BADLANDS:* ARTIST-PERSONAL MANAGER CONFLICTS OF INTEREST IN THE MUSIC INDUSTRY

I. INTRODUCTION

The music recording industry is notorious for unethical and abusive business practices[1] which often result in the exploitation and depredation of recording and other musical artists.[2] The pervasive conflicts of interest inherent in the contractual relationships forming the basic structure of the music recording industry allow for this exploitation.

The music industry revolves around four fundamental contractual relationships involving musical artists: artist-agent, artist-personal manager, artist-record company, and songwriter-publisher.[3] The resulting "interlocking web of relationships inherent

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[1] *See generally* F. DANNEN, HIT MEN: POWER BROKERS AND FAST MONEY INSIDE THE MUSIC BUSINESS (1990) (discussing disreputable inner workings of the pop music industry, including payola scandals, alleged Mafia connections, the power of promoters, and personal and corporate rivalries and vendettas corrupting the industry).

[2] *See generally* M. ELIOT, ROCKONOMICS: THE MONEY BEHIND THE MUSIC (1989) [hereinafter ROCKONOMICS] (describing personal managers, record companies, and publishing companies using their influence and business skill to impose one-sided contracts on susceptible artists); *see also* S. GARFIELD, EXPENSIVE HABITS: THE DARK SIDE OF THE MUSIC INDUSTRY 23-95 (1986) [hereinafter EXPENSIVE HABITS] (the Beatles, the Who, the Kinks, Fleetwood Mac, Sting, and Elton John, in addition to other recording artists, all litigated contracts they considered inequitable).

Perhaps the greatest area of contention between recording artists and music companies involves the payment of royalties. Royalties are the means by which artists are compensated for their efforts. *See* S. SHEMEL & M. KRASILOVSKY, THIS BUSINESS OF MUSIC 3-7 (5th ed. 1985) [hereinafter THIS BUSINESS OF MUSIC]. The Beatles were involved in a decade-long lawsuit in which they claimed that their record label, Capitol Records, owed them over $100 million in royalties for the sale of certain records which Capitol claimed had been scrapped or donated to charity. *See* Soocher, *You Never Give Me My Money*, ROLLING STONE, Jan. 25, 1990, at 14, 14-15 [hereinafter Soocher]. The parties reached an out-of-court settlement requiring a cash payment to the Beatles of $80 million and an unusually high royalty rate on future record sales. *Id.*

The Four Seasons had several songs at the top of the music charts in the early 1960s, including *Sherry*, *Big Girls Don't Cry*, and *Walk Like A Man*. ROCKONOMICS, *supra*, at 124. Royalties on the songs would have meant a substantial sum of money for the group. However, the group's record label refused to pay the royalties. *Id.*

[3] *See generally* THIS BUSINESS OF MUSIC, *supra* note 2, at 3-369 (detailed discussion of various facets of the music industry). For a discussion of the artist-agent relationship, see *infra* notes 22-30 and accompanying text. For a discussion of the artist-personal manager relationship, see *infra* notes 31-43 and accompanying text.

Artist-recording company agreements were originally construed as creating employee-employer relationships. *See, e.g.*, Miller v. Columbia Records, 70 A.D.2d 517, 415 N.Y.S.2d 869 (1st Dep't 1979). However, a 1988 case involving members of the Beatles and their record label, Capitol Records, altered that construction. *See* Apple Records, Inc. v. Capitol Records, Inc., 137 A.D.2d 50, 529 N.Y.S.2d 279 (1st Dep't 1988). In *Apple Records*, the court found that a breach of fiduciary duty claim was properly alleged

in [music] contracts"[4] creates a fertile environment for conflicts of interest. The danger becomes particularly acute when a party dons "multiple hats,"[5] and secures from the artist the exclusive

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where Capitol Records, licensed to manufacture and distribute Beatles albums, secretly sold albums it claimed had been " 'scrapped', that is, destroyed as damaged or as not selling." *Id.* at 56, 529 N.Y.S.2d at 283. The Beatles began their dealings with Capitol in 1962 and continued to rely on its services after achieving their popularity and success. The court determined that such a long and enduring relationship bore a "special relationship of trust and confidence . . . which existed independent of the contractual duties." *Id.* at 57, 529 N.Y.S.2d at 283. The court found that fraudulent concealment and misrepresentation of the transactions through false statements and accountings were actionable as fraud, which was distinct from the cause of action for breach of contract. Synthesizing *Apple Records* and *Miller* demonstrates that "recording artists may successfully allege tort claims in conjunction with breach of contract claims where sufficient facts are alleged to demonstrate that the course of dealing involved extra-contractual duties on the part of the recording company." Marks, *Avoiding, Pursuing and Defending Litigation in the Music and Recording Industry*, in COUNSELING CLIENTS IN THE MUSIC AND RECORDING INDUSTRY 33, 41 (1989) [hereinafter *Avoiding, Pursuing and Defending Litigation*]. In *Apple Records*, the parties reached an out of court settlement on the Beatles' claim for the contested royalties. Soocher, *supra* note 2, at 14-15.

Songwriters have long claimed that their relationship with publishers is fiduciary in nature. Establishing a fiduciary relationship has important consequences because a breach by a fiduciary can result in punitive damages, rescission, and reversion of the copyrights to the artist. Marks & Stevens, *Publisher-Fiduciary Issue Gets an Airing*, ENT. LAW & FIN., Jan. 1989, at 1 [hereinafter *Publisher-Fiduciary Issue*].

The most recent case deciding whether the songwriter-publisher relationship is fiduciary in nature held that the relationship was based on contract principles and did not give rise to fiduciary obligations. Mellencamp v. Riva Music Ltd., 698 F. Supp. 1154 (S.D.N.Y. 1988). In *Mellencamp*, recording artist John Cougar Mellencamp alleged breach of fiduciary duty by his publishing company for failure to actively promote his music and to obtain all payments due him from third parties. *Id.* at 1156. Although earlier cases supported the view that an author-publisher contract created a "technical fiduciary relation," *id.* at 1157, the court determined that such contracts were founded on contract principles, not trust principles. *Id.* The court reasoned that New York law imposed "an implied covenant of good faith and fair dealing" on contracts. *Id.* The court stated that "[w]hen the essence of a contract is . . . the grant of an exclusive license in exchange for a share of the . . . profits in exploiting the license, . . . [there is] an obligation on the part of the assignee to make reasonable efforts to exploit the license." *Id.* The court concluded that "trust elements" in an author-publisher agreement were relevant only when the publisher allowed or participated in tortious conduct against the author. *Id.* at 1158. "Ordinarily, however, the express and implied obligations assumed by a publisher in an exclusive licensing contract are not, as a matter of law, fiduciary duties." *Id.* at 1159.

English courts, on the other hand, have determined that publishers are *per se* fiduciaries. *See* O'Sullivan v. Management Agency and Music Ltd., [1985] 3 All E.R. 351 (CA); John v. James, High Court of Justice, Chancery Division, 1982 J. No. 15026 (Nov. 29, 1985) *cited in* Yanover & Kotler, *Artist/Management Agreements and the English Music Trilogy: Another British Invasion?*, 9 LOY. L.A. ENT. L.J. 211, 225-26 (1989).

[4] Marks, *Ethical Aspects of Entertainment Law Practice*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 449, 451 (PLI 1989) [hereinafter *Ethical Aspects*] (the varied functions of entertainment attorneys are conducive to conflicts of interest). Similar language is used by Marks, together with Stevens in *Publisher-Fiduciary Issue*, *supra* note 3, at 5.

[5] The problem of "multiple hats" arises most frequently when a personal manager also serves as an artist's record producer and/or publisher. Lane, *Fees or Famine: Could California's Personal Managers Survive Regulation?*, 19 J. ARTS MGMT. & L. 5, 15 (Winter 1990) (formerly PERF. ARTS REV.) [hereinafter *Fees or Famine*] (recommending regulation of personal managers); *Publisher-Fiduciary Issue*, *supra* note 3, at 5; *Ethical Aspects*, *supra* note 4, at 451-52. Contracts through which the personal manager becomes the artist's

right to perform two or more of the above functions.[6] Such conflicts frequently arise when personal managers[7] have pecuniary interests in the recording or publishing company to which their artists are signed.[8] Although a "multiple hat" arrangement may benefit an artist who would be unable to obtain a recording or publishing deal if not for his personal manager's investment in the company, many unscrupulous personal managers promote their own interests ahead of their clients', making such arrangements detrimental to the artist.

The continued existence of conflicts of interest in the music industry, and their resulting negative effects, is largely attributable to two factors. First, no statutory, administrative, or licensing requirements clearly define the role of, or regulate, personal managers.[9] Consequently, personal managers are virtually free to dictate the contract terms when dealing with artists. Artists

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recording company or publisher are referred to as "across the board" contracts. Zimmerman, *Exclusivity of Personal Services: The Viability and Enforceability of Contractual Rights*, 16 J. ARTS MGMT. & L. 61, 81-82 (Fall 1986) (formerly PERF. ARTS REV.) [hereinafter *Exclusivity of Personal Services*] (superior bargaining power is used to obtain exclusive control over creative talent). Occasionally, artists will be required to enter "tie-in" contracts. *Fees or Famine*, *supra*, at 15; Schoenfeld, *Recording Artists and Exclusive Contracts*, 179 N.Y.L.J., June 21, 1978, at 1, col. 1, 3, col. 1 [hereinafter Schoenfeld]. Such contracts make a recording agreement dependent upon the artist agreeing to a publishing deal with the party controlling the recording contract. A "tie-in" contract was at issue in Frye v. Warner Bros. Music Co., 77 Civ. 1724 (C.D. Cal. memorandum opinion Aug. 16, 1977). In *Frye*, members of the popular rock music band the Eagles entered into exclusive songwriting and recording contracts with two companies owned in part by their personal manager. Schoenfeld, *supra*, at 3, col. 1. The songwriting agreement contained a clause stipulating that the contract was entered into in consideration for the execution of an exclusive recording contract. *Id.* The plaintiffs alleged that they would not have been offered the recording contract if they had not agreed to the publishing contract. *Id.* The plaintiffs claimed that such a "tie-in" contract violated the Sherman Act by limiting competition in the publishing industry. *Id.* Because the case was settled out-of-court, the validity of these "tie-in" contracts remains unresolved. *Id.*; *Fees or Famine*, *supra*, at 15.

6 *Publisher-Fiduciary Issue*, *supra* note 3, at 5.

7 For a discussion of the functions of personal managers, see *infra* notes 31-43 and accompanying text.

8 Among the most successful managers to gain from these ventures were Robert Stigwood (RSO label), Phil Walden (Capricorn Records), Chris Blackwell (Island Records), and David Geffen, a former booking agent at William Morris (Asylum Records). MARSH, BORN TO RUN - THE BRUCE SPRINGSTEEN STORY 78-79 (1981) [hereinafter MARSH]. Geffen, after selling Asylum to Warner Brothers in 1972, later formed Geffen Records. Dutka, *Little Shop of Winners*, TIME, Dec. 12, 1988, at 60. In 1990, Geffen Records, as part of an industry-wide consolidation in which many smaller, independent labels were acquired by large corporations, was purchased by MCA, Inc. for $550 million in MCA stock. *See* Stevenson, *Pop Impresario Strikes Gold in $550 Million Sale to MCA*, N.Y. Times, Mar. 15, 1990, at A1, col. 5, D7, col. 1. MCA, in turn, was sold to the Matsushita Electric Industrial Co., resulting in a payment to Geffen of nearly $700 million. *See*, Fabrikant, *The Record Man with Flawless Timing*, N.Y. Times, Dec. 9, 1990, § 3 (Business), at 4, col. 1.

9 *See* Siegel, *Personal Management*, in COUNSELING CLIENTS IN THE ENTERTAINMENT INDUSTRY 137, 141 (PLI 1989) [hereinafter *Personal Management*].

often agree to personal management contracts without first seeking advice or legal counsel, making them susceptible to the machinations of personal managers.[10] The lack of regulation becomes particularly troublesome as artists, eager for success and lacking business experience, place their trust in personal managers and ultimately enter into unfavorable contracts.[11]

The second reason for the continued existence of conflicts of interest in the music industry is the hesitancy of American courts to intervene. Although the industry is rife with conflicts of interest, this issue is seldom litigated.[12] When such cases do arise, American courts have routinely refrained from interfering with standard industry practices.[13] Although all contracts are typically reviewed with reference to their commercial setting and industry norms,[14] considering the historical exploitation and victimization of recording artists,[15] this general rule fails to adequately protect

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[10] Although a new entertainer does not have much bargaining power, he is not necessarily condemned to signing a bad contract. More resources are available to entertainers today than in the past. Entertainment law is a growing field, luring more attorneys into this area of practice. Also, attorneys concerned with the plight of artists have formed groups such as the Volunteer Lawyers for the Arts. Therefore, artists, even those in weak financial positions, have an opportunity to have their interests represented. Interview with Leonard M. Marks, Partner, Gold, Farrell & Marks, in New York City (Oct. 24, 1989) [hereinafter Interview with Marks] (Mr. Marks has been involved in litigation involving artists such as the Beatles, Jim Croce, Eddie Murphy, and Billy Joel, among others). Despite the availability of counsel, many artists go unrepresented and sign what the manager puts in front of them without negotiation. *Id.*

[11] *Exclusivity of Personal Services*, *supra* note 5, at 81-82.

[12] *See Ethical Aspects*, *supra* note 4, at 452; Yanover & Kotler, *Artist/Management Agreements and the English Music Trilogy: Another British Invasion?*, 9 LOY. L.A. ENT. L.J. 211, 213 (1989) [hereinafter *British Invasion*]. The high cost of litigation may serve as a deterrent to initiating lawsuits. Generally, only those artists who have achieved financial success can consider bringing suit. Artists who enter contracts primarily benefitting only the personal manager—artists with the greatest need for judicial remedy—probably will not be able to afford the cost of litigation.

[13] *See* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988 (2d Cir. 1983). Although holding that acquiring an interest in a lawsuit against a former client constituted a breach of fiduciary duty based on the novel and unique facts of the case, the *Harrisongs* court refused to apply a strict standard of scrutiny to the artist-personal manager relationship for fear that it would "not suit the realities of the business world." *Id.* at 995. *See also* Croce v. Kurnit, 565 F. Supp. 884, 893 (S.D.N.Y. 1982) (refusing to find breach of fiduciary duty because contracts, although greatly favoring personal managers, did not "differ[] so grossly from industry norms"); Laurel Canyon, Ltd. v. Springsteen, N.Y.L.J., Aug. 25, 1976, at 6, col. 1 (N.Y. Sup. Ct. Aug. 19, 1976) (in granting injunction to personal manager, court said that personal management, record production, and publishing contracts were not unconscionable). For a discussion of the *Springsteen* and *Croce* cases, see *infra* notes 131-72 and accompanying text.

The phrases "American courts" and "American cases" are used primarily as terms of convenience and to facilitate comparison with English cases. In fact, the primary American cases addressed in this Note were decided by courts in New York.

[14] *See infra* notes 78-83 and accompanying text.

[15] Rhythm and Blues stars from the 1950s are still fighting their record labels to recover unpaid royalties. The Rhythm & Blues Foundation was established as a means of pressuring the music industry to redress the inequities pervading the industry and to

vulnerable artists. By relying on customary practices, the courts countenance a vicious cycle of exploitation.

Croce v. Kurnit[16] is one of the few American cases confronting the problem of personal manager conflicts of interest in the music industry.[17] In *Croce*, the leading American case on the issue, the district court held that controlling both the artist's publishing and recording rights did not constitute a breach of the personal managers' fiduciary duties.[18] In reaching this decision, the court failed to adequately consider the great influence personal managers wield over their trusting clients and the heightened danger of abuse that arises in "multiple hat" transactions.

The *Croce* decision is inconsistent with American cases involving artists and personal managers in other entertainment industries and English cases involving the music industry. Recognizing the trust and reliance artists place in their personal managers, and ignoring industry norms, these courts have held that such conflicts of interest do in fact constitute a breach of fiduciary duty.[19] Conflicts of interest issues have been raised again in *Joel v. Weber*,[20] giving an American court the opportunity

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assist victimized artists. *See* Barol, *One for the Soul Survivors: Righting Old Wrongs in the Music Business*, NEWSWEEK, Nov. 7, 1988, at 123.

16 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984). For a discussion of *Croce*, see *infra* notes 149-72 and accompanying text.

17 The issue of conflicting interests between musicians and their personal managers was also raised in Laurel Canyon, Ltd. v. Springsteen, N.Y.L.J., Aug. 25, 1976, at 6, col. 1 (N.Y. Sup. Ct. Aug. 19, 1976) and ABKCO Music, Inc. v. Harrisongs Music, Ltd., 508 F. Supp. 798 (S.D.N.Y. 1981), *aff'd*, 722 F.2d 988 (2d Cir. 1983). For a discussion of *Springsteen*, see *infra* notes 131-48 and accompanying text. In contrast to *Croce* and *Springsteen*, the conflict in *Harrisongs* arose after the management relationship was terminated. Allen Klein, former personal manager of George Harrison, purchased the rights to a copyright infringement claim against Harrison. The court concluded that the artist-personal manager relationship was that of principal and agent, and therefore fiduciary in nature. The court held that Klein breached his fiduciary duty by using confidential information acquired during his employment for his own financial gain, and in competition with Harrison's interests. *Harrisongs*, 722 F.2d at 994-95.

18 Fiduciaries are held to a high standard of loyalty, good faith, and fairness. Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928). For a discussion of the principal-agent relationship, see *infra* notes 93-104 and accompanying text.

19 *See* Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542 (E.D. Mich. 1984), *modified*, 767 F.2d 919 (6th Cir. 1985) (for a discussion of *Detroit Lions*, see *infra* notes 105-23 and accompanying text); Gershunoff v. Panoff, 77 A.D.2d 511, 430 N.Y.S.2d 299 (1st Dep't 1980) (for a discussion of *Gershunoff*, see *infra* notes 178-85 and accompanying text); Pryor v. Franklin, No. TAC17 MP1114 (Cal. Lab. Comm'r Aug. 18, 1982), *cited in Fees or Famine*, *supra* note 5, at 19; A. Schroeder Music Publishing Co. v. Macaulay, [1974] 3 All E.R. 616 (HL) (for a discussion of *Schroeder*, see *infra* notes 187-90 and accompanying text); Clifford Davis Management Ltd. v. WEA Records Ltd., [1975] 1 All E.R. 237 (CA) (for a discussion of *Clifford Davis Management*, see *infra* notes 191-201 and accompanying text); O'Sullivan v. Management Agency and Music Ltd., [1985] 3 All E.R. 351 (CA) (for a discussion of *O'Sullivan*, see *infra* notes 202-10 and accompanying text).

20 No. 20702/89 (N.Y. Sup. Ct. Apr. 6, 1990). Joel alleges that his personal manager breached his fiduciary duty by, *inter alia*: acquiring personal interests in Joel's investments without informing Joel; double commissioning Joel for the costs of music videos

to establish a new, higher standard of protection for musical artists from overreaching personal managers.

Given the approach taken thus far by American courts, legislation protecting recording artists from unscrupulous managers is essential. This legislation should define the fiduciary nature of the artist-personal manager relationship and impose specific guidelines for personal manager conduct in conflicts of interest situations. In the absence of legislation, the judiciary should not hesitate to penalize personal managers for failure to adequately fulfill their fiduciary duties. The breach of fiduciary duty claim is an important weapon in artists' litigation arsenals; if successfully argued, it would entitle plaintiffs to greater damage awards than those available under claims based on contract theories.[21]

Part II of this Note compares the functions of agents and personal managers. Part III examines the statutory schemes governing artists' representatives and determines that personal managers are not subject to existing regulation. Part IV discusses various contract and tort claims disgruntled artists could assert against their overreaching personal managers in the absence of a statutory basis for protection. This Part focuses on the fiduciary nature of the artist-personal manager relationship and the problem of conflicts of interest, which may constitute a breach of fiduciary duty. Part V analyzes the case law addressing conflicts of interest in the artist-personal manager relationship, comparing the approaches taken by American and English courts. Part VI examines the duties imposed on attorneys who have interests conflicting with those of their clients. Finally, in Part VII, this Note recommends imposing more rigorous regulation on personal managers to better protect the interests of performing artists.

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made by a company owned by the personal manager; using Joel's copyrights as collateral for personal loans without informing Joel; and inducing Joel to enter unfair management agreements without disclosing either his prior breaches of fiduciary duty or the unsuccessful investments made on Joel's behalf. *See* Joel v. Weber, N.Y.L.J., Mar. 23, 1990, at 22, col. 4 (N.Y. Sup. Ct. Apr. 6, 1990) (decision granting partial summary judgment to Joel on claim for payment on promissory notes); Plaintiff's Amended Complaint at 2-5, Joel v. Weber, (No. 20702/89); *see also* Flick, *Billy Joel Sues Former Manager for $90 Mil*, BILLBOARD, Oct. 7, 1989, at 96 (Joel seeks to void contract and prevent Weber from receiving further compensation).

In the most recent phase of the case, the Appellate Division, First Department, reinstated Joel's common law fraud and aiding-and-abetting fraud claims against the accounting firm alleged to have assisted the former personal manager in misappropriating Joel's assets. *See* Anderson, *Billy Joel's Fraud Complaint Reinstated*, 205 N.Y.L.J. May 15, 1991, at 1, col. 5.

[21] For a discussion of the possible contract and tort claims an artist could assert against his personal manager, see *infra* notes 73-104 and accompanying text.

II. FUNCTIONS OF AGENTS AND PERSONAL MANAGERS

Recording artists commonly retain representatives to assist them in various facets of their careers. Distinguishing between agents and personal managers (sometimes "managers") has important implications because agents are expressly regulated by state statutes[22] and artists' unions,[23] while personal managers are not. Artists hire representatives for guidance in two primary areas: the procurement of employment and the promotion and development of their careers. To obtain employment, artists retain agents; for promotion and development, they employ personal managers. To those involved in the entertainment industry, this definitional distinction is well understood. There can be a great deal of similarity and overlap in their roles, however, as both are responsible for promoting the interests and furthering the careers of their clients; this frequently leads to confusion as to whether an agency or managerial function is being performed.[24]

Agents, or "booking agents,"[25] perform the very specific task of procuring employment. Agents promote their clients' careers by "find[ing] or receiv[ing] offers of employment for the talent and negotiat[ing] the contract."[26] After securing employment, agents collect performance fees for the artists, deduct commissions for their services,[27] and forward the net balance to the

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22 For a discussion of the relevant California and New York statutes, see *infra* notes 50-70 and accompanying text.

23 Some of the more prominent unions are discussed *infra* note 47.

24 *Fees or Famine*, *supra* note 5, at 9.

25 *Personal Management*, *supra* note 9, at 142 (booking agents are responsible for procuring employment but are frequently confused with personal managers).

Booking agents are a "person, firm or corporation who for a fee procures, offers, promises, or attempts to procure employment or engagements for musicians whether or not, in addition to such activities, he/she or it performs additional services for musicians as artists' manager or personal manager or otherwise." BYLAWS OF THE AMERICAN FEDERATION OF MUSICIANS, art. XXIII, § 2 (1989). The American Federation of Musicians is one of the unions regulating agents. *See infra* note 47.

The Screen Actors Guild ("SAG"), another union regulating agents, defines an agent as a

> person, copartnership, association, firm or corporation who or which offers to or does represent, act as the representative of, negotiate for, procure employment for, counsel or advise any member of the SAG in and about and in connection with or relating to his employment or professional career as an actor in the production of motion pictures.

RULE 16(g) SCREEN ACTORS GUILD CODIFIED AGENCY REGULATIONS 1. SAG rules of agency are the result of negotiations between SAG, the Association of Talent Agents, the National Association of Talent Representatives, and other franchised talent agents. *Id.* SAG regulations apply only to performing artists in the motion picture industry. *See* SCREEN ACTORS GUILD, CONSTITUTION AND BY-LAWS, art. II (1989).

26 THIS BUSINESS OF MUSIC, *supra* note 2, at 84.

27 A commission is calculated as a percentage of the contract rate. It is usually in the amount of 10-15%, depending on the talent, the union involved, and the length of the agreement. *Id.*

artists or their managers.[28]

Many agency firms handle a large roster of clients,[29] but rarely represent struggling artists. Because agency contracts often contain terms permitting artists to terminate the agreement upon the agent's failure to furnish a given amount of work within a specific time period, agents seek to represent only the most employable, well-established artists.[30] Given the difficulty of securing agents, struggling artists first seek the assistance of personal managers.

The artist-personal manager relationship is a broad one, based on trust, but highly susceptible to abuse by unregulated, unscrupulous personal managers. Since artists "are generally young and frequently unsophisticated in business or legal matters, the need for independent counsel is paramount"[31] when they enter contractual relationships. However, many artists do not often seek such independent counsel prior to signing personal management contracts. Unscrupulous personal managers may take advantage of this fact and sign their clients to one-sided contracts.

The primary distinction between agents and personal managers is that the personal manager function requires a more in-depth, personal involvement in the careers, and lives, of their clients than does performance of the agency function.[32] Personal managers provide unique and versatile services, which vary depending on the particular needs of the artist. The artist-manager relationship is therefore highly personal by nature.[33] Addition-

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28 Stenzel, *Arts, Communications, Entertainment and Sports Law-Musicians' Engagement Contracts*, 65 MICH. B.J. 1093, 1099 (1986) (background on contractual relationships in music industry).

29 The leading agencies, the William Morris Agency and International Creative Management, maintain thousands of clients throughout the entertainment industry on their rosters. *Fees or Famine*, *supra* note 5, at 10; THIS BUSINESS OF MUSIC, *supra* note 2, at 84.

30 *Fees or Famine*, *supra* note 5, at 10. *See* Standard AF of M Exclusive Agent-Musician Agreement, cl. 5(b), *reprinted in* THIS BUSINESS OF MUSIC, *supra* note 2, at 637.

31 *Ethical Aspects*, *supra* note 4, at 452.

32 Johnson & Lang, *The Personal Manager in the California Entertainment Industry*, 52 S. CAL. L. REV. 375, 380 (1979) [hereinafter Johnson & Lang] (proposing licensing of personal managers that would allow them to procure employment, and legislation prescribing their fiduciary duties).

33 Artists receive advice from numerous sources, including lawyers, accountants, and agents. However,

> it is for overall guidance and support in all areas of the entertainment field that they turn to the personal manager. The personal manager is the person who helps the artist in his or her creative endeavors, who nurtures, grooms, guides, befriends, and at all times is the driving force in the forefront, breaking through the barriers of frustration and difficulty that one encounters in the entertainment industry. A personal manager is one who believes in and keeps fighting for his or her clients when all others have given up.

BROCHURE, NATIONAL CONFERENCE OF PERSONAL MANAGERS.

ally, personal managers often have substantial private financial investments in the artists they represent. Personal managers frequently support and finance struggling artists from the outset of their careers, while agents generally do not sign with artists until they are reasonably certain of the artists' likelihood of success.[34]

Developing unknown artists to the point where record companies would consider signing them requires great knowledge of, and experience in, the various facets of the entertainment industry. According to the National Conference of Personal Managers,[35] managers possess this expertise and use it "to guide, advance and promote the careers of clients who retain [their] services."[36] They provide not only advice and counseling, but must also "create opportunities for the artists they represent."[37] Such opportunities result when a personal manager serves as a "liaison between the artists . . . and booking agents, the entertainment industry and the general public."[38]

Personal managers are responsible for the day-to-day details of artists' careers, as well as long-term planning. They commonly handle accounting and tax issues, investments, and royalty audits.[39] They give advice regarding the selection of materials and booking agents, publicity, and the supervision of accountants

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[34] A strong indication of this likelihood of success, in the music industry, is the artist's acquisition of a recording contract. *See Fees or Famine*, *supra* note 5, at 10, 14. Because agents generally will not represent clients unless they are reasonably certain of achieving a degree of success, personal managers are often the only ones willing to spend the time and money necessary to develop young artists. *See* Note, *The Personal Manager in California: Riding the Horns of the Licensing Dilemma*, 1 COMM/ENT L.J. 347, 347 (1978) (recommending that personal managers be licensed and allowed to procure employment). Such expenditures are not always limited to business related items such as equipment and rehearsal space, but may also include essential items such as food and shelter. *See Personal Management*, *supra* note 9, at 146.

[35] The National Conference of Personal Managers ("NCOPM"), which is divided into East and West divisions, is "a nonprofit association for the purposes of educating personal managers, providing a forum for personal managers to discuss matters affecting them, and providing a united front through which personal managers might take action with respect to such issues." Johnson & Lang, *supra* note 32, at 391 n.101. The NCOPM defines a personal manager as

> one who is engaged in the occupation of advising and counseling talent and personalities in the entertainment industry. Personal managers cannot by law seek employment or engagements for the artists and entertainers they represent. He or she is one who has the expertise to develop new talent. Moreover, a personal manager acts as a liaison between his or her clients and theatrical agents as well as all others in the field of entertainment.

BROCHURE, NATIONAL CONFERENCE OF PERSONAL MANAGERS.

[36] CODE OF ETHICS, NATIONAL CONFERENCE OF PERSONAL MANAGERS.

[37] *Id.*

[38] *Id.*

[39] Jossen, *Fiduciary Aspects of the Personal Manager's Relationship with a Performing Artist*, 11 J. ARTS MGMT. & L. 108, 109 (1981) (formerly PERF. ARTS REV.) [hereinafter *Fiduciary Aspects*].

and attorneys.[40] Personal managers may also be involved in the negotiation of recording, film, and television contracts.[41]

The broad scope of their responsibilities is illustrative of the significant influence personal managers wield over artists.[42] Personal managers rely on their in-depth involvement in artists' careers and their frequent expenditure of personal funds to justify charging a substantially higher commission than do agents.[43]

III. THE REGULATORY SCHEME

Agents are responsible for procuring employment for artists.[44] However, exactly what constitutes "procurement" is unclear.[45] Any efforts expended by personal managers to promote, develop, and create opportunities for artists they represent conceivably may be viewed as procurement. For instance, personal managers routinely give artists advice regarding which employment opportunities they should accept and are involved in various business transactions, including the negotiating of recording or publishing contracts. In a more obvious infringement of the agency role, personal managers may sometimes promise or attempt to procure employment as a means of signing or retaining

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40 *See* THIS BUSINESS OF MUSIC, *supra* note 2, at 85.

41 *See Personal Management*, *supra* note 9, at 144-45; Interview with Marks, *supra* note 10. In addition to negotiating such contracts, the manager acts as a liaison, seeking to ensure proper promotion of the artist, adequate air play, and funding for various production costs and touring. *See Personal Management*, *supra* note 9, at 145.

42 Very few artists manage themselves, as they are frequently unwilling to assume such responsibility, or believe that they are incapable of handling it. Many musicians would rather pursue the creative side of their profession and concentrate on performing and creating. *See Fiduciary Aspects*, *supra* note 39, at 108.

Entertainers may spend too much time on the road to effectively manage their business affairs, or oversee those they employ. Also, many artists consider themselves inept in business dealings and, therefore, rely on others. Johnson & Lang, *supra* note 32, at 381 n.32. Billy Joel, commenting on his suit against his personal manager, expressed the following attitude common among many artists: "It wasn't my job. I trusted other people to look after my money." Wild, *Billy Joel: The Rolling Stone Interview*, ROLLING STONE, Jan. 25, 1990, at 35, 38. "Artists don't think like accountants. We think like artists. We're supposed to represent the other side. We're knuckleheads when it comes to business. Money isn't why I did what I've done with my life. I did what I did because it made me happy." *Id.*

43 The typical managerial fee is 10-25% of artists' gross receipts from all entertainment related income. *See* THIS BUSINESS OF MUSIC, *supra* note 2, at 86; *Fees or Famine*, *supra* note 5, at 15. Commissions based on gross receipts are calculated based on the artist's total income prior to the deduction of expenses. Some managers take commissions based on net receipt computations rather than gross receipts. Net receipt commissions are calculated at a higher percentage because the computation base is determined after deduction of expenses for items such as agents, publicity, travel, and band members. THIS BUSINESS OF MUSIC, *supra* note 2, at 86.

44 *See supra* notes 25-30 and accompanying text.

45 For cases discussing whether procurement activity was performed, see *infra* note 50 and accompanying text.

clients.[46]

If personal managers procure employment, they become subject to statutory and union regulations governing agents.[47] Personal managers are wary of becoming subject to such regulation because they would then be required to perform both agency and managerial functions. More importantly, they would have to obtain licenses and their fees would be subject to limitation.[48] Consequently, personal managers often attempt to avoid the appearance of procuring employment through contract clauses explicitly stating that they are not responsible for doing so.[49]

In California and New York, there has been substantial litigation to determine whether personal managers have procured employment in violation of the state statutes regulating agents.[50]

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[46] *See* Johnson & Lang, *supra* note 32, at 375-76.

[47] Several unions seek to regulate the artist-agent relationship. Among the most prominent in the music industry are the American Federation of Musicians ("AF of M"), the American Guild of Variety Artists ("AGVA"), the Screen Actors Guild ("SAG"), and the American Federation of Television and Radio Artists ("AFTRA"). The unions seek to prevent abuses by agents in their dealings with artists by granting franchises to qualified agents. The agents must adhere to these franchise agreements. Personal managers, however, are not explicitly subject to union regulation. *See Fees or Famine*, *supra* note 5, at 11; *British Invasion*, *supra* note 12, at 212-14; THIS BUSINESS OF MUSIC, *supra* note 2, at 89-90.

[48] California does not regulate fees charged by agents. New York, on the other hand, limits agents' commissions to 10% of their clients' compensation (20% for opera and concert engagements). N.Y. GEN. BUS. LAW § 185 (McKinney 1988 & Supp. 1991). The AF of M limits commissions to 15% for engagements of two or more consecutive days per week, and 20% for one night engagements. The AF of M allows agents an additional 5% if they have negotiated personal management contracts approved by the AF of M. *See* BYLAWS OF THE AMERICAN FEDERATION OF MUSICIANS, art. XXIII § 6 (1989).

[49] This is frequently done by including a contract term providing that the personal manager will not play any role whatsoever in procuring employment. *See Fees or Famine*, *supra* note 5, at 14; Johnson & Lang, *supra* note 32, at 387. However, such a provision does not prevent an artist from successfully suing a personal manager who has procured employment in violation of statutory licensing requirements. *See* Buchwald v. Superior Court, 254 Cal. App. 2d 347, 62 Cal. Rptr. 364 (Cal. Ct. App. 1967).

[50] *See generally* Pine v. Laine, 36 A.D.2d 924, 321 N.Y.S.2d 303 (1st Dep't 1971) (plaintiff was denied recovery for services performed in negotiating recording contract because he was not licensed as employment agent and did not come within the incidental procurement exception for personal managers); Friedkin v. Harry Walker, Inc., 90 Misc. 2d 680, 395 N.Y.S.2d 611 (Civ. Ct. 1977) (entertainer recovered commissions paid to booking agent who was unlicensed and who did not come within incidental procurement exception); Pryor v. Franklin, No. TAC17 MP1114 (Cal. Lab. Comm'r Aug. 18, 1982), *cited in Fees or Famine*, *supra* note 5, at 19-20 (unlicensed manager acted as agent, court ordered award of over $3 million to artist); Raden v. Laurie, 120 Cal. App. 2d 778, 262 P.2d 61 (Cal. Dist. Ct. App. 1953) (since scope of employment was to counsel, advise, and act as business manager in matters not related to obtaining engagements, plaintiff was not acting as employment agency as defined in statute); Buchwald v. Superior Court, 254 Cal. App. 2d 347, 62 Cal. Rptr. 364 (Cal. Ct. App. 1967), *rev'd sub nom.* Buchwald v. Katz, 101 Cal. Rptr. 692 (Cal. Ct. App.), *rev'd*, 8 Cal. 3d 493, 503 P.2d 1376, 105 Cal. Rptr. 368 (1972) (court voided contracts as manager procured employment without license). *Buchwald* involved members of the group the Jefferson Airplane. The court also held that the manager obtained publishing agreements from the group in

Discontented artists frequently rely on these statutory provisions to terminate their management agreements. By alleging that their personal managers engaged in employment activity while not licensed to do so, or under New York law, procured more than "incidental" employment, artists might be granted rescission of their agreements. Contracts may be deemed void upon a finding in favor of the artist.[51] Artists who prevail may also be awarded attorney fees and the restitution of commissions paid to their managers under the contract.[52] Although these statutory provisions will provide relief to some artists, the existence of various loopholes, combined with the ambiguous function of personal managers, enables managers to circumvent the requirements of the statutes.

In California, the 1978 Talent Agencies Act (the "Act")[53] regulates the procurement of employment for artists. The Act governs any

> person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.[54]

The Act requires that agents obtain a license from,[55] and have their contracts approved by,[56] the California Labor Commissioner. The Act does not formally regulate fees but requires that the fees be registered with the Labor Commissioner.[57]

Although the Act contains language regarding advice and gui-

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violation of his fiduciary duty as he did not inform the group of other publishing offers that would have been to their advantage. The manager had a duty to disclose material information within his knowledge before the agreement was signed. Johnson & Lang, *supra* note 32, at 401 n.155. For a more detailed discussion of the Jefferson Airplane cases, see *id.* at 396-402; *Fiduciary Aspects*, *supra* note 39, at 110-11; Comment, *The Regulation of Artist Representation in the Entertainment Industry*, 8 LOY. L.A. ENT. L.J. 55, 59-62 (1988) [hereinafter *Artist Representation*].

51 *See Buchwald*, 254 Cal. App. 2d at 353-56, 62 Cal. Rptr. at 370-72.

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

53 CAL. LAB. CODE §§ 1700-1700.47 (West 1989 & Supp. 1991). For a detailed history and analysis of the Talent Agencies Act, see Johnson & Lang, *supra* note 32; *Artist Representation*, *supra* note 50; Note, *The Personal Manager in California: Riding the Horns of the Licensing Dilemma*, 1 COMM/ENT L.J. 347 (1978).

54 CAL. LAB. CODE § 1700.4 (West 1989).

55 *Id.* § 1700.5.

56 *Id.* § 1700.23.

57 *Id.* § 1700.24.

dance in career development, it does not govern personal managers.[58] The Act merely acknowledges that agents, in the course of procuring employment, may offer artists career advice. Personal managers appear to be immune from the Act's requirements as long as they do not procure employment. Many managers, however, seek to obtain recording contracts for their clients.[59] Prior to a 1986 amendment, procurement of recording contracts by personal managers was deemed a violation of the Act.[60] The 1986 amendment excepting procurement of recording contracts from the Act's purview recognizes the practical reality that managers are frequently required to negotiate recording contracts and are often involved in other activities bordering on procuring employment.[61] The exception is especially significant since many personal managers have ownership interests in recording companies. As a result of the 1986 amendment, managers can sign clients to their own record companies without being subject to the Act.[62] Dissatisfied artists who sign with their manager's record companies are thus deprived of the Act's protection.[63] Artists must prove that their unlicensed manag-

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58 *See Fiduciary Aspects*, *supra* note 39, at 115; THIS BUSINESS OF MUSIC, *supra* note 2, at 89.

59 *See supra* note 41 and accompanying text; *Fees or Famine*, *supra* note 5, at 14; *see also infra* note 61 (during legislative debates on the Talent Agencies Act, personal managers claimed that procuring recording contracts is a necessary function given the nature of the music industry).

60 *See* Sinnamon v. McKay, No. SFMP 73 TAC 9-80 (Cal. Lab. Comm'r 1981) (unlawful procurement of recording contract and live engagements without license rendered agreements null and void); McFadden v. Ripp, No. SFMP 71 TAC 7-80 (Cal. Lab. Comm'r 1980) (personal management agreement rendered void due to manager's securing a recording contract and live engagements without obtaining a license), *discussed in* Comment, *Personal Managers and the California Talent Agencies Act: For Whom the Bill Toils*, 2 LOY. L.A. ENT. L.J. 145, 155 (1982).

61 For a description of the personal manager's responsibilities, see *supra* notes 31-43 and accompanying text. *See generally* Johnson & Lang, *supra* note 32, at 406 n.174 (discussion of debates in 1977-78 surrounding the writing of the Talent Agencies Act and whether personal managers should be included in the Act). The personal manager lobby claimed that the realities of the entertainment industry required that managers "engage in some limited activities which can be construed as procuring employment. The negotiation of recording contracts is one activity which is commonly done by an entertainer's personal manager and not by an artists' manager but which has been interpreted as an employment activity requiring licensing." *Id.* (quoting Staff Memorandum of Assembly Comm. in Labor, Employment, and Consumer Affairs regarding A.B. 2535 (as amended Apr. 10, 1978), at 2 (Apr. 1978)).

62 Recording contracts are generally considered to be employment contracts. *See* Miller v. Columbia Records 70 A.D.2d 517, 415 N.Y.S.2d 869 (1st Dep't 1979); THIS BUSINESS OF MUSIC, *supra* note 2, at 12. The record company retains the benefits of the artist's services, including the copyrights and possession of the tapes or masters. Recording companies typically withhold royalties from artists until recording costs have been recouped. *Id.* at 12-13.

63 For cases in which artists invoked the California and New York statutes in lawsuits against their personal managers, see *supra* note 50.

ers procured other types of employment to have their contracts voided under the Act.

Personal managers are further able to circumvent the regulations imposed by the Act via a 1982 amendment allowing them to work with agents without becoming subject to the Act.[64] The amendment, while recognizing that personal managers often work in conjunction with agents to determine the best employment opportunities for their clients, also allows unethical managers to perform the agency role under a veil of non-involvement in procurement activity. When there is no agent personally involved in booking employment, the manager's procurement practice becomes particularly suspect, since it is the manager who is most likely booking the employment himself, thereby violating the Act if unlicensed.[65]

Similar to the California loopholes allowing personal managers to procure recording contracts and work with agents, the New York Employment Agencies Act[66] contains a loophole enabling personal managers to procure employment for artists without becoming subject to the requirements of the statute. The Employment Agencies Act defines theatrical agents as:

> any person . . . who procures or attempts to procure employment or engagements for . . . radio, television, phonograph recordings, . . . concert . . . or other entertainments or exhibitions or performances, *but such term does not include the business of managing such entertainments, exhibitions or performances, or the artists or attractions constituting the same, where such business only incidentally involves the seeking of employment therefor.*[67]

The emphasized text of the Employment Agencies Act is commonly known as the "incidental booking exception" and refers to personal managers. Although the meaning of "incidental" is ambiguous,[68] the New York statute makes the agent-personal manager distinction clearer than does the California Talent Agencies Act be-

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64 The amendment provides that "[i]t is not unlawful for a person or corporation which is not licensed pursuant to this chapter to act in conjunction with, and at the request of, a licensed talent agency in the negotiation of an employment contract." CAL. LAB. CODE § 1700.44(d) (West 1989).

65 Interview with Marks, *supra* note 10.

66 N.Y. GEN. BUS. LAW §§ 170-191 (McKinney 1988 & Supp. 1991) (Employment Agencies Act).

67 *Id.* § 171(8) (emphasis added). A theatrical engagement is "any engagement or employment of a person as an actor, performer or entertainer in employment described in subdivision eight of this section." *Id.* § 171(9).

68 Generally, to protect against doing more than "incidental" procurement, one should "avoid[] any prolonged or regular course of conduct involving the seeking or serving of employment." *Personal Management*, *supra* note 9, at 143.

cause there is no reference to advice or counsel. The Employment Agencies Act suggests that agents have primary responsibility for bookings, while personal managers are responsible for offering career guidance, but may occasionally book engagements without becoming subject to the statute.[69] Courts decide on an *ad hoc* basis whether managers have procured employment to a degree that is more than incidental and are in effect acting as employment agents.[70]

IV. Contract Claims and Agency Principles Relating to Conflicts of Interest

Personal managers are not explicitly subject to regulation under the current statutory framework. Present legislation regulates only those individuals who procure employment, *i.e.*, agents. Furthermore, there are loopholes in the statutes which permit personal managers to perform a variety of procurement functions without becoming subject to the statutory requirements and limitations.[71] The absence of legislation directly governing personal managers, along with the loopholes in the current legislation, opens the door to unethical behavior by personal managers. Since the statutory scheme does not provide adequate protection from overreaching personal managers, artists will have to rely on contract and tort claims in any dispute with their personal manager.[72]

A. *Contract Claims*

1. Breach of Contract

The first possible contract theory a disgruntled artist may assert against his personal manager is breach of contract. Such a claim, however, would be extremely difficult to prove, unless it is based on contract provisions requiring specific conduct. The music industry is exceedingly competitive and unpredictable, re-

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69 *See Fees or Famine*, *supra* note 5, at 21.

70 *See, e.g.*, Friedkin v. Harry Walker Inc., 90 Misc. 2d 680, 395 N.Y.S.2d 611 (Civ. Ct. 1977); Greenfield v. Tripp, 10 A.D.2d 638, 196 N.Y.S.2d 902, *reh'g & appeal denied*, 10 A.D.2d 850, 201 N.Y.S.2d 494 (2d Dep't 1960).

71 *See supra* notes 60-70 and accompanying text.

72 "[A] manager who can successfully remove himself from the scope of the [statutes] can relieve himself from regulation thereunder, and as such, his conduct will be governed by common law." *British Invasion*, *supra* note 12, at 214. *See also Fidcuciary Aspects*, *supra* note 39, at 115-16 (principles of contract and agency law apply to the artist-personal manager relationship as personal managers function as agents by procuring employment).

sulting in a high rate of artist failure.[73] Therefore, claiming that a personal manager's poor advice and guidance caused the artist's lack of success is not a judicious argument. An artist's failure is not proof of personal manager misfeasance,[74] rather, it may be the result of inadequate talent or poor market conditions. A personal manager is required only "to exercise his best judgment,"[75] so even advice that turns out to be erroneous will rarely provide a valid basis for relief.[76] A breach of contract claim that is more likely to succeed is one based on contract clauses governing a specific activity, such as the manner in which the client's money is to be handled.[77] Such a breach would be much easier to establish.

2. Unconscionability

Another possible contract claim for disgruntled artists is that of unconscionability. A claim of unconscionability requires showing that the contract was both substantively and procedurally unconscionable when drafted.[78] This determination is made by evaluating "the contract's commercial setting, purpose and effect."[79] Substantive unconscionability requires analyzing "the substance of the bargain to determine whether the terms were unreasonably favorable" to one party.[80]

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[73] Fewer than 20% of all records produced sell enough copies to recover their cost. Simensky, *Determining Damages for Breach of Entertainment Agreements*, 8 ENT. & SPORTS LAW. 1, 11 (1990) [hereinafter Simensky].

[74] *Personal Management*, *supra* note 9, at 157-58.

[75] *Id.* at 158. In every contract involving exlusive dealings, there is an implied requirement of best efforts. Wood v. Lucy, Lady Duff-Gordon, 222 N.Y. 88, 118 N.E. 214 (1917), *reh'g denied*, 222 N.Y. 643, 118 N.E. 1082 (1918).

[76] *See Personal Management*, *supra* note 9, at 157-58. If a breach of contract is established, assessment of damages is extremely difficult. "The judiciary has long recognized the difficulty in measuring damages for entertainment violations because of the excessively high failure rate—and therefore unpredictability—of entertainment projects, especially new projects." Simensky, *supra* note 73, at 12.

[77] *See Personal Management*, *supra* note 9, at 158.

[78] There must be an "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965).

[79] Sablosky v. Edward S. Gordon Co., 73 N.Y.2d 133, 138, 535 N.E.2d 643, 647, 538 N.Y.S.2d 513, 517 (1989) (arbitration clause in employment contract held not unconscionable because real estate brokerage business generates numerous disputes).

[80] Gillman v. Chase Manhattan Bank, 73 N.Y.2d 1, 12, 534 N.E.2d 824, 829, 537 N.Y.S.2d 787, 792 (1988) (provisions of security agreement were reasonable in commercial context, purpose, and effect, and therefore not substantively unconscionable) (citing State v. Avco Fin. Serv., 50 N.Y.2d 383, 406 N.E.2d 1075, 429 N.Y.S.2d 181 (1980)).

To satisfy the substantive requirement, the personal manager's fees and commissions would have to be evaluated. The customary commission for personal managers in the music industry is 10-25% of an artist's gross receipts. *See supra* note 43. A commission that substantially exceeds this rate should be considered "unreasonably favorable" for it goes beyond what is normally required for a personal manager to recover a fair

Procedural unconscionability focuses on the formation of the contract and considerations of meaningful choice. Elements of procedural unconscionability include "whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power."[81] Although the doctrine of unconscionability has been successfully invoked in a variety of fields, including the music industry,[82] American courts have nonetheless rejected claims of unconscionability in the artist-personal manager context, holding that the contracts in question, though substantially one-sided and lacking negotiation, were consistent with industry norms.[83] Although an artist would seemingly be able to establish the required elements, a claim of unconscionability is not likely to suc-

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profit as well as recoup any personal investment made in promoting his client. *See* Central Budget Corp. v. Sanchez, 53 Misc. 2d 620, 621, 279 N.Y.S.2d 391, 392 (Civ. Ct. 1967) ("Excessively high prices may constitute unconscionable contractual provisions. . . ."). However, a personal management contract allowing for a 50% commission in certain situations was not found unconscionable. *See infra* notes 131-47 and accompanying text.

When a personal manager obtains an artist's recording or publishing rights, the possibility of overreaching arises. The frequent consequence is that a personal manager receives commissions and royalties substantially exceeding what the artist himself earns from his efforts. In one instance, a personal manager received commissions of over $176,000, while the artist, upstart Bruce Springsteen, was left with approximately $67,000 after deducting advances and disbursements made by the personal manager. *See* Summary of Amounts Due to Bruce Springsteen, March 31, 1976, *attached to* Plaintiff's Reply Affidavit, Laurel Canyon, Ltd. v. Springsteen, N.Y.L.J. Aug. 25, 1976, at 6, col. 1, (N.Y. Sup. Ct. Aug. 19, 1976), *aff'd*, 55 A.D.2d 882, 391 N.Y.S.2d 364 (1st Dep't 1977) [hereinafter Summary of Amounts Due]. While a personal manager is certainly entitled to recover any personal expenses extended on the artist's behalf, when the manager's earnings exceed the artist's, the likelihood of impropriety arises. Such results are seemingly "unreasonably favorable" even in the context of the exploitive practices of the music industry, and wholly unnecessary to satisfy the purpose of the contracts.

[81] *Gillman*, 73 N.Y.2d at 11, 534 N.E.2d at 828, 537 N.Y.S.2d at 791 (citations omitted) (failure to read terms of agreement does not render the agreement procedurally unconscionable). *See also* Leasing Serv. Corp. v. Graham, 646 F. Supp. 1410 (S.D.N.Y. 1986) (considerations include relative bargaining power, alternatives available to the party claiming unconscionability, and whether the contract is oppressive or reasonable); Fleischmann Distilling Corp. v. Distillers Co. Ltd., 395 F. Supp. 221, 232-33 (S.D.N.Y. 1975) (notice of termination provision in contract between distributor and seller was not unconscionable as plaintiff had choice to refuse contract).

Many artists would be able to establish procedural unconscionability. Upstart artists often lack the business experience and bargaining power necessary for any meaningful negotiation, and must generally accept the onerous terms imposed by the personal manager. Artists, anxious for an opportunity, and uncertain whether others will recognize their talent, usually have no meaningful choice but to sign whatever is placed before them.

[82] *See* Graham v. Scissor-Tail, 28 Cal. 3d 807, 623 P.2d 165, 171 Cal. Rptr. 604 (1981) (arbitration clause in standard form concert promotion contract held unconscionable for designating biased arbitrator).

[83] For a discussion of the American cases, see *infra* notes 131-75 and accompanying text.

ceed unless the courts adopt a more pragmatic approach toward the exploitive practices of the music industry.

3. Undue Influence

A third possible contract claim, and the one most likely to succeed, is undue influence. Undue influence is found in two situations. If a person is under the domination of another and the stronger party asserts unfair persuasion, the contract is formed under undue influence and is voidable by the weaker party.[84] Undue influence also occurs when unfair persuasion is exerted against a party to the contract "who by virtue of the relation [with the stronger party] is justified in assuming that that person will not act in a manner inconsistent with his welfare."[85] The latter situation more closely characterizes the artist-personal manager contract formation process than does the former. Although claims of undue influence have been successfully argued by artists in English courts,[86] the issue has not been litigated in the American cases deciding artist-personal manager disputes.[87]

In a claim of undue influence, the artist would first have to establish that there was a confidential relationship with the personal manager.[88] Since the artist-personal manager relationship is one of principal-agent, and therefore fiduciary in nature,[89] this first element is easily satisfied. The second element, unfair persuasion, is also readily established. Many factors may be considered in determining whether unfair persuasion was exerted, including, but not limited to, the relative business experience of the parties, inequity in the contract terms, the absence of independent advice, and the susceptibility of the party claiming undue influence.[90] As these elements characterize the artist-personal manager contract formation process, it is likely that a claim of undue influence could be successfully argued.[91]

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84 *See* RESTATEMENT (SECOND) OF CONTRACTS § 177(1) (1981).

85 *Id.*

86 For a discussion of the British cases, see *infra* notes 186-210 and accompanying text.

87 The primary issues litigated in the American cases were unconscionability and breach of fiduciary duty. For a discussion of the American cases, see *infra* notes 131-75 and accompanying text. A claim of undue influence was raised in Springsteen v. Appel, No. 76 Civ. 3334 (S.D.N.Y. filed July 27, 1976), but this case was never litigated.

88 *See* 25 AM. JUR. 2D *Duress and Undue Influence* § 38 (1966) ("excercise of undue influence may be inferred in all cases of confidential or quasi-confidential relationship").

89 *See infra* notes 93-95 and accompanying text.

90 RESTATEMENT (SECOND) OF CONTRACTS § 177 comment b (1981); E. FARNSWORTH, CONTRACTS § 4.20, at 285-86 (2d ed. 1990).

91 The American cases discussed *infra* notes 131-75 involved upstart artists lacking business experience and susceptible to the machinations of their personal managers.

B. *Tort Claims—Breach of Fiduciary Duty*

In addition to contract claims, dissatisfied artists may assert claims based on tort theories. A successful tort claim is more advantageous in that it may allow for punitive damages, reversion of copyrights obtained by the personal manager, and termination of the relationship.[92] One possible tort claim is breach of fiduciary duty. The artist-personal manager relationship is founded on agency principles and thus gives rise to fiduciary obligations. A breach of these fidiciary duties may arise when a personal manager obtains an interest in a recording or publishing company, thus creating conflicts of interest.

1. Agency Principles and the Fiduciary Relationship

Agency is "a fiduciary relationship by which one party confides to another the management of some business to be transacted in the former's name or on his account, and by which such other assumes to do the business and render an account of it."[93] The existence of an agency relationship is dependent on a manifestation of the principal's intent that the agent act on his behalf, the agent's acceptance of the duty to act, and the understanding that the principal has control over the relationship.[94] Accordingly, the artist-personal manager relationship is one of principal-agent as it satisfies all of the required elements. The artist hires the manager to develop and promote the artist's career, the manager agrees to use his special knowledge and experience in the entertainment industry on the artist's behalf, and the artist has the ultimate authority to ratify the manager's decisions.[95]

An agent's agreement to act on behalf of the principal creates a fiduciary duty in the agent in favor of the principal. The concept of a fiduciary relationship is rather amorphous, having no fixed definition. In general, the "fiduciary relationship is one founded upon trust or confidence reposed by one person in the integrity and fidelity of another. It . . . exists in all cases in which

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The artists received no independent advice, and ultimately agreed to inequitable contract terms. Therefore, the elements of undue influence would have been satisfied.

92 *Publisher-Fiduciary Issue*, *supra* note 3, at 1; *Avoiding, Pursuing and Defending Litigation*, *supra* note 3, at 33 (tort claims may also allow for greater discovery and a longer statute of limitations).

93 3 AM. JUR. 2D *Agency* § 1 (1986).

94 *See* RESTATEMENT (SECOND) OF AGENCY § 1 comment b (1958).

95 For a discussion of the artist-personal manager relationship, see *supra* notes 31-43 and accompanying text.

influence has been reposed and betrayed."[96]

The principles of trust and reliance inherent in a fiduciary relationship require that agents conduct their business in a manner beyond reproach. Fiduciaries are held to the highest standards of fairness, good faith, and loyalty.[97] Fiduciary responsibilities include the duty to use one's best efforts in performing the objectives of the agency;[98] to act only for the benefit of the principal;[99] to keep and render accounts of all money paid or received;[100] and to reveal to the principal any fact that may impact on the subject matter of the employment or which may influence the decisions or actions of the principal.[101]

> An agent is subject to a duty to use reasonable efforts to give his principal information which is relevant to affairs entrusted to him and which, as the agent has notice, the principal would desire to have and which can be communicated without violating a superior duty to a third person.[102]

Facts that will impact on the employment and influence decision making include an agent's possessing personal or adverse interests in the subject matter of the representation. Agents must disclose to, and receive permission from, their principals prior to obtaining a personal interest in the subject matter of the agency, and must also reveal any conflict of interest that affects the representation of a principal.[103] The principal's ratification of the dis-

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96 Mellencamp v. Riva Music Ltd., 698 F. Supp. 1154, 1156 (S.D.N.Y. 1988) (quoting Penato v. George, 52 A.D.2d 939, 942, 383 N.Y.S.2d 900, 904-05 (2d Dep't 1976)).

97 Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928).

98 The concept that an agent has an obligation to use his best efforts to promote his principal's interests underlies every agency contract. Griffin & Evans Cosmetic Marketing, Inc. v. Madeleine Mono, Ltd., 73 A.D.2d 957, 957, 424 N.Y.S.2d 269, 270 (2d Dep't 1980) (citing Van Valkenburgh, Nooger and Neville v. Hayden Publishing Co., 30 N.Y.2d 34, 281 N.E.2d 142, 330 N.Y.S.2d 329 (1972)).

99 RESTATEMENT (SECOND) OF AGENCY § 387 (1958).

100 *Id.* § 382.

101 *See* Cristallina S.A. v. Christie, Manson & Woods Int'l, Inc., 117 A.D.2d 284, 502 N.Y.S.2d 165 (1st Dep't 1986) (auction house failed to properly advise plaintiff of painting's appeal and salability); Silberkraus v. Reinhard, 221 A.D. 615, 225 N.Y.S. 14 (3d Dep't 1927) (broker failed to inform seller, when signing commission contract, that there was a buyer); Jorgensen v. Beach 'N' Bay Realty, Inc., 125 Cal. App. 3d 155, 177 Cal. Rptr. 882 (Cal. Ct. App. 1981) (agent failed to disclose dual role and misrepresented buyers).

102 *Cristallina S.A.*, 117 A.D.2d at 293, 502 N.Y.S.2d at 171 (quoting RESTATEMENT (SECOND) OF AGENCY § 381 (1958)). *See also* Gershunoff v. Panov, 77 A.D.2d 511, 512, 430 N.Y.S.2d 299, 301 (1st Dep't 1980) (failure to disclose to principals the fee arrangements for ballet performance was "entirely incompatible with the duty owed by [the] manager . . . to his principals").

103 *See* Naviera Despina, Inc. v. Cooper Shipping Co., 676 F. Supp. 1134, 1141 (S.D. Ala. 1987) (shipping agent breached fiduciary duty by failing to inform its principal of conflict of interest resulting from agent's representation of cargo shipper, failing to advise principal of existence of conflicting charter agreement, and by following provisions

closed conflicting interest precludes any claim of breach of fiduciary duty based on conflicts of interest grounds.[104]

2. Application of Fiduciary Principles

Detroit Lions, Inc. v. Argovitz[105] is one of the few cases to explore the problem of conflicts of interest in the context of the entertainment industry. The decision should serve as a model for courts to follow when confronted with conflicts of interest cases, including those involving personal managers. In 1980, the Detroit Lions ("Lions") of the National Football League ("NFL") drafted Billy Sims, a University of Oklahoma running back, and signed him to a four-year contract. Sims and sports agent Jerry Argovitz entered into an agency agreement that same year, and developed a close relationship in which Argovitz counselled Sims on numerous financial, professional, and personal matters.[106]

Early in 1983, Argovitz applied for ownership of the Houston franchise in the fledgling United States Football League ("USFL"). The application was approved in early May 1983. Argovitz informed Sims of the application, but he did not disclose the extent of his intended interest in the team.[107] Prior to approval of the franchise application, Argovitz and the Lions were engaged in negotiations for a new contract for Sims. In April 1983, negotiations between Argovitz and the Lions for Sims' new contract progressed normally, each side making proposals in an effort to determine the fair market value for Sims' services. Then, in May 1983, after obtaining the USFL franchise, Argovitz significantly reduced his demands, abandoning the performance and injury guarantees Sims desired. By June 1, 1983

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of conflicting charter agreement at principal's expense). The duty to not act adversely without consent applies whether or not there is harm to the principal. RESTATEMENT (SECOND) OF AGENCY § 389 comment c (1958). When an agent pursues a conflicting interest with the consent of his principal, the agent has a duty to deal fairly with the principal and disclose every fact that may affect the principal's judgment. *Id.* § 390. Failure to reveal relevant facts constitutes fraud. W. SEAVEY, LAW OF AGENCY § 150 (1964).

104 2 F. MECHEM, A TREATISE ON THE LAW OF AGENCY § 1206 (2d ed. 1982). The agent's failure to disclose renders voidable, upon the principal's option, any agreement entered into by the agent. Injury to the principal and the agent's intent are not relevant to the principal's authority to void an agreement. *Id.*

105 580 F. Supp. 542 (E.D. Mich. 1984), *modified*, 767 F.2d 919 (6th Cir. 1985) (circuit court opinion available on WESTLAW, AllFeds library).

106 *Detroit Lions*, 767 F.2d 919 (WESTLAW, AllFeds Library). Their relationship was therefore similar to that of artist-personal manager.

107 *Detroit Lions*, 580 F. Supp. at 544. Argovitz did not disclose the amount of his investment, his obligation for 29% of a $1.5 million letter of credit, or that he was to serve as president of the franchise at a salary of $275,000 and 5% of the annual cash flow. *Id.*

the parties were only $500,000 apart, and were making significant progress. Argovitz asserted to Sims, however, that the Lions were not negotiating seriously.[108]

In late June, despite being very close to an agreement with the Lions, Argovitz decided to solicit an offer from his new USFL team, the Houston Gamblers ("Gamblers").[109] Believing that the Lions were not negotiating in good faith—a belief based on Argovitz' misrepresentations—Sims agreed to negotiate with the Gamblers. Negotiations began on the morning of June 30 and an agreement was reached later that afternoon. The Gamblers' offer included the skill and injury guarantees that Sims sought, but which Argovitz had abandoned early in his talks with the Lions.[110]

Argovitz informed Sims that the Lions would probably match the terms, but Sims believed otherwise based on Argovitz' earlier claims, and told Argovitz not to contact the Lions.[111] In fact, during negotiations with the Gamblers, Argovitz refused to accept a telephone call from the Lions. The Lions were thus effectively denied any opportunity to respond to the Gamblers' offer, and Sims signed with the Gamblers.

The district court determined that although Sims knew of Argovitz' participation in the Gamblers franchise, Argovitz "could not justifiably expect Sims to comprehend the ramifications of [his] interest in the Gamblers or the manner in which that interest would create an untenable conflict of interest; a conflict that would inevitably breach [his] fiduciary duty to Sims,"[112] because Sims was an "unsophisticated young man."[113] "Argovitz knew, or should have known, that he could not act as Sims' agent under any circumstances when dealing with the Gamblers."[114] The court further determined that Argovitz' conduct constituted a breach of fiduciary duty "so pronounced, so egregious, that to deny recision [of the Gamblers-Sims contract] would be uncon-

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108 *Id.*

109 One of Argovitz' partners represented the Gamblers in negotiations with Sims but the court determined that Argovitz played an important role by pressing the importance of signing Sims and disclosing the terms necessary to do so. Argovitz knew that obtaining Sims "would make the Gamblers' franchise." *Id.* at 545.

110 *Id.*

111 The court determined that Sims' decision not to contact the Lions was emotionally motivated, since he believed that the Lions were not interested in retaining his services. *Id.*

112 *Id.* at 544.

113 *Id.* at 546.

114 *Id.* at 544. In fact, the USFL Constitution prevented anyone with an interest in a team from serving as the agent or representative of any player. *Id.*

scionable."[115] As agent, Argovitz was obligated to use his best efforts to obtain the most favorable contract possible for Sims. Argovitz' personal interest in the Gamblers severely hampered these efforts, with the welfare of his team gaining priority over his principal.

Argovitz' participation in these transactions raised the presumption of fraud. Argovitz could overcome this presumption only by proving that Sims had knowledge of Argovitz' adverse interest, that every material fact which may have affected Sims' judgment was disclosed, and that Sims consented to the transaction.[116] The court determined that numerous material facts, including the extent of his investment in the Gamblers; the stability of and fringe benefits associated with playing in the NFL rather than the USFL; the valuable contract clauses given by the Gamblers to other players but not sought by Argovitz; and the great leverage Sims had from having two teams compete for his services, were not disclosed.[117]

The court was particularly perturbed by Argovitz' failure to take advantage of the "wedge" created by the two teams negotiating for Sims.[118] An agent's bargaining position is strongest when two parties compete for the same athlete, but "Argovitz's conflict of interest and self dealing put him in the position where he would not even use the wedge" in negotiations.[119] Expert testimony at trial indicated that, after receiving an offer from one team, it would be common practice for the player's representative to contact other teams involved in the negotiations in an effort to use the offer as leverage for even better offers.[120] The court determined that Argovitz did not follow the normal practice for fear of losing Sims to the Lions, which would have had a detrimental financial impact on the Gamblers.[121] Argovitz was

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115 *Id.*

116 *Id.* at 548.

117 *Id.* at 549.

118 *Id.* at 546. The court was "dismayed by Argovitz's egregious conduct. The careless fashion in which Argovitz went about ascertaining the highest price for Sims' service convinces us of the wisdom of the maxim: no man can faithfully serve two masters whose interests are in conflict." *Id.* at 549.

119 *Id.* at 546.

120 *See id.* Rookie quarterback Jim Kelly received a contract from the Gamblers with terms similar to those agreed to by Sims, although Sims was already a proven NFL star. Kelly's deal was the result of his agent's active efforts. His agent had no personal interests that conflicted with Kelly's. Had Argovitz been free from conflicting interests, he would have been able to get a better deal for Sims. *Id.*

121 *Id.* Because of his ownership interest in the team, Argovitz would personally profit if the Gamblers were successful. Similarly, he would incur personal liabilities if the team failed. The team's on field and financial success depended largely upon Sims. *Id.* at 548.

obligated to solicit a final offer from the Lions and present Sims with the final offers from both teams. "Then and only then could it be said that Sims made an intelligent and knowing decision to accept the Gamblers' offer."[122] Failure to do so was a breach of fiduciary duty. Because Argovitz failed to disclose material facts and utilitze the "wedge," the court rejected the defense of ratification and rescinded the contract.[123]

V. Conflicts of Interest in the Music Industry

The conflicts of interest problems which hindered the Billy Sims negotiations frequently arise in the music industry. Artists rely on their personal managers for career advice and guidance, and place their full faith and trust in their judgment. As a result, artists anticipate that their managers will recommend only favorable agreements. However, this reliance may prove injudicious when a personal manager obtains an interest adverse to his artist's interests.

A. *Advisory Conflicts*

Personal manager conflicts of interest in the music industry have been classified into two broad categories: advisory and economic.[124] Advisory conflicts arise when a personal manager cannot adequately fulfill his obligation of vigorously promoting, representing, and advising his client because he has an interest in a company—usually publishing or recording—which is seeking to obtain the artist's services.[125] Similarly, if problems later arise between the personal manager's company and the artist, then the artist may be deprived of the manager's objectivity and vigorous representation. A personal manager might give priority to his independent business interests rather than the client's.[126]

The more specific issue of a personal manager's bargaining leverage falls within this broad category of advisory conflicts. As in *Detroit Lions*, a personal representative having interests adverse to his artist's might not exploit the "wedge" of a competing bidder to obtain the best possible deal for his client for fear of losing him to the opposing party, or having to offer the client more

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122 *Id.* at 545.

123 *Id.* at 549. The ratification defense is valid only when there is full knowledge of every material fact at the time the alleged ratification occurs. *Id. See supra* notes 103-04 and accompanying text.

124 *Personal Management*, *supra* note 9, at 154-55. These classifications should not be construed as describing the full range of possible conflicts.

125 *Id.* at 154.

126 *See id.* at 155.

favorable terms to retain him.[127] Also, a personal manager may utilize his influential position to convince a client to sign with the manager's company even though doing so may be contrary to the artist's best interests.[128]

B. *Economic Conflicts*

The second broad category, economic conflicts, arises when managers receive multiple commissions from a single source of revenue. For example, if an artist is signed to his personal manager's publishing company, the manager could receive both publishing royalties and management commissions from the artist's efforts. The result is a "double commission" on the revenue generated by the artist. The artist is frequently left with only a small percentage of the money earned. "A personal manager should never 'double commission' an artist"[129] as it is fundamen-

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127 *See generally Detroit Lions*, 580 F. Supp. at 548-49 (Argovitz misrepresented to Sims the character of negotiations with the Lions because losing Sims would have been detrimental to the Gamblers).

128 The potential for conflict is clear when managers wear multiple hats. Steve Winwood began his professional music career as a 15 year-old singer for the Spencer Davis Group. Chris Blackwell listened to the group perform and immediately spotted Winwood as an enormous talent. He signed the group to a recording contract with his company, Island Records. Blackwell also became Winwood's manager. After the Spencer Davis Group split up, EMI records offered Winwood a recording deal. Blackwell, as manager, presented the offer to Winwood, but persuaded him to stay with Island, claiming his company was capable of providing the same services as EMI through a new arrangement for pressing and distribution with Philips. Fox, *Chris Blackwell: Treasured Island Chronicles*, AUDIO, Feb. 1987, at 55 (interview with Blackwell discussing his start in the music business and the evolution of Island Records).

An advisory conflict clearly existed in this situation as Blackwell's personal interests were best served by convincing Winwood to remain with Island. Although Island may, in fact, have been able to provide the same services, an independent manager may have advised Winwood not to take the risk, and would have been in a stronger negotiating position, using EMI as a wedge against Island to get the best possible deal for the artist.

129 *Personal Management*, *supra* note 9, at 155.

One example of an economic conflict involved singer-songwriter Bob Dylan and his personal manager Albert Grossman. Dylan signed his first publishing deal, with Dutchess Music, for a $500 advance. Dissatisfied with this original deal, Grossman convinced Dylan, who had yet to achieve a significant level of success, to repurchase his publishing rights from Dutchess. Six months after entering the Dutchess agreement, Dylan repurchased the publishing rights for $500. Grossman then reached an agreement with M. Witmark and Sons Publishing, which paid Dylan a $1,000 advance and Grossman 25% of the publishing royalties. At the end of the three-year contract, Grossman convinced Dylan to start his own publishing company. With the formation of Dwarf Music, Dylan's own publishing company, Grossman's stake increased to 50% of Dylan's total publishing income. This was in addition to his 20% managerial commission. Furthermore, the managerial commission was applied against Dylan's own 50% interest in the publishing royalties, giving Grossman a double commission on a single source of cash flow. ROCKONOMICS, *supra* note 2, at 114-15.

Grossman's advice was largely self-serving, exploiting Dylan's business naivete for his own benefit. Because Dylan was incensed by the exorbitant percentage taken by Grossman, he refrained from publishing songs for a five-year period to avoid sharing the income with Grossman. *See id.* at 117.

tally unfair.

C. *Resolution of Conflicts of Interest in the Music Industry*

Both American and English courts have confronted the problem of personal manager conflicts of interest in the music industry, although not framing the issue in terms of advisory and economic conflicts. Litigation in American courts has been limited, rendering it difficult to identify a specific American "doctrine." However, as a general proposition, American courts provide less protection for artists than English courts,[130] because American courts have been concerned with adhering to industry practices.

1. The American Approach

The classic example of an overreaching personal manager exploiting his influential position involves the personal manager for singer-songwriter Bruce Springsteen. Springsteen's rise to superstardom in the *Badlands*[131] of the music industry was not without incident. In *Laurel Canyon, Ltd. v. Springsteen*,[132] Bruce Springsteen's personal manager sought to enjoin Springsteen from selecting his own record producer, claiming that the record company—in which the personal manager held a substantial interest—possessed that right. Although the injunction was the primary question before the court, the personal manager's conflicts of interest were an important underlying issue.

In 1972, Springsteen, an unknown but talented musician, signed, on the hood of his car, a personal management agreement with aspiring record producer Mike Appel.[133] Springsteen also eventually signed separate exclusive music publishing and record production agreements with companies (collectively "Laurel Canyon") in which Appel held significant economic interests.[134] As a result of his superior bargaining position and in-

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130 *Exclusivity of Personal Services*, *supra* note 5, at 82.

131 © Copyright 1978 (words and music by Bruce Springsteen).

132 N.Y.L.J., Aug. 25, 1976, at 6, col. 1 (N.Y. Sup. Ct. Aug. 19, 1976), *aff'd*, 55 A.D.2d 882, 391 N.Y.S.2d 364 (1st Dep't 1977).

133 *See* MARSH, *supra* note 8, at 57, 60-61; *Fees or Famine*, *supra* note 5, at 15. The agreement was reportedly referred to as "a slavery deal" by an attorney who later read the agreement at the request of a CBS Records executive. Nevertheless, Springsteen had complete faith in his manager. MARSH, *supra* note 8, at 60.

134 MARSH, *supra* note 8, at 60-61; *Exclusivity of Personal Services*, *supra* note 5, at 82; Affidavit of Michael Appel at 16, Laurel Canyon Management, Inc. v. Springsteen, No. 17579/76 (N.Y. Sup. Ct. Sept. 24, 1976) (order of attachment to satisfy money owed under management agreement).

fluence over Springsteen, the contracts largely favored Appel and his Laurel Canyon companies.

The management agreement paid Appel commissions as high as 50% in "high earning situations."[135] Under the publishing contract, Springsteen irrevocably sold and transferred all of his compositions, and the copyrights thereto, to Laurel Canyon.[136] Laurel Canyon had sole discretion as to whether others would be granted permission to use the compositions. Springsteen's desires were not a consideration. Furthermore, the publishing royalties, typically the largest source of revenue for recording artists, were to be divided equally between Springsteen and Laurel Canyon.[137]

The recording contract required Springsteen to make five albums for Laurel Canyon. Laurel Canyon then signed an independent agreement with CBS Records for the manufacture and distribution of the records.[138] This agreement, an example of abusive overreaching by Appel, provided that Springsteen would make ten albums, and paid Laurel Canyon a record royalty percentage three times greater than that which Springsteen was to receive. This resulted in Springsteen earning approximately ten cents per record, while Laurel Canyon received about forty cents per album.[139] Springsteen, more concerned with completing his first album than with the details of the agreements, did not read the contracts, nor did he have them reviewed by an attorney.[140]

Finally realizing the inequity of his contracts, and believing that Appel's conduct had been improper, Springsteen, in preparation for renegotiations with Appel, in early 1976 requested that

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135 MARSH, *supra* note 8, at 189. *See* Rider to Management Agreement between Bruce Springsteen and Laurel Canyon Management, Inc. ¶ 15 (May 1, 1972) (manager's 50% commission was based on artist's gross income, less expenses); *see also* Complaint at 4, Springsteen v. Appel, 76 Civ. 3334 (S.D.N.Y. filed July 27, 1976) (manager was to receive 50% commission if artist's earnings exceeded $15,000 per week). The normal rate is 10-25%. *See supra* note 43.

136 The publishing agreement was for a five-year term and pertained to all compositions written prior to and during the five-year period. It provided in part: "The Writer hereby irrevocably sells, assigns, transfers, and delivers to the Publisher, its successors and assigns, all musical works which have been written, composed, created or conceived in whole or in part, . . . and the exclusive right to secure copyright therein throughout the entire world . . . ." Plaintiff's Complaint at 12, Laurel Canyon Management, Inc. v. Springsteen, No. 17579/76 (N.Y. Sup. Ct. Sept. 24, 1976).

137 *Id.* Appel believed he was entitled to such a large share because of the time and money he expended, including a second and third mortgage on his home, to make Springsteen a success.

138 MARSH, *supra* note 8, at 189.

139 *Id.* at 69, 189.

140 *See id.* at 61; *Fees or Famine*, *supra* note 5, at 15; *Exclusivity of Personal Services*, *supra* note 5, at 82.

accountants be allowed to audit Laurel Canyon.[141] The audit revealed that during a four-year period, Laurel Canyon received income of one to two million dollars from Springsteen generated revenue. In contrast, Springsteen's total income for the period totaled less than $100,000.[142] On July 27, 1976, after Appel refused to allow Jon Landau, a Springsteen confidant, to produce his next record, Springsteen filed suit in federal court alleging that Appel's conflicts of interest constituted a breach of his fiduciary duty as personal manager.[143]

Two days later Appel sought an injunction in New York Supreme Court to prevent Landau and Springsteen from recording together. In opposition to the motion, Springsteen asserted Appel's breach of fiduciary duty. The court found Springsteen in breach of contract for working with Landau. Relying on the "unique and extraordinary" talent clause contained in the recording contract, the court ruled that ordinary damages would be insufficient and therefore granted the injunction.[144] In issuing the injunction, the court did not expressly rule on the "underlying issue" of the validity of the three contracts.[145] The court stated, however, that there was "no showing that the contracts were obtained by fraud or duress or are unconscionable."[146] Soon after the injunction was issued, the parties settled out of court.[147]

In upholding the contracts, and by giving minimal consideration to their validity, the court seemed concerned only with the mere fact that Springsteen signed the contracts, and not whether he understood them.[148] By adopting such an approach, the court failed to hold Appel to his fiduciary obligations. The court ignored the fact that Appel, as personal manager, had great influ-

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141 *See* MARSH, *supra* note 8, at 189-90. It was at this point that Springsteen finally consulted an attorney who "immediately saw the unfairness of the contracts, and the conflicts inherent in Appel representing Bruce's overall career on one hand and acting as his record production company on the other." *Id.* at 190.

142 *Id.* at 194. This was the first audit conducted during the four-year period, although the contracts provided that an audit was to be conducted every three months. *Id.* Laurel Canyon, through management commissions alone—not including publishing and record royalties—received over $176,000, while Springsteen was left with less than $68,000. *See* Summary of Amounts Due, *supra* note 80.

143 MARSH, *supra* note 8, at 195. *See* Complaint, Springsteen v. Appel, 76 Civ. 3334 (S.D.N.Y. filed July 27, 1976).

144 Laurel Canyon, Ltd. v. Springsteen, N.Y.L.J., Aug. 25, 1976, at 6, col. 1, col. 2 (N.Y. Sup. Ct. Aug. 19, 1976), *aff'd*, 55 A.D.2d 882, 391 N.Y.S.2d 364 (1st Dep't 1977).

145 MARSH, *supra* note 8, at 204.

146 *Laurel Canyon*, N.Y.L.J., Aug. 25, 1976, at 6, col. 2.

147 The settlement freed Springsteen from his contracts with Appel, and CBS agreed to increase his commission rate. MARSH, *supra* note 8, at 205-06.

148 *Exclusivity of Personal Services*, *supra* note 5, at 82.

ence over Springsteen; failed to disclose material facts that might have impacted on Springsteen's decisions; and was receiving numerous and excessive commissions from Springsteen generated revenue. Moreover, the court did not take into account the absence of independent counsel when Springsteen signed the contracts.

The problem of conflicts of interest in the music industry surfaced again in the 1982 case of *Croce v. Kurnit*.[149] As the *Springsteen* court discussed the problem in a rather cursory manner, *Croce* is the leading case on personal manager conflicts of interest. In *Croce*, the court once again bound a naive artist to contracts entered into without negotiation, and failed to hold the personal managers to their strict fiduciary duties.

Croce involved nine causes of action, including claims of breach of fiduciary duty and unconscionability.[150] Ingrid Croce, the widow and estate representative of singer-songwriter Jim Croce, brought suit against Croce's recording, publishing, and personal management companies, as well as the attorney who drafted the contracts.[151] These companies were operated by common officers: Tommy West, Croce's college friend, Philip Kurnit, an attorney whom Croce had met prior to signing the contracts, and Terry Cashman, an associate of both West and Kurnit. These three, along with a fourth party, Eugene Pistilli, formed their own recording, publishing, and management companies (collectively "CP&W"), to which Croce was signed.

With hopes of pursuing a musical career, Croce, in September 1968, executed several agreements with the CP&W companies.[152] These included exclusive recording, publishing, and management contracts.[153] The only obligation placed on West, Kurnit, and Cashman under the contracts was to pay the Croces a total of $1,200 on an annual basis, and to make royalty payments based on sales of Croce's music.[154] Kurnit, who signed the contracts on behalf of the corporations, explained the contract terms to Croce but did not advise him to seek independent legal counsel. Consequently, Croce signed the agreements without in-

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149 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984).

150 *Id.* at 886.

151 *Id.* at 885-87.

152 *Id.* at 887.

153 *Id.*

154 *Id.* The defendants also retained all rights to Croce's performances and compositions. The court concluded that had Croce been represented by someone skilled in the music industry, terms of the agreements would have been more favorable to Croce. *Id.* at 894 n.7.

dependent representation.[155] There were, however, no allegations that Kurnit misled Croce[156]—when Croce signed the contracts, he was aware that Kurnit was a principal in the CP&W companies.[157]

Ingrid Croce asserted claims of breach of fiduciary duty and procedural unconscionability against Kurnit based on his role in signing the contracts on behalf of the companies while also appearing to act as Croce's attorney.[158] The court held that although Kurnit was not retained as Croce's attorney, "[e]ven in the absence of an express attorney-client relationship, . . . a lawyer may owe a fiduciary obligation to persons with whom he deals."[159] Further, the court stated that a lawyer is under a fiduciary obligation when persons who are not his clients have, or should have, cause to rely on him.[160] As a result of Croce's reliance on Kurnit, the court determined that Kurnit stood as Croce's fiduciary.

Although not representing Croce when the contracts were signed, the court determined that Kurnit became Croce's fiduciary because he was introduced to Croce as "the lawyer," and explained the complicated contracts to him. The court then found that Kurnit breached his fiduciary duty as Croce's "lawyer" because he was a principal in the transactions, did not advise Croce to retain independent counsel, and because Croce did not have such independent representation when signing the agreements.[161] Kurnit's unethical conduct resulted in the court holding him liable for Croce's legal expenses.[162] However, the court determined that the breach did not go to the root of the contracts

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155 When signing an artist to a contract, it is prudent practice to make sure the artist is represented by an attorney. If the artist declines to seek counsel, a clause should be included stating that the artist chose not to be represented. This will provide a certain degree of protection should the artist bring suit. Interview with Marks, *supra* note 10.

156 In fact, Kurnit later represented Croce in other matters, including issues relating to copyright royalties. *Croce*, 565 F. Supp. at 888.

157 *Id.* at 887. Croce knew that Kurnit was a shareholder and director of the CP&W companies.

158 The estate alleged that Kurnit acted as Croce's attorney when the first contracts were signed, "or in such a manner as to lead the Croces to reasonably believe that they could rely on his advice." *Id.* at 890.

159 *Id.*

160 *Id.* The court found that, although Kurnit did not act as Croce's attorney during the signing of the contracts, there was continuous representation because Kurnit served as counsel on various matters, including matters relating to the contracts. *Id.* at 891.

161 *Id.* at 890, 894 n.7.

162 *Id.* at 894. Kurnit's conduct breached his obligations under the A.B.A. Model Code of Professional Responsibility. *See id.* at 890 n.3. For a discussion of the ethical standards governing the legal profession, see *infra* notes 211-25 and accompanying text.

and therefore denied rescission.[163]

Turning to the other CP&W officers, the court found that the fiduciary duty "applie[d] not only to Kurnit's relationship but also . . . to West and Cashman, in whom the Croces placed their trust."[164] Although West and Cashman, like Kurnit, had an interest in the companies, the court, perhaps finding a more convenient target in the attorney, did not consider their failure to disclose their conflicting interests to constitute a breach of their fiduciary duties.[165] The court recognized the inherent conflict of the publishing, recording, and management contracts being controlled by the same entity, and also took note of Croce's dependence on his manager.[166] However, the court determined that "the conflict between [an] artist and [his] producer does not so completely overbalance the mutuality of their interest as to make management and recording contracts held or controlled by the same interests, . . . in and of itself, determinative of the issues of unfairness and unconscionability."[167]

In evaluating the contracts for unfair and unconscionable terms, the court stated that:

> [T]he contracts were hard bargains, signed by an artist without bargaining power, and favored the publishers, but as a matter of fact did not contain terms which shock the conscience or differed so grossly from industry norms as to be unconscionable by their terms. The contracts were free from fraud and although complex in nature, the provisions were not formulated so as to obfuscate or confuse the terms. . . . Because of the uncertainty involved in the music business and the high risk of failure of new performers, the contracts, though favoring the defendants, were not unfair.[168]

The court concluded that "the contracts were neither unconscionable nor unfair and that Cashman and West did not breach a fiduciary

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163 Croce would have been entitled to the return of the master tapes and copyrights had the court granted rescission. *Croce*, 565 F. Supp. at 894.

164 *Id.* at 891.

165 For a discussion of the high standard of conduct required by fiduciaries, see *supra* notes 93-104 and accompanying text.

166 There was substantial testimony at trial regarding the problem of personal managers having interests in recording and publishing companies. *Croce*, 565 F. Supp. at 893.

167 *Id.* The court defined unconscionable contracts as those which affront decency and "involve[] gross onesidedness, lack of meaningful choice and susceptible clientele." *Id.* at 892. Claims of unconscionability require demonstrating an absence of meaningful choice by one party along with contract terms unreasonably favoring the other party. *Id.* For a discussion of the elements of claims of unconscionability, see *supra* notes 78-83 and accompanying text.

168 *Croce*, 565 F. Supp. at 893.

duty"[169] despite their failure to explain the inherent conflict posed by a personal manager controlling the artist's publishing and recording rights, or to seek offers from other interested parties. Croce's lack of bargaining power, absence of independent representation, and terms favoring the stronger party were also not given adequate consideration by the court.

A claim of unconscionability requires a showing that the contract was both substantively and procedurally unconscionable when formed.[170] To determine the substantive aspect, the court examined standard industry practices and found the terms of the agreements to be consistent therewith.[171] Further, the court did not consider the contracts to be procedurally unconscionable because they lacked "haste and high pressure tactics" and "did not provide for the sole benefit of the defendants."[172] The court, therefore, found Croce's only remedy to lie in damages for the attorney's breach of fiduciary duty.

The American approach, as evidenced by *Croce* and *Springsteen*, has not been favorable to recording artists confronted with overreaching personal managers. In fact, the courts have refused to apply a strict standard of review to the artist-personal manager relationship for fear of infringing on industry practices.[173] While the courts have employed the customary device of evaluating contracts against their commercial background, this general rule is not well-suited for analyzing artist contracts in the music industry. Eager for any opportunity, artists place their trust in personal managers, and, lacking bargaining power and independent representation, have traditionally been pressed into onerous contracts.[174] Because it has been the industry's practice to exploit artists, the court's deference to industry norms merely perpetuates a vicious cycle of artist abuse. Accordingly, industry norms are an unacceptable standard for determining the conscionability of artist contracts in the music

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169 *Id.*

170 *See supra* notes 78-83 and accompanying text.

171 " 'Whether a contract or any clause of the contract is unconscionable is a matter for the court to decide against the background of the contract's commercial setting, purpose, and effect.' " *Croce*, 565 F. Supp. at 893 (quoting Wilson Trading Corp. v. David Ferguson, Ltd., 23 N.Y.2d 398, 403-04, 244 N.E.2d 685, 688, 297 N.Y.S.2d 108, 112 (1968)).

172 *Id.* (citation omitted). The court noted that Croce earned "millions of dollars." *Id.* This was probably more attributable to Croce's immense talents than to favorable contract terms.

173 *See* ABKCO Music, Inc. v. Harrisongs Music, Ltd., 722 F.2d 988, 995 (2d Cir. 1983) (strict scrutiny would "probably not suit the realities of the business world").

174 *See generally* EXPENSIVE HABITS, *supra* note 2, at 20-23 (describing the travails of artists and their bad contracts).

industry.[175]

Furthermore, *Croce* and *Springsteen* are inconsistent with other decisions affording greater protection to artists. American courts have enforced the strict fiduciary duties of personal managers in other entertainment fields,[176] and English courts have provided substantial protection for recording artists from overreaching personal managers.[177] In one American case, *Gershunoff v. Panov*,[178] the court found a breach of fiduciary duty by a personal manager, Maxim Gershunoff, for failure to disclose conflicts of interest to his clients.

The case involved world renowned ballet stars Valery and Galina Panov (the "Panovs"), who emigrated to Israel from Russia. Gershunoff, their manager, also acted in the capacity of ballet impresario.[179] As manager, Gershunoff promoted the artists and obtained engagements for them in exchange for commissions of 20% for each performance. When the Panovs performed at an event produced by Gershunoff, the commission was to be negotiated.[180] The contract required that Gershunoff disclose the nature of his role so that if acting as impresario, the commission rate could be negotiated.[181]

As the Panov's manager, Gershunoff convinced the Panovs to give several performances for a fee of $10,000 per performance. In addition, the Panovs were to be paid $25,000 for their premier performance, a fact not disclosed by Gershunoff. Gershunoff received an advance of $12,500 from the producer and claimed that he was entitled to it as his fee for serving as impresario.[182] Gershunoff failed to reveal the prepayments or the full amount of the performance fees, contending that, as impresario, he bore the risks of financial loss and was therefore entitled to the money.

The court determined that Gershunoff's "egregious" conduct was "entirely incompatible with the duty owed by [a] manager . . . to

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[175] *See* Buchwald v. Paramount Pictures Corp., 90 L.A. Daily J. App. Rep. 14482, Dec. 26, 1990 (L.A. Super. Ct. Dec. 21, 1990) (invalidating as unconscionable certain provisions of the standard movie studio net profit formula).

[176] *See* Gershunoff v. Panov, 77 A.D.2d 511, 430 N.Y.S.2d 299 (1st Dep't 1980) (ballet); Pryor v. Franklin, No. TACIT MP1114 (Cal. Lab. Comm'r Aug. 18, 1982) (comedy/films), *cited in Fees or Famine*, *supra* note 5, at 19; Detroit Lions, Inc. v. Argovitz, 580 F. Supp. 542 (E.D. Mich. 1984), *modified*, 767 F.2d 919 (6th Cir. 1985) (sports).

[177] For a discussion of the English cases, see *infra* notes 186-210 and accompanying text.

[178] 77 A.D.2d 511, 430 N.Y.S.2d 299 (1st Dep't 1980).

[179] An impresario is essentially the producer of the show, the person who risks funding the event. Any profits resulting from the performances belong to him. *Id.* at 512, 430 N.Y.S.2d at 300-01.

[180] *Id.* at 511, 430 N.Y.S.2d at 300.

[181] *See id.*, 430 N.Y.S.2d at 300.

[182] *See id.* at 512, 430 N.Y.S.2d at 301. The contracts did not support Gershunoff's claim that he was an impresario of the event.

his principals."[183] Gershunoff shirked this duty by failing to disclose the fee arrangements and abide by the contract requiring negotiation of fees when acting as impresario. Furthermore, Gershunoff's receipt of an advance payment exceeding his obligation to the Panovs and his refusal to render an accounting of all fees when requested to do so, violated the " 'minimal obligations imposed upon an agent who acts for his principal.' "[184] Additionally, the court considered Gershunoff's concealment and misrepresentation of previous fee arrangements as factors in awarding the Panovs over $236,000.[185]

The court's decision reflects concern for artists inexperienced in business who entrust their affairs to a double-dealing manager. The court recognized the artists' susceptibility to the machinations of a manager who was unchecked in the transactions he arranged and, therefore, acted to hold the manager to his strict fiduciary duties.

2. The English Approach

In contrast to the American decisions, English courts have recognized the extensive influence personal managers in the music industry wield over artists. In what has been labelled the "English music trilogy,"[186] English courts have uniformly protected recording artists from overreaching managers. The reasoning of these opinions focuses on the bargaining power of the parties, the faith and trust artists place in their managers, the absence of independent representation, and the resulting leverage managers have in imposing contract terms.

The first case in the trilogy, *A. Schroeder Music Publishing Co. v. Macaulay,*[187] involved a struggling artist, Macaulay, who in 1966 signed a standard form publishing contract with A. Schroeder Music Publishing Co. ("Schroeder"). This contract granted to Schroeder the exclusive right to Macaulay's songwriting services. Four years later, Macaulay successfully sought to have the publishing contract deemed void as an unreasonable restraint of trade that was contrary to public policy.[188] In deeming the con-

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183 *Id.*, 430 N.Y.S.2d at 301.

184 *Id.*, 430 N.Y.S.2d at 301 (quoting decision of trial court). For a discussion of the fiduciary obligations of agents, see *supra* notes 93-104 and accompanying text.

185 *Gershunoff*, 77 A.D.2d at 511, 430 N.Y.S.2d at 300.

186 *British Invasion*, *supra* note 12, at 214. The trilogy involves recording artists who signed standard form contracts.

187 [1974] 3 All E.R. 616 (HL). For a more detailed discussion of the background of this case, see EXPENSIVE HABITS, *supra* note 2, at 70-76.

188 *Schroeder*, [1974] 3 All E.R. at 618. The agreement was to be for a five-year period,

tract void, the court distinguished between standard contract forms entered into willfully by parties in equal bargaining positions or resulting from negotiation, and standard contract forms lacking negotiation, dictated by the party in superior bargaining position. The court recognized that while successful artists have bargaining leverage to negotiate more favorable contracts, unknown artists, such as Macaulay, must generally sign whatever is placed before them.[189]

The standard form agreement signed by Macaulay was not negotiated. As a result, it was one-sided, placing total responsibility on Macaulay while Schroeder was under no affirmative obligation. The contract required that Macaulay assign to Schroeder the copyrights in all his works, while Schroeder was neither obligated to publish the works, nor required to return the copyright in any song not published. Schroeder had total discretion regarding publishing decisions, and Macaulay had no power of termination if Schroeder chose not to publish the songs. Further, Macaulay was not entitled to any payment from Schroeder unless the songs were published. In the absence of any obligation on Schroeder's part, the court held that binding the composer for such an extended period of time constituted an unreasonable restraint of trade.[190]

The second case in the trilogy, *Clifford Davis Management Ltd. v. WEA Records Ltd.*,[191] was decided only a few days after *Schroeder* and also addressed the issue of unequal bargaining power, but in the context of the artist-personal manager relationship and conflicts of interest. Clifford Davis was the manager of the immensely successful popular music group Fleetwood Mac. Christine McVie and Robert Welch were two of the group's prominent composers, who, though talented in music, were inex-

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automatically extended to ten should the royalties in the initial five-year period equal or exceed £5000. This represented a minimal amount, assuring that if his work met with any success, Macaulay would be bound for ten years. Macaulay assigned to Schroeder the worldwide copyright in every composition, including collaborative works. Schroeder was to pay Macaulay a £50 advance recoupable against royalties. The royalty rate payable to Macaulay ranged from 10-50%, with Schroeder retaining the remainder. No contract clause required Schroeder to actually publish Macaulay's works. Also, Schroeder had the right to terminate, while Macaulay had no corresponding power. *Id.* at 618-21.

189 *See id.* at 622. A party's superior bargaining position, allowing him to adopt a take it or leave it attitude, does not raise a presumption of unconscionability. However, the court must be diligent to assure that the contract is not an unconscionable bargain. *Id.* at 624 (opinion of Lord Diplock).

190 *Id.* at 622. The court indicated that had the contract contained a clause allowing Macaulay to terminate the agreement in the event Schroeder decided not to publish his works, the outcome may have been different. *Id.*

191 [1975] 1 All E.R. 237 (CA). For more on the background of this case, see EXPENSIVE HABITS, *supra* note 2, at 55-59.

perienced in business.[192] Davis convinced both of them to sign separate publishing agreements with him.[193]

Fleetwood Mac and Davis eventually had a falling out and parted ways. McVie and Welch continued writing, and the group released a new album, *Heroes are Hard to Find*, under new management. WEA Records was granted the right to distribute the album in England. Davis, however, claimed that under the publishing contracts, he retained the exclusive copyrights in works by McVie or Welch up to 1981, and brought suit seeking an interim injunction restraining the sale of the album in England.[194]

The Court of Appeal, in reversing the lower court's grant of the injunction, relied on *Schroeder* to find unequal bargaining power and render the contracts invalid. The vast inequality of bargaining power between Davis and the group members enabled him to impose an unenforceable "stranglehold" publishing agreement—terms of which the court considered "amazing"—on the composers.[195] The court identified several factors forming the basis of its decision. First, in negotiating the publishing agreement, the composers' bargaining power was "gravely impaired" by having to confront their personal manager as adversaries. The group's success was dependent on their music being published. They relied on Davis to direct them in business transactions and expected him to arrange for equitable agreements. Under the executed publishing agreements, however, Davis retained for himself complete discretion in deciding whether or not to publish the compositions, and was obligated to do little more

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192 *Clifford Davis Management*, [1975] 1 All E.R. at 237.

193 *Id.* at 239; EXPENSIVE HABITS, *supra* note 2, at 56. Terms of the publishing deals were essentially as follows:

The agreements were for five years, with Davis having the option to extend them to ten. All compositions were to be given to Davis, who then became entitled to the worldwide copyrights in all the compositions. He was at liberty to convey the copyrights to any other party, whether or not in the music industry, regardless of the composer's desires. McVie was obligated to deliver at least one composition each month. Davis, however, as publisher, was empowered to reject the works. If he accepted a work, he was required only to pay one shilling. Acceptance did not obligate him to publish the song. If the composition was published the composers were entitled to 10% royalties on sales of sheet music and 50% royalties on record sales. *Clifford Davis Management*, [1975] 1 All E.R. at 239.

One commentator described these contract terms as "funny, quite unbelievable and perversely courageous" and "so open to ridicule and annulment in any courtroom that Clifford Davis must have had a strange mixture of guts and stupidity even to try them on." Yet he knew Welch and McVie would agree to them. EXPENSIVE HABITS, *supra* note 2, at 56.

194 *Clifford Davis Management*, [1975] 1 All E.R. at 239.

195 *Id.* Terms of the contract are summarized *supra*, note 193.

than pay minimal compensation.[196]

Next, the court considered the personal manager's ability to unduly influence[197] the composers. The court inferred from the nature of the contracts that the manager used a standard contract form. McVie and Welch signed these agreements without any explanation or opportunity to read them. Davis was their sole advisor. Given the nature of the artist-personal manager relationship and the onerous terms imposed on his clients, the court determined that Davis "ought to have seen that the composer[s] had independent advice."[198]

Finally, the court considered the contract terms to be "manifestly unfair" as the composers were bound for ten years while the publisher had no corresponding obligation. The court determined that the consideration for the copyright transfers was "grossly inadequate."[199] As a result, the court held that the inequality of bargaining power rendered the agreements unenforceable, and set aside the copyright assignments.[200]

After *Davis*, there were four principle factors to consider in determining the validity of music contracts: 1) whether the terms of the contract were manifestly unfair; 2) whether there was inadequate consideration for the transfer of copyrights; 3) whether there was impaired bargaining power resulting from the personal manager serving as publisher; and 4) whether undue influence was asserted by the manager for his own benefit and whether there was an absence of independent representation.[201] Artists could assert the presence of these factors as the basis for claims against overreaching personal managers.

In the final case of the trilogy, *O'Sullivan v. Management Agency and Music Ltd.*,[202] the Court of Appeal further explored the undue influence personal managers exert on their clients and expanded on *Clifford Davis Management* by suggesting that since personal managers stand in a fiduciary capacity, they should be required to assure that artists receive independent counsel.

In February 1970, Gilbert O'Sullivan, a young and unknown singer-songwriter of popular music, entered into a personal man-

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196 *See Clifford Davis Management*, [1975] 1 All E.R. at 240.

197 For a discussion of claims of undue influence, see *supra* notes 84-91 and accompanying text.

198 *Clifford Davis Management*, [1975] 1 All E.R. at 241.

199 *Id.* at 240.

200 *Id.* at 241.

201 *See id.* at 240-41; *British Invasion*, *supra* note 12, at 220.

202 [1985] 3 All E.R. 351 (CA). For a more detailed discussion of the background of this case, see EXPENSIVE HABITS, *supra* note 2, at 76-86.

agement agreement with Gordon Mills, the successful manager of performers such as Tom Jones and Engelbert Humperdinck. O'Sullivan also eventually signed exclusive record production and music publishing contracts with companies in which Mills was a substantial shareholder.[203] O'Sullivan achieved great success but his relationship with Mills deteriorated due to disputes concerning the production of his recordings and Mills' failure to establish a joint publishing company with him.[204]

As a result of the continuing disputes and dissatisfaction with his contracts, O'Sullivan brought suit seeking to have the contracts declared void, claiming undue influence and unreasonable restraint of trade. The trial court held for O'Sullivan, finding that the contracts were obtained by undue influence because of the "special relationship between O'Sullivan and [Mills]."[205] The trial court evaluated the contracts and after recognizing the complete control Mills had over O'Sullivan's career, found that Mills "knew that it would be unjust and unfair to expect O'Sullivan to know where his best interests lay without independent legal and professional advice."[206] Mills probably would not have convinced O'Sullivan to agree to such unfavorable terms had O'Sullivan received independent representation.[207]

The court's finding that Mills breached his fiduciary duty by failing to urge O'Sullivan to seek independent advice and by exerting undue influence on O'Sullivan was not challenged on ap-

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203 *O'Sullivan*, [1985] 3 All E.R. at 355. Mills was entitled to 20% of all earnings under the management contract. *Id.* The recording agreement paid O'Sullivan only 5% in the United Kingdom and 3.5% elsewhere. EXPENSIVE HABITS, *supra* note 2, at 79. Other artists with independent managers could receive at least 8%. *Id.* Under the publishing contract, O'Sullivan surrendered the copyrights in all his songs to Mills. *Id.* The harshness of the deals was obvious. Sales of O'Sullivan's second album, *Back to Front*, grossed £1,700,000, but O'Sullivan netted only £60,000. *Id.* at 81 n.*.

204 *O'Sullivan*, [1985] 3 All E.R. at 356. A joint publishing company is a valuable asset for a composer. Under a co-publishing agreement, the composer and publisher would establish a publishing company in which each would have a 50% interest. The composer would assign the copyrights in his compositions to the company in exchange for a royalty. In addition to the royalty, the composer would retain 50% ownership of the copyrights. This allows a composer to retain some control over his works. *Id. See* Sukin & Edell, *Analysis and Negotiation of Music Publishing Agreements*, in COUNSELING CLIENTS IN THE MUSIC AND RECORDING INDUSTRY 3, 11 (1989) (purpose of co-publishing agreement is for songwriter to retain portion of copyright and participate in publisher's 50% of income).

205 *O'Sullivan*, [1985] 3 All E.R. at 357. Mills, for his part, conceded that as manager, he stood as a fiduciary to O'Sullivan, but disputed that his publishing and recording companies were also fiduciaries. *Id.* at 358.

206 *Id.*

207 *Id.* To maintain the validity of the agreements, Mills was required to show that they "were the consequence of the free exercise of O'Sullivan's will in the light of full information regarding the transaction. That has not been done. He had no independent advice about these matters at all." *Id.* at 369 (opinion of Lord Fox).

peal. The issue on appeal, rather, was whether the recording and publishing companies stood in fiduciary relationships with O'Sullivan. The Court of Appeal determined that O'Sullivan considered Mills and the recording and publishing companies to be one and the same. In fact, according to the court, these companies were chiefly responsible for handling all of O'Sullivan's affairs, including management. Because the recording and publishing companies

> knew they were dealing with a young and inexperienced man who was content to put himself entirely in their hands and relied entirely on them to give him a fair deal [and because they] were responsible for the contractual arrangements . . . they were just as much in a confidential relationship to O'Sullivan as was Mills himself.[208]

Thus, the court found that the record and publishing companies were fiduciaries and that the agreements were obtained by undue influence. The court held the contracts voidable and ordered an accounting of profits to O'Sullivan less reasonable remuneration for work performed by the defendant companies. It also ordered the return of the master recordings and copyrights to O'Sullivan.[209]

As noted by one commentator, "The *O'Sullivan* case places an awesome burden on managers who also act as publishers or record companies."[210] The decision reflects a consistent English approach highly protective of recording artists. English courts consider a personal manager's exertion of undue influence and imposition of onerous contract terms on vulnerable, unrepresented artists to constitute a breach of the manager's fiduciary duties. Artist-personal manager agreements entered under such circumstances are set aside by the English courts. American courts, in contrast, rely on industry practices to justify enforcing such agreements. The English courts recognize artists' unequal bargaining power and the resultant ability of managers to impose onerous contract terms on artists lacking independent advice, and therefore require that artists be provided with independent counsel. American courts should adopt a similar requirement.

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208 *Id.* at 358. *See also* John v. James, High Court of Justice, Chancery Division, 1982 J. No. 15026 (Nov. 29, 1985), *cited and discussed in British Invasion, supra* note 12, at 226-31 (artist-publisher and artist-record company relationships are fiduciary by nature).

209 *O'Sullivan*, [1985] 3 All E.R. at 368-69.

210 *British Invasion, supra* note 12, at 223.

VI. CONFLICT OF INTEREST RULES GOVERNING LAWYERS

Attorneys play prominent roles in the music industry, both in a legal capacity and increasingly as personal managers. Since the contractual relationships around which the music industry revolves often create the potential for conflicts of interest, attorneys must be concerned with the rules governing their conduct in conflict situations.[211] Attorney conduct is governed by either the A.B.A. Model Code of Professional Responsibility ("Model Code") or the A.B.A. Model Rules of Professional Conduct ("Model Rules"), depending on the state where the attorney practices.

The Model Code and the Model Rules establish different guidelines for attorney conduct in conflict of interest situations. The Model Code prohibits an attorney from pursuing an independent business relationship with a client when two conditions are present: 1) the lawyer and client have differing interests; and 2) the client believes the lawyer will be using his legal judgment for the client's protection. However, the client can nonetheless give his consent to such a relationship.[212] The Model Rules impose much stricter requirements on an attorney seeking to pursue a business relationship with a client outside the representation. The Model Rules prohibit an attorney from entering a business transaction with a client unless:

> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;
> (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and
> (3) the client consents in writing thereto.[213]

In addition to the Model Code and Model Rules, California has adopted its own code of ethical conduct, which is very similar to the Model Rules. The California rules prohibit an attorney from acquiring interests adverse to a client unless: 1) the transaction and its terms are fair to the client, and such terms are fully disclosed to the

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211 *Ethical Aspects*, *supra* note 4, at 451-52.

212 MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-104(A) (1983). *See* Greene v. Greene, 47 N.Y.2d 447, 391 N.E.2d 1355, 418 N.Y.S.2d 379 (1979) (construing the Code as adopted in New York, court held that attorneys representing plaintiff in an action against attorneys' former law firm might be liable on the claim, therefore creating substantial conflicts of interest). New York's code of professional resonsibility has been amended, effective September 1, 1990, but Disciplinary Rule 5-104 was not affected.

213 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (1989).

client in a writing that can be reasonably understood; 2) the attorney advises the client, in writing, that the client may seek independent advice, and the client is given a reasonable opportunity to obtain such advice; and 3) the client consents in writing to the terms of the transaction.[214]

A case addressing the problem of attorney conflicts of interest in the entertainment industry is *Day v. Rosenthal*.[215] This case involved the entertainer Doris Day, her husband Martin Melcher (together, the "Melchers"), and their attorney Jerome Rosenthal. For a period of sixteen years, Rosenthal served not only as the Melchers' attorney, but also as business manager, investment advisor, and record keeper. The Melchers, like many artists, were unsophisticated in financial and business matters, and relied entirely upon their manager to perform these duties.[216]

Rosenthal took advantage of his clients' unyielding trust by establishing certain business ventures which proved to be disastrous for the Melchers, but profitable for him. Over a period of twelve years, the Melchers lost over $4 million in oil and gas joint ventures, while Rosenthal collected secret profits of over $400,000.[217] In another joint venture, the Melchers contributed over $1 million, while Rosenthal, an "equal" partner, put up less than $74,000, most of which was borrowed from Melcher.[218] Other Rosenthal ventures involving the Melchers' money included a sham tax shelter in which both Rosenthal and another client had interests that were not disclosed to the Melchers, and hotel deals in which Rosenthal used the Melchers' money to run the hotels as if they were his own. The Melchers invested over $3 million in the hotel venture, but, according to the trial court, the money went directly into Rosenthal's pockets.[219]

Rosenthal's primary influence was on Melcher, not Day. To ensure the availability of funds, Rosenthal persuaded Melcher to enter into a personal management agreement with Day, paying Melcher 25% of Day's gross income. That money proved insufficient to finance Rosenthal's schemes, so Rosenthal persuaded Melcher to take

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214 Rules of Professional Conduct, Rule 3-300, in CALIFORNIA RULES OF COURT (State) (West 1990). The Rules were passed pursuant to the California Business and Professions Code. CAL. BUS. & PROF. CODE §§ 6076, 6077 (Deering, 1991).

215 170 Cal. App. 3d 1125, 217 Cal. Rptr. 89 (Cal. Ct. App. 1985), *cert. denied*, 475 U.S. 1048 (1986).

216 *See id.* at 1135, 217 Cal. Rptr. at 94-95.

217 *Id.* at 1136, 217 Cal. Rptr. at 95.

218 *See id.* at 1136-37, 217 Cal. Rptr. at 95. The Melchers also paid Rosenthal $230,000 in "legal fees," "overhead expenses," and "profit distributions" related to the ventures.

219 *See id.* at 1136-40, 217 Cal. Rptr. at 95-97.

Day's money without her knowledge or consent in the form of "loans" to a Melcher-owned company. That company would then loan the money directly to Melcher or the Rosenthal venture needing the money.[220]

Day fired Rosenthal after her husband's death. Rosenthal responded by instituting eighteen legal proceedings against his former clients.[221] The appellate court, in affirming the trial court, determined that Rosenthal's activities breached California's Rules of Professional Conduct.[222] According to the court, Rosenthal, upon entering an agreement which gave him such broad authority in his dealings with the Melchers, "had an obligation to provide a full disclosure of the true implications of the agreements. He never adequately informed them, and he didn't advise them to obtain independent legal advice. They signed the agreements in all innocence and as a result of undue influence."[223] Rosenthal placed his interests ahead of the Melchers', did not disclose conflicts of interest, failed to provide independent and competent legal counsel, took secret profits, and exposed the Melchers to losses and liability.[224] Rosenthal's conduct thus constituted legal malpractice, breach of fiduciary duty, fraud, and abuse of process. The court awarded the Melchers over $26 million, including $1 million in punitive damages in an effort to put the Melchers " 'back to a position as if they had not become enmeshed in the machinations of Rosenthal's twisted sense of professional responsibility.' "[225]

When attorneys act in a managerial capacity, they are held to the strict ethical obligations of the legal profession. Since the artist-personal manager relationship is similarly fiduciary in nature, personal managers who are not attorneys should be held to the rigorous standards required of all fiduciaries. Because of the long history of artist explortation, courts should examine artist-personal manager agreements with the same strict scrutiny with which they review attorney-client transactions.

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220 *Id.* at 1140, 217 Cal. Rptr. at 97-98.

221 *Id.*, 217 Cal. Rptr. at 98.

222 The court applied the Rules of Professional Conduct that were in effect during the course of Rosenthal's representation of the Melchers. *Id.* at 1148 n.13, 217 Cal. Rptr. at 103 n.13. The applicable Rules prohibited a lawyer from acquiring interests adverse to a client, accepting employment adverse to a client without that client's consent, accepting adverse employment without disclosing his relationship and interest in the subject of the employment, and representing conflicting interests without the consent of all the parties involved. *Id.* at 1148, 217 Cal. Rptr. at 103.

223 *Id.* at 1136, 217 Cal. Rptr. at 95.

224 *Id.* at 1148, 217 Cal. Rptr. at 103.

225 *Id.* at 1135, 217 Cal. Rptr. at 94 (quoting trial court).

VII. CONCLUSION

The artist-personal manager relationship is one of principal-agent, and as such, personal managers must adhere to the rigid standards required of fiduciaries. Though recognizing the fiduciary character of the relationship, American courts have nonetheless upheld onerous contracts imposed by overreaching personal managers on the grounds that the exploitive contract terms were consistent with industry norms.[226] Because personal managers frequently abuse their positions to promote their own interests, artists are in need of greater protection than they are currently afforded. This protection can be achieved through legislation stipulating the fiduciary nature of the relationship and imposing guidelines for personal manager conduct in conflict of interest situations.[227]

The agency principles discussed in *Detroit Lions, Inc. v. Argovitz*,[228] along with the prescriptions established in the English music trilogy[229] and the Model Rules of Professional Responsibility[230] form the basis of the proposed legislation. The rules of agency require fiduciaries to disclose information which might influence their principals, including the presence of conflicting interests. Effective legislation would require that personal managers disclose such information to their clients in writing, in easily understandable terms delineating the nature of the conflicts. In addition, the legislation should require that the contract terms be fair and reasonable, and that they be explained in a writing that is easily understood by the artist. If the artist wishes to proceed with the relationship after reading both the disclosure statement and the contract provisions, the legislation should require that the artist acknowledge having read them and that he manifest his consent in writing.[231]

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226 *See* Croce v. Kurnit, 565 F. Supp. 884 (S.D.N.Y. 1982), *aff'd*, 737 F.2d 229 (2d Cir. 1984). For a discussion of the *Croce* decision, see *supra* notes 149-72 and accompanying text.

227 Other commentators have also suggested the need for regulation. *See Fees or Famine*, *supra* note 5, at 24-26 (summarizing earlier proposals and recommending legislation that would define the role of personal managers and impose licensing requirements); *see also Fiduciary Aspects*, *supra* note 39, at 120 (suggesting legislation based on agency and attorney-client principles); Interview with Marks, *supra* note 10 (recommending that legislation be considered to protect artists' rights).

228 580 F. Supp. 542 (E.D. Mich. 1984), *modified*, 767 F.2d 919 (6th Cir. 1985). For a discussion of *Detroit Lions*, see *supra* notes 105-23 and accompanying text.

229 For a discussion of the cases making up the English music trilogy, see *supra* notes 186-210 and accompanying text.

230 For a discussion of the rules governing attorney conduct in conflict of interest situations, see *supra* notes 211-25 and accompanying text.

231 *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8 (1989).

The fiduciary duty of using best efforts requires that personal managers exploit the "wedge" created by multiple parties bidding for the artist's services.[232] Therefore, when an artist signs with a publishing or record company in which the personal manager has an interest, this proposed legislation would require that the personal manager prove that the terms were as fair as any that could have been obtained through a third, independent party. Finally, any meaningful legislation would require that personal managers recommend that artists seek independent representation in all contractual dealings with their managers.[233] If the artist declines to seek independent advice, a statement that he chose to ignore the recommendation should be included in the contract. If a personal manager can prove that he complied with the stipulated elements of this proposed legislation, he will have satisfied his fiduciary obligations. This proposal is fair to both artists and personal managers as it affords greater protection for artists while still enabling personal managers to pursue other business interests.

Hal I. Gilenson

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232 *See Detroit Lions*, 580 F. Supp. at 546.

233 *See* Clifford Davis Management Ltd. v. WEA Records Ltd., [1975] 1 All E.R. 237 (CA); O'Sullivan v. Management Agency and Music Ltd., [1985] 3 All E.R. 351 (CA). For a discussion of these cases, see *supra* notes 191-210 and accompanying text.