ATTORNEY RICKY ANDERSON
WALT CHAMPION

MUSIC INDUSTRY CONTRACTS

Cases and Forms

Wolters Kluwer

ASPEN SELECT SERIES

MUSIC INDUSTRY CONTRACTS
CASES AND FORMS

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This book is dedicated to my wife Toi, our Daughter Alysia,
and our Son Ricky II, for their continued support.
Watching our children mature in the Entertainment Industry is
PRICELESS.
That's right, Team Anderson always working!!!

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To my many, many family members, Omega Psi Phi Fraternity Brothers, and friends, who are too many to include or the publisher will terminate my Publishing Agreement, please know that you are loved and appreciated.

Attorney Ricky Anderson
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Chapter 1
Introduction

In our other book, *Entertainment Law: Cases, Documents, and Materials*, the authors looked at entertainment law through the unique eyes of the entertainment industry. Here, we have entitled our book *Music Industry Contracts: Cases and Forms*, and we now look at music industry contracts with the caveat that, essential to all aspects of music production and performance, there must be a mechanism for payment to the artist. There is no free lunch. Art for Art's sake, money for God's sake! The forms are vitally important to that payment scheme—why spend thousands of hours perfecting your talents and spending likewise thousands of dollars to make your performances marketable and commercial if there is no remuneration? Another aspect of this scheme is the "handlers" of the creative people (the talent—performers, producers, etc.); e.g., management, booking agents, roadies, etc.

Paid musicians have been a part of our society since the hunters and gatherers learned to grow crops, domesticate animals, and congregate in towns. This led to leisure time (a concept Rae Dawn Chong did not know in *Quest for Fire*), which necessitated that music could now be a paid vocation. Why toil in the fields when you can make more money playing the lute?

The case of *Lumley v. Wagner* involves the famous mezzo-soprano, Johanna Wagner (niece of composer Richard Wagner) who was the DIVA of her age, who sought the right to terminate her performance with Benjamin Lumley to sing exclusively at Her Majesty's Theatre on Haymarket from April 1, 1852, for three months, two nights a week. Frederick Gye, who ran Convent Gardens, wanted to break the contract with Her Majesty's Theatre. Gye acted maliciously. Lumley sought and was granted an injunction to stop Wagner from performing at the Convent Gardens.

Johanna Wagner appealed the granting of the injunction—the crux of the problem was whether the injunction constituted indirect specific performance. The order prohibited her from performing in any place other than at Her Majesty's Theatre during the contractual period. The judge stated that you cannot "suffer them to depart from contracts at their pleasure." "It is true that I have not the means of compelling her to sing . . . . The jurisdiction which I now

exercise is wholly within the power of the court." *Lumley v. Gye* 118 E.R. 749 (1854, QB, Crompton, J.) asserts that one may claim damages from a third person who interferes in the performance of a contract by another. This is a nascent example of the tort of tortious interference of a business relationship, when the interference is malicious and causes great and immediate damages.

Recording contracts are usually the first step in the direction of a musical career. "We in the music industry depend on our contracts. They are the one thing that gives our industry some order. We need that (contractual) guarantee so the artists that are successful will continue making records for us, and we can reinvest those profits in new artists. It's important that everyone respect the sanctity of the contracts, otherwise there would be chaos." (Terry Ellis, Imago Records, suing DreamWorks Records for $40,000,000, quoted in Daily Variety, June 12, 1996, reprinted in Richard Schulenburg, Legal Aspects of the Music Industry 10 (1999)). Usually, the recording company will offer a contract to the would-be entertainer that is one-sided but adds a clause saying that it is a legal document and should be reviewed by an attorney. Like they say in boxing, protect yourself at all times.

All music industry contracts are legal documents and should be reviewed by an attorney. There should be a clause at the end of each contract that reminds you that this is a legal, binding contract and legal advice might be necessary. If there is no such clause, then you should really seek legal advice. There are many types of "music industry contracts," such as publisher agreements, management contracts, production agreements, recording contracts, distribution agreements, foreign distribution agreements, ASCAP and BMI agreements, booking agent contracts, performance contracts (including riders), promotion contracts, merchandising contracts, touring agreements, film and TV music contracts, video game music agreements, and internet and/or phone-based music agreements.

With apologies to the memory of Professor Williston; the first stage of the contracting process is the formation of a contract which can be divided into offer and acceptance. After formation, there might be an interpretation of the contract, which could include an analysis of terminations, assignments, defenses, or remedies that might accompany an alleged breach of contract. It is readily admitted that there is no entirely satisfactory definition of the term "contract." One definition is that "[a] contract is a promise, or set of promises, for breach of which the law gives a remedy, of the performance of which the law in some way recognizes as a duty" (1 Williston, Contracts Section 1:1 (4th ed. 1990), as quoted in Joseph Perillo, Calamari and Perillo on Contracts 1 (5th ed., 2003)).

"The whole point of a contract is to create legal consequences." (Thomas Haggard, Contract Law from a Drafting Perspective 55 (West, 2003)). The clauses that can create legal consequences are duties, rights, privileges,

conditions, and/or warranties. For example, when there is a "Duties" clause, look to see if the duty is anteceded by a *shall* or a *will*. "A contract duty is something the non-performance of which will be considered a breach. Contract duties can be created by using either *shall* or *will*." "Duties to refrain from acting are created with the words of shall not or will not. Negations of, exceptions to, and quantifications upon previously created duties are expressed by saying it is not required to." (Haggard Contract Law from a Drafting Perspective 55).

A valid contract is formed if both parties intended the act of signing to be the last act in the formation of a binding contract. In this contractual discussion, identify the offeror and the offeree, and then ascertain if there was a proper response. There must be an offer and acceptance. If there's a problem, the party who now has a better offer alleges that the contract is breached. Here, interpretation of the contract comes into play. "In determining, the meaning of an indefinite or ambiguous term in a contract, the language should be read in light of all the surrounding circumstances. The interpretation that is placed on a contract by the parties prior to the time that it becomes a matter of controversy is entitled to great, if not controlling influence in ascertaining the intent and understanding of the parties," (Walter Champion, Sports Law in a Nutshell (West, 4th ed., 2009)).

In *Ketchum v. Hall Syndicate, Inc.*, 37 Misc. 2d 693, 236 N.Y.S. 2d 206 (1962), which follows, the court did not allow a contract to be terminated on the grounds that there was a lack of mutuality as the terms of the contract were indefinite.

Henry K. Ketcham, Plaintiff,
v.
Hall Syndicate, Inc., Defendant
Supreme Court, Special and Trial Term, New York County
December 19, 1962
236 N.Y.S. 2d 206

On January 24, 1951 the plaintiff (the creator of the cartoon panel entitled "Dennis The Menace") and the defendant, then known as the Post-Hall Syndicate, Inc., entered into an agreement for the syndication by Hall of the cartoon panels.

The contract provided that the panels were to be delivered to Hall's office in the City of New York at least six weeks prior to the scheduled date or release.

The agreement further provided that its duration should be for the period of one year with automatic renewals from year to year without notice unless the plaintiff's share from syndication did not equal certain minimum stipulated weekly payments, in which event either party had the right to terminate it.

There is no claim that the minimum returns have not been met. In fact, the evidence is quite to the contrary, and it is uncontradicted that the payments are now over five times the required minimum.

The parties performed under the contract from the date thereof until December 18, 1961 when the plaintiff wrote a letter to the defendant in which he purported to cancel and terminate the contract as of March 11, 1962. However, the plaintiff is still performing under the contract by reason of the provision in the aforesaid letter of December 18, 1961, that if the cancellation were not recognized then the plaintiff would continue to perform until such right of cancellation and termination should be established by litigation.

In answer to the plaintiff's letter, on March 8, 1962, the defendant advised the plaintiff that by reason of the payment of the minimum provided by the terms of the contract that it would deem the contract renewed for the further period of one year and that it would also deem it renewed from year to year thereafter provided the stipulated payments had been made.

The plaintiff's complaint seeks a declaratory judgment determining whether the plaintiff has the legal right to terminate the contract on the grounds (a) that it is for an indefinite term and that there is no mutuality; (b) that section 2855 of the Labor Code of the State of California provides that such a contract may not be enforced beyond seven years from the commencement of the services; and (c) that if the contract is governed by the laws of the State