publisher utilizes the risk allocation doctrine by applying the winners versus losers analysis to all income received. Thus, by cross collateralizing the various agreements of writer *X*, the publisher is retaining more income. This in turn allows the publisher to reduce her risk against the possibility that writer *Z* will never generate any income for the publishing company.[214]

c. *Procedural & Substantive Unconscionability*

Even when several terms within a contract are deemed unconscionable, the court is not required to strike the whole agreement, but may remove only portions of the contract.[215] Clauses standing on their own may be unconscionable, but not render an entire contract unconscionable. Thus, the court in *Croce* should have analyzed the provisions individually as opposed to simply reviewing the contract as a whole. In *Buchwald II*, Paramount argued that only clauses that are divisible can be struck and that Buchwald was attacking intertwined financial clauses.[216] Obviously, a publisher would present this argu-

207. *See Buchwald II*, 90 Daily Journal D.A.R. at 14487.
208. *See* KOHN, *supra* note 59, at 110; NASHVILLE SONGWRITERS ASSOCIATION INTERNATIONAL, *supra* note 71, at 89-92.
209. *See Buchwald II*, 90 Daily Journal D.A.R. at 14485.
210. *See* SHEMEL, *supra* note 73, at 263-64.
211. 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).
212. *See id.* at 893.
213. *See generally* Tomlinson, *supra* note 66, at 165 (exemplifying a cross-collateralized agreement). *See also* KOHN, *supra* note 59, at 144-45.
214. *See* O'DONNELL, *supra* note 9, at 429, 432.
215. *See* U.C.C. § 2-302 (1990). *But see* A Schroeder Music Publ'g Co. v. Macaulay, 3 All E.R. 616 (H.L. 1974) (holding that a contract is to be reviewed as a whole as opposed to reviewing individual terms).
216. *See* Buchwald v. Paramount Pictures Corp., 90 Daily Journal D.A.R. 14482, 14487 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal).

ment while defending an ESA. Most questionable provisions concern when and how money will be disbursed to the songwriter. Again, this argument returns to risk allocation and the fact that publishers would have paid less in advances if they had realized that their accounting practices were going to be rejected by the court.[217]

A songwriter would probably never succeed on a claim for procedural unconscionability based on unfair surprise. These contracts are prevalent and standardized across the music industry. However, procedural unconscionability may be met via a finding of oppression—when the songwriter is unable to negotiate a contract that is a meeting of the minds. The one-sided terms that favor the publisher, balancing his losses against his gains at the writer's expense, reach the level of substantive unconscionability. If the courts continue to review substantive unconscionability based on the outcome of the contract, songwriters such as Jim Croce who receive a benefit from their contract will not be able to succeed. Courts and the music industry as a whole need to reject current industry standards that place songwriters in a "take it or leave it" situation.

5. What to Expect After the *Buchwald* Cases

What effect did the decision in *Buchwald II* really have on the movie industry and is it a harbinger of change in the music publishing business? Paramount and other studios feared that, once the net profits clause was struck down as unconscionable, the movie industry as they knew it would no longer survive.[218] However, the net profits language is still present in contracts and continues to be litigated.[219] Following on the tail of *Buchwald II* was *Batfilm Productions, Inc. v. Warner Bros. Inc.*[220] The court reached an opposite finding from that in *Buchwald II*, but *Batfilm Productions'* facts are distinguishable. Plaintiffs Melniker and Uslan obtained the motion picture rights to the *Batman* comic book and made a deal with Warner Bros. that was similar to Buchwald's deal with Paramount.[221] The distinction is not within the contracts, but in the power and affluence of the parties.

217. *See id.* at 14485.

218. *See* O'DONNELL, *supra* note 9, at 431.

219. *See generally* Tim Conners, Note, *Beleaguered Accounting: Should the Film Industry Abandon its Net Profits Formula?*, 70 CAL. L. REV. 841 (1997) (analyzing the current net profits formula that is still in use by most major film studios, and stating that this formula has been the cause of extensive litigation).

220. BIEDERMAN ET AL., *supra* note 5, at 462 (citing Batfilm Prods., Inc. v. Warner Bros., Inc., Nos. BC051653 & BC051654 (Cal. Super. Ct., L.A. County, Mar. 14, 1994) (unpublished decision)).

221. *See* BIEDERMAN ET AL., *supra* note 5, at 462-63; *Buchwald II*, 90 Daily Journal D.A.R. at 14487.

Melniker was the former general counsel of Metro Goldwyn-Mayer movie studio.[222] In the court's opinion he "knew all the tricks of the trade [and the] inside and out [of] how these contracts work, what they mean, and how they are negotiated."[223] The court focused its analysis on the bargain principle and the idea that a fairness factor alone will not determine whether a contract is unconscionable.[224] In removing the idea of fairness, the court, in essence, found that if the terms were lopsided they were still enforceable under the benefit of the bargain.

Because of Melnicker's knowledge of the various agreements and how the industry functioned, the court found the contract met the parties' reasonable expectations.[225] The procedural unconscionability analysis used by the court looked at the absence of unfair surprise and insinuated that the plaintiffs did not suffer from oppressive terms as a result of Melniker's stature in the film community.[226] The *Buchwald II* court stressed that the net profits terms were only negotiable for those parties with clout.[227] The *Batfilm Productions* court is perhaps implying that Melniker had the clout but chose not to use it in his negotiations. Further, the plaintiffs did not meet their burden of production regarding allegations of various unconscionable terms.[228]

Melniker is comparable to the plaintiff in *Graham v. Scissor-Tail Inc.*[229] to the extent of his knowledge of the industry and implications of contract terms. The court in *Batfilm Productions* would not look past the absence of unfair surprise and review the contract as the court did in *Graham*. It is as if Melniker were the wrong plaintiff to win a net profits case. Subsequent cases challenging the net profits language have been settled out of court[230] or are currently pending.[231]

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222. *See* BIEDERMAN ET AL., *supra* note 5, at 463 (citing Batfilm Prods., Inc. v. Warner Bros., Inc., Nos. BC051653 & BC051654 (Cal. Super. Ct., L.A. County, Mar. 14, 1994) (unpublished decision)).

223. *Id.*

224. *See id.*

225. *See id.* at 465.

226. *See id.* at 463-65.

227. *See* Buchwald v. Paramount Pictures Corp., 90 Daily Journal D.A.R. 14482, 14483 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal).

228. *See* BIEDERMAN ET AL., *supra* note 5, at 463 (citing Batfilm Prods., Inc. v. Warner Bros., Inc. (Cal. Super. Ct., L.A. County, Mar. 14, 1994) (unpublished decision)).

229. 623 P.2d 165 (Cal. 1981).

230. *See supra* notes 156-177 and accompanying text (referring to *Buchwald II*, which was settled out of court).

231. *See, e.g.*, Brian Willen, *Estate of Jim Garrison v. Warner Bros.*, THE AMERICAN LAWYER, Sept. 1996, at 106. The estate of the former New Orleans district attorney who wrote the book that eventually became the movie JFK, sued Warner Bros. under a theory of conspiracy to fix the terms of the net profit clauses. *See id.* The plaintiffs, who include thousands of actors, directors, producers, and writers that have signed these agreements in the past, were denied certification as a class for the contract claims. *See id.*

Thus, the decision in *Buchwald II* did not put the industry out of business as was predicted by Paramount.[232]

CONCLUSION

By changing industry standards so that unconscionable contractual terms are no longer accepted, there are really no losers but only winners, whether in the movie industry or the music publishing industry. The initial benefit to the songwriter will be an increase in payment of actual royalties due and more clearly defined accounting statements. The songwriter, even one who is unestablished, will be placed on a more equal footing with the publisher; in turn, this will further the bargaining principle. The parties will have actually bargained and the terms will be reached not solely upon industry norms but by what will benefit each party. New industry norms allowing for negotiations and a meeting of the minds will remove the oppressive nature from ESAs. If these changes are made, the court will not have to be concerned with uprooting the risk allocation between the parties because it should be more evenly distributed.

Arguably, publishers, especially small independent publishers, are always concerned that they will be put out of business if contracts are not upheld as written. The winners-pay-for-losers argument is probably more convincing for the small publisher, for example, the small independent movie producer, because independent companies normally survive on shoestring budgets.[233] It would be unfair to all participants in the music industry to conclude that the currently used standard ESA should continue to be enforced under industry norms simply because a relatively small number of persons will suffer by changes.

Although the decision in *Buchwald II* does not seem to have made a vast impact to date, based on changes in the English entertainment industry after the pronouncements in the "English Music Trilogy,"[234] it is evident that changes are on the way in the American music industry, even if slow in coming. It has been over twenty years since the

232. *See* Mathews, *supra* note 93, at 6.

233. An independent film company is one that is not affiliated with one of the major film companies such as Warner Bros., Paramount, or Universal. *See* BIEDERMAN ET AL., *supra* note 5, at 466. Because independents work on a much smaller scale, their budgets are normally substantially smaller. *See id.*

234. *See* O'Sullivan v. Management Agency & Music Ltd., 3 All E.R. 351 (C.A. 1985); Clifford Davis Management Ltd. v. WEA Records Ltd., 1 All E.R. 237 (C.A. 1975); A Schroeder Music Publ'g Co. v. Macaulay, 3 All E.R. 616 (H.L. 1974). *See also* discussion, *supra* Part II.B.

English court handed down its decision in *Macaulay*[235] as compared to seven years since the ruling in *Buchwald II*.[236]

Courts are afraid to apply the unconscionability doctrine because they do not want to disturb the parties' allocation of risks. If the industry as a whole will restructure the agreements, courts should no longer have to use an unconscionability analysis on these types of agreements because the goals of this doctrine—alleviating unfairness of terms and overreaching of parties—will have already been met.

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235. *Macaulay*, 3 All E.R. at 616.

236. *See* Buchwald v. Paramount Pictures Corp., 90 Daily Journal D.A.R. 14482, 14487 (Cal. Super. Ct., L.A. County, Dec. 21, 1990) (Phase II) (vacated pursuant to settlement on appeal).