

Fiduciary Duty:

Can It Help Calm the Fears of Underpaid Artists?

- By Wendy V. Bartholomew¹

At a California Senate Select Committee hearing about the entertainment industry held in the fall of 2002, representatives from various music industry positions came together to express their views on problems plaguing the industry.² Music attorney Don Engel, speaking on behalf of artists, described record industry accounting practices as “intentionally fraudulent,” comparing record companies to Enron and WorldCom.³ At the hearing, one artist’s representative went so far as to accuse the record companies of running a continuing criminal enterprise.⁴ While most artists did not go this far, they did express distrust in record companies and the system under which they operate.⁵ Many artists see themselves as victims of a system designed to keep them perpetually indebted to record companies who own the product of their labor.⁶ While some artists expressed gratitude for the initial investments made by the record companies in their talent, they complained about feeling cheated by companies due to their small share of the proceeds when the gamble pays off for the labels.⁷

This type of distrust and discontent led to the formation of groups such as the Recording Artists Coalition (“RAC”). The RAC is a nonprofit, non-partisan coalition formed to represent the interests of recording artists whenever label and artists’ interests conflict with regard to legislative issues, and to address other public policy debates affecting the music industry. This coalition of vocal performers and acts has more than 150 diverse members and is growing.⁸ Among the names on the group’s diverse roster are Bruce Springsteen, Sting, R.E.M., Bonnie Raitt, Madonna, Eric Clapton, Dave Matthews, Billy Joel, Elton John, Linkin Park, No Doubt, Christina

Aguilera, the Dixie Chicks, and Kenny Rogers.⁹ With politicians, lawyers, and managers on their side, the RAC artists have been receiving the attention of lawmakers over issues such as the length of recording contracts, copyright ownership, accounting practices, payola, and health benefits for artists.¹⁰ In addition to lobbying the legislature, RAC members are also taking their labels to court in furtherance of their cause. Courtney Love, for example, filed suit to be released from her recording contract.¹¹ The Dixie Chicks, in their counter-suit against Sony, charged the label with committing “systematic thievery” to cheat them out of royalties.¹² Artist’s concerted efforts over the past few years to lobby state legislatures and Congress and to battle their labels in the courtroom has become known as the Artist Rights Movement.

The major record labels—Universal, Sony, Time Warner, EMI/Virgin and Bertelsmann—represented by a powerful trade group, the Recording Industry Association of America (“RIAA”), disagree with the accusations of the RAC. The record companies instead feel that *they* are the victims. Industry studies point out that for every hit the business scores, it loses \$6.3 million on albums that do not make it.¹³ Fewer than five percent of signed artists ever deliver a hit.¹⁴ This is a huge financial risk. Labels are insulted that after making multi-million dollar investments in artists, very few of which actually pay off, they are then “held hostage” by the successful few.¹⁵ They claim they are forced to pay large advances and give in to the whims of artists who make millions, yet complain that they are oppressed.¹⁶ They protest that artists should be

helping fight the real enemy of digital piracy, instead of accusing record companies of thievery.¹⁷

Undoubtedly, dysfunction exists in the relationship between record labels and recording artists. In describing the situation, California State Senator Kevin Murray said, “[i]t is

as if one spouse began secretly moving assets in order to benefit him or herself to the detriment of the other spouse. Upon discovery, it is bound to generate resentment, anger and possibly revolt.”¹⁸ Artists and labels, like the spouses in Senator Murray’s analogy, undoubtedly work best when working together. As Senator Murray points out, “one of the most significant issues is trust. In the case of artist related issues, the artists and the record companies are supposed to be allies and partners.”¹⁹

All of this dissension comes at a time when the recording industry is faced with what some might call a crisis—record sales are down and music piracy is widespread and growing. The fact is, artists and record companies need each other, especially now. The artists need the record companies to invest in and market their music.²⁰ Record companies need artists to make music and act as their allies in fighting piracy and determining the best business models and formats to deal with new technology-related challenges.²¹ As former RIAA chief Hilary Rosen has pointed out, “[w]e want to resolve our disagreements and move on to other critical matters, especially piracy. We’re on the same side in 99% of the issues.”²²

Of the one percent of the issues on which artists and record companies find themselves on opposing sides, record label accounting practices is one of the most debated. Despite all the talk, not much headway has been made toward solving the problem—either in legislatures or in courts—at least not in a way that affects the industry as a whole.²³ As Greg Hessinger, director of the American Federation of Television and Radio Artists (“AFTRA”), has explained, “changes must be implemented that provide for greater transparency and a fuller duty to account so that artists can at least be certain that they are being paid correctly.”²⁴ In his opinion, the industry needs to address the problem of flawed

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accounting practices *now*, before the industry can focus on long-term solutions to other problems it faces.²⁵

The purpose of this note is to examine the legal causes and consequences of what many consider poor label accounting practices, and to propose a solution: imposing a duty on record labels to correctly and transparently collect and distribute artist royalties. If labels operate under a fiduciary duty to their artists when receiving and paying royalties, artists will get paid what they are due. If they are not, artists will have viable remedies available to them—remedies that create an incentive for labels to make positive changes in the way they handle royalty accounting. This will, in turn, work to repair the relationship between artists and labels and restore trust where distrust is rampant. Once recording artists and their labels are able to resolve their differences on issues such as accounting practices, the two can work together in facing the many pertinent problems plaguing the music industry today.

I. Standard Recording Contracts and Recording Industry Practices have a Tendency to Benefit Recording Companies at the Expense of Artists

A. The Standard Recording Contract

In order to fully examine the relationship between artists and labels, and their accounting

practices, it is imperative to have an understanding of the key provisions of a recording agreement. The recording contract is considered the hub around which nearly every aspect of the music industry revolves, and royalty accounting is no exception.²⁶ Virtually every material provision in a music industry

made through the record label, or at best, on the record label's terms.

(2) Term

The "term" of the recording agreement indicates the amount of time the artist will be under exclusive contract with the record company.³² Normally, the term of the agreement consists of an initial period with multiple, successive options.³³ The record company can exercise one or all of these options in its sole discretion, requiring the artist to record additional albums.³⁴ The number of option

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agreement, particularly those relating to the artist's compensation and the term of the agreement, are extremely complex.²⁷ The fundamentals of the relationship between artists and labels contain a complexity of issues unlike those of any other type of business relationship.²⁸ For example, the typical recording agreement contains complicated advance payment structures and extensive royalty provisions that require an expert to decipher and to determine the amount of royalties due from record sales.²⁹ Because of these complexities and because the agreements are often close to one hundred pages long, the description below of the key elements of a recording contract are meant only to give a cursory understanding of what is typically involved in such agreements. Included here are descriptions of key provisions, including Exclusivity, Term, Advances, Recording Costs, and Royalties, as well as commentary on how these standard contract provisions affect the debate over royalty accounting.

(1) Exclusivity

Under a recording agreement, the recording artist's activities in every arena of the record industry are granted exclusively to the record company during the length of the contract's term.³⁰ This means that the artist typically cannot perform as a featured artist on other artists' records or a soundtrack album.³¹ Because of the Exclusivity Clause, the artist is locked in—if money is to be made by the artist, it will be

periods for a new artist on a major label ranges from six to eight.³⁵ During the initial term and each option period, the artist must create a specific number of albums.³⁶ Each album usually must contain at least ten individual master recordings.³⁷ The artist must also give the record company rights in a number of items including the master tapes, all original session tapes, mechanical license information, sample licenses, artwork, jacket copy information, and credits.³⁸ If the artist fails to deliver any of these items, the term of the agreement is suspended until proper delivery is completed, meaning that time stops ticking on the length of the agreement's term until all the requirements are fulfilled.³⁹ So, when a new artist signs a recording agreement, they begin a relationship that will continue through the following six to eight albums of their creative career (unless the label decides to let them go instead of exercising an option). During this time, artists are under the control of the label. This is no small commitment.

(3) Royalties

Artist royalties are based on record sales, and are calculated as a percentage of the selling price.⁴⁰ The percentage may be based on the Suggested Retail List Price ("SRLP") or on the wholesale price of the album.⁴¹ Almost all major labels use the SRLP to calculate royalties.⁴² Royalty rates for new artists in the United States range from eleven to thirteen percent of the SRLP.⁴³ The royalty rate for a more established artist ranges from sixteen

to eighteen percent, and may be as much as eighteen to twenty-one percent of the SRLP for a very successful artist.⁴⁴

(a) Royalty Deductions

The artist’s royalty is not a percentage of the entire SRLP generated on an album. Instead, certain deductions and reductions will affect the retail or wholesale price, in order to determine the royalty base.⁴⁵ For example, the SRLP may be reduced by a “container” charge or “packaging deduction” of 25 percent.⁴⁶ The deduction is meant to recover the costs associated with the physical packaging of the CD—the jewel case, printing, and liner notes.⁴⁷ The actual cost of the packaging is usually significantly less than what the record company deducts.⁴⁸ Ironically, the packaging deduction is still applied even for sales via the Internet, when no physical packaging is needed.⁴⁹ In addition to this packaging deduction, the contract may also call for deductions for free or promotional goods, and reductions for CDs sold outside the United States, through record clubs or non-traditional formats (such as DVD, enhanced CD, CD-ROM, or minidisk.)⁵⁰ Often the artist’s royalty rate is cut in half for sales in military bases, foreign territories, or record clubs—regardless of whether or not the label is earning less from these sales.

Although it is becoming more common to base royalty calculations on 100 percent of records sold, some contracts still call for an across the board deduction in the amount of sales used in calculating royalties—generally 10-15 percent.⁵¹ This means that the artist will only receive royalties from 85-90 percent of the records they sell.⁵² The original purpose of this deduction was to make up for the number of vinyl records that would break during manufacturing or shipping and could not be sold.⁵³ Some contracts still call for this deduction even though modern methods of manufacturing records have virtually eliminated the problem of breakage.⁵⁴ Although none of these deductions directly reflect actual costs incurred by the record company, they traditionally remain in standard royalty calculations.⁵⁵ Some view these deductions as inappropriate and arbitrary.⁵⁶ Regardless, the deductions are not generally something a new artist can easily negotiate his or her way out of, even if they know enough to do so. The smaller the royalties the record company ultimately pays the artist, the larger the record company’s profit.⁵⁷

(b) Sample Royalty Calculation⁵⁸

“SRLP” - Retail List Price (for a CD)	\$15.98
Container Charge (25% of retail)	(\$4.00)
Subtotal #1	\$11.98
Free Goods Adjustment (15%)	(\$1.80)
Actual Revenue Basis	\$10.18
Total Artist Royalty Rate (11%)	\$1.12
Producer Royalty (30%)	\$0.34
Final Net Artist Royalty	\$0.78

(4) Recoupment of Advances and Recording Costs

While it is the record company who initially pays recording costs for each album’s production, as well as advances paid to the artist for living expenses during the recording process, ultimately the individual artist bears these costs.⁵⁹ Usually the contract dictates the establishment of a recording fund as a means of covering costs.⁶⁰ This fund is intended to cover both the recording costs and compensation to the artist for a particular album.⁶¹ The entire recording fund is recoupable by the record company directly from the artist’s future royalties from album sales.⁶² At least half of the costs of videos and other major promotional costs are also taken from the artist’s portion of royalties.⁶³ Recoupment of recording costs is cross-collateralized among all of the albums that the artist records under the entire agreement.⁶⁴ This means that any unrecouped amount payable to a record company in connection with one album may be collected from royalties earned by any of the artist’s previous or future albums.⁶⁵ If an artist’s first album is only moderately successful, but a subsequent album earns a great deal of royalties, the artist will not be paid anything until the record label has been reimbursed for monies paid to the recording fund for both the first album *and* the second album. The purpose of this policy is to use the artist’s success at one time to protect against any previous or future losses.⁶⁶

Based on the royalty rates given in the example above of a Sample Royalty Calculation, the

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album may have to reach Gold (500,000 copies sold) or Platinum (1,000,000 copies sold) status before the label is able to recoup recording costs, advances, video costs, radio promotion costs, and tour support, and actually pay the artist any royalties.⁶⁷ This is, of course, assuming that nothing is underreported or under calculated.

Complaints about the structure of royalty recoupment provisions in artist contracts, which dictate that major costs including the costs of recording the record are recouped against the artist's royalties, are among the primary criticisms made by artists.⁶⁸ Those that believe the recoupment policies in the standard recording agreement are arduous note that the majority of recording artists will never achieve financial success or independence because of the standard industry recoupment policies.

Courtney Love, a member of the RAC, believes that "the system is set up so that almost no one gets paid."⁶⁹ She notes, in her article entitled "Courtney Love Does the Math," that as a result of the current system, a record label can make \$6.6 million in profits, while the band breaks up because it still carries \$2 million in debt.⁷⁰ For a moderately successful record, the

record company makes the upfront investment and takes the financial risk, but the artist actually pays for most of the costs.⁷¹ Artists view this situation as innately unfair, especially when they consider that they sign ownership rights in their master recordings over to labels.⁷² Chairman Hatch has stated, "[the music industry] is the only industry in which, after you pay off the mortgage, the bank still owns the house."⁷³ No other industry with royalty artists operates this way.⁷⁴

(5) Royalty Accounting and Auditing

Royalty payments and statements to artists are made twice a year.⁷⁵ The contract will usually require a royalty statement to accompany each payment, with some contracts providing that a statement can be withheld if no royalties have been

earned, charges have not accrued, or the artist does not specifically request one.⁷⁶ The recording contract will also usually state that if the artist does not file notice of an audit or claim within two years of the date of the royalty statement, then they are forever foreclosed from challenging the accuracy of that statement.⁷⁷ If an artist decides to audit, he or she will usually have to object to the royalty statement within the prescribed time limits and give advance notice of the audit to the record company, usually at least 30 days before the auditors intend to commence the audit.⁷⁸ The record company can usually postpone the audit at least once.⁷⁹ For example, the contract might allow the record company to postpone an audit for two months if it gives the artist 10 days notice prior to the scheduled commencement date.⁸⁰ The amount of time the audit

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may last may also be limited by the terms of the contract, as well as restrictions on what auditors can examine, when they may conduct the audit, and who the auditors may be.⁸¹ It has long been the policy of most labels, for example, to limit audits to the company's royalty statements only, disallowing auditors from accessing any manufacturing documents.⁸²

For an artist who has a steady but modest stream of record sales, the investment of hiring an auditor on retainer will be too high to justify doing so, especially since most contract clauses prevent multiple artists from sharing the cost of the audits. Therefore, such an artist may never be paid what he or she is due. While a few successful artists can afford to audit and find out where discrepancies exist, record companies are making an opportunistic profit

off of the 95 percent of artists who cannot or do not audit.⁸³

The purpose of an audit is to produce confidence in the royalty recipients that they are being accounted to properly by allowing them to check the figures they are being provided.⁸⁴ If, as is the case in the recording industry, the right to audit is severely limited, then it cannot serve the purpose of instilling confidence and good will.⁸⁵

B. Accounting Practices

Although many of the provisions in the standard recording agreement seem to favor record labels at the expense of artists, such provisions might be tolerable if artists could at least be certain that what their contracts entitle them to is what they are getting. Unfortunately, under current industry accounting practices artists are not getting paid what they are due, record companies are not taking responsibility, and there are virtually no penalties for labels when they keep more than their share.

(I) Artists are not Getting Their Fair Share

During the recent legislative hearings held by the California Senate, it was clear that artists suspect they are being systematically cheated out of their royalties.⁸⁶ They believe that after they sign contracts that unavoidably favor the record company, they are not paid the royalties they are due under the contract.⁸⁷ During the legislative hearings, auditors claimed that virtually all royalty statements

wrongdoing.⁸⁹ California State Senator Kevin Murray commented, “I was reminded of the tobacco executives standing in front of Congress and swearing that they did not believe tobacco was harmful to ones [sic] health.”⁹⁰ Audits routinely detect unpaid royalties, and it is estimated that labels misreport or underpay artist royalties by 10 to 40 percent.⁹¹

In response to accusations that record labels treat their artists unfairly, the RIAA emphasizes the contracts artists sign are negotiated on their behalf by very skilled lawyers who would not have their clients sign poor contracts.⁹² The RIAA has done studies which show that only one of 244 contracts signed from 1994-96 was negotiated without the artist’s legal counsel.⁹³ However, according to attorneys who represent artists, even top artists do not have the sway to negotiate and change a contract offered when utilizing the best legal assistance available.⁹⁴ Considering that the five major recording industry conglomerates release more than 90 percent of commercial music, an artist is not left with much of a choice.⁹⁵ They must either sign the contract substantially as offered, or give up the hope of a career as a music artist supported by a label.⁹⁶ Not surprisingly, most choose to sign. This inability to negotiate a more favorable deal up-front leaves artists with a bitter taste in their mouths when they do not receive what they are entitled to under their contracts.

The labels assert that artists are getting paid properly. However, artists’ auditors say that nearly all audits find underpayments.⁹⁷ Sadly, there are huge numbers of artists whose royalties are significant, but not significant enough that they can afford to pay the minimum \$15,000 retainer required to initiate an audit.⁹⁸ And even if artists do audit, their contracts require them to go to court in order to be paid what is due. Because of this, artists will generally settle for much less than what they are due.

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under report royalties due to artists.⁸⁸ When confronted by these accusations, representatives from all five major record conglomerates denied any

Either way, artists are frequently left with less than what their contract entitles them to receive.

Senator Murray believes there is at the least purposeful neglect on the part of record company accounting departments.⁹⁹ When questioned at the last California Senate hearing on the matter, royalty accountants at record companies admitted that there are “royalty policies” which often override the provisions of an artist’s contract, and that these policies favor the record company more than the artists.¹⁰⁰ It seems record companies have traded away accurate royalty accounting to artists for operational efficiency in their accounting departments.¹⁰¹

(2) Record Companies are not being Penalized

Record contracts essentially bar any penalties for underpaying royalties. Generally, contracts include a clause that prevents the company from being liable for more than the amount of royalties due, no matter what their behavior.¹⁰² These clauses instruct that a court must determine the

amount due, and give labels a chance to pay up before the company is in breach of their contract.¹⁰³ Unless an artist can prove specific intent to commit fraud (which is very difficult to prove), labels will never be liable for breach of contract arising out of royalty payments.¹⁰⁴ Consequently, record companies can be purposefully negligent without penalty, while artists lose out. If record companies do get caught underpaying royalties and an artist takes them to court, there is no penalty. At most, a court will force the company to turn over at least a portion of what was due to the artist anyway. If the underpayment

goes unnoticed, record labels are in essence rewarded by keeping the monies owed to artists.

II. Artists Have Been Unable to Make Significant Changes in Industry Practices Using Existing Legal Means

Artists who sue their record labels usually lose on the pleadings because it is difficult to establish their claims. Those that do not lose on the pleadings usually settle with their record company.¹⁰⁵ While a settlement may benefit that particular artist, it does not help the industry problem as a whole.¹⁰⁶ Record companies can continue current practices until an artist gains enough bargaining power to threaten the status quo. Even if an artist wins a suit and is able to receive damages for the amount of royalties they have missed out on, he or she is still bound to an

agreement with a party whom the artist feels has been acting fraudulently. In attempting to break free from the relationship with their labels, artists have tried various legal theories, including: fraudulent inducement to contract, breach of contract, violation of RICO; unjust enrichment, and breach of the covenant of good faith and dealing. These have been met with limited success.

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Several of these claims were pleaded in the course of the Dixie Chicks’ battle with Sony in 2002.¹⁰⁷ The Dixie Chicks entered into a recording contract with Sony in 1997, which required the Dixie Chicks to deliver to Sony, at Sony’s option, up to six albums.¹⁰⁸ The group claimed that Sony engaged in a scheme to deprive them of millions of dollars in royalties and tried to extract an extra album from them.¹⁰⁹ After repeated attempts to complete an audit and resolve the disputes, the Dixie Chicks, in a letter to Sony dated July 13, 2001, purportedly terminated the Recording Agreement, asserting that Sony had “fraudulently induced” the Dixie Chicks

into entering the contract, and had issued “false and fraudulent royalty statements.”¹¹⁰ They also alleged, “Sony applied its institutional policies and practices to engage in a pervasive, systematic and intentional scheme to under-account and deprive them of millions of dollars they were entitled to receive.”¹¹¹ Sony commenced an action seeking a declaratory judgment and an injunction.¹¹² In their counterclaim, the Dixie Chicks claimed breach of contract, fraud, and violation of RICO.¹¹³

One of the Dixie Chicks’ theories was that Sony fraudulently induced them to enter into their recording contract.¹¹⁴ To support a claim for fraud where a contract exists, a party must demonstrate a fraudulent misrepresentation collateral or extraneous to the contract.¹¹⁵ Fraud in the inducement to contract can be supported by a false statement of present fact, or a false statement of future intent which concerns a matter collateral to a contract between the parties.¹¹⁶ The group based their claim for fraudulent inducement on Sony’s alleged intention not to perform the contract at the time it was created.¹¹⁷ Specifically, they alleged, “prior to the execution of the recording agreement, Sony represented to the Dixie Chicks that it would render timely, accurate and honest accountings, would pay all amounts due them and would permit them to conduct meaningful audits to ascertain the accuracy of its accountings, which representations were known to Sony to be false at the time.”¹¹⁸ The New York court, however, held that a contractual promise made with the undisclosed intention not to perform it does not constitute fraud.¹¹⁹ Because the promises Sony made regarding accountings, payments, and audits were consistent with the express terms of the Recording Contract, they could not be the basis for a fraud claim.¹²⁰ Interestingly, if the court had recognized a fiduciary duty by Sony on behalf of the Dixie Chicks for royalty accounting, the Dixie Chicks might have been able to get out of their contract under a fraudulent inducement theory because the fiduciary duty would have existed beyond the duty to perform under the contract.¹²¹

The Dixie Chicks had similar luck on their other claims. Their RICO claim, for example, was dismissed during the early stages of the litigation.¹²² Their claim was that Sony was involved in racketeering activity in the form of mail and wire fraud by sending a series of royalty statements through the mail which knowingly understated amounts due from Sony to the Dixie Chicks.¹²³

Unfortunately, without the ability to perform a proper audit of Sony’s records, the group could not give the court the specific dates and details of the mail fraud in order to survive a Rule 9(b) motion.¹²⁴ This case is one example of the difficulties artists face when trying to recover their royalties in court. When all they have to depend on is the contract itself and they cannot perform the type of audit necessary to gather the information needed to plead their claims (if they can afford an audit at all), it is not easy for an artist to do much when they suspect their label has been withholding royalties.

III. The Existence of a Fiduciary Relationship between Record Companies and Recording Artists for the Limited Purpose of Royalty Accounting May Even Out the Scale

Making the duty to pay royalties a fiduciary duty essentially means that the artist would have a moral right, in addition to the contractual right, to receive fair and accurate royalty statements and would have additional remedies available to them to enforce their rights.¹²⁵

A. Fiduciary Duty Explained

Fiduciary duty is a product of social policy, designed to regulate opportunism and its effect of creating abuses of trust or confidence.¹²⁶ When a person undertakes to act for another, he or she will often be exposed to opportunities to benefit himself or herself.¹²⁷ Because of this temptation, the actor might divert value from their beneficiary or arrange to receive a concurrent benefit.¹²⁸ Social policy dictates that this type of behavior be restricted where the beneficiary has not granted his or her fully informed consent.¹²⁹ Because opportunism seems to come naturally in certain situations, the fiduciary constraint is a strict one.¹³⁰

Fiduciary duty is a broad term and courts are careful not to define particular instances of fiduciary relations in such a way as to exclude other and new cases.¹³¹ It is not mandatory that a fiduciary relationship be formalized in writing.¹³² The ongoing

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conduct between the parties may create a fiduciary relationship that court will recognize.¹³³ Fiduciary duties arise as a matter of law in formal relationships such as attorney-client, partnership, and trustee.¹³⁴ However, its operation is not limited to the dealings and transactions between these formal relationships.¹³⁵ The duty extends to all relations in which confidence is rested, and in which dominion and influence resulting from this confidence can be exercised by one person over another.¹³⁶ A fiduciary relationship generally arises when there is an unequal relationship between the

parties—the party entrusting the confidence must be in a position of inequality, dependence, weakness or lack knowledge.¹³⁷ Broadly speaking, a fiduciary relationship is one founded on trust or confidence, where one party depends on the integrity and fidelity of another.¹³⁸

A new fiduciary relationship will not be created lightly since it imposes extraordinary duties and requires the fiduciary to put the interests of the beneficiary ahead of its own if necessary.¹³⁹ Once such a relationship is established, the law provides that neither party may exert influence or pressure on the other, take selfish advantage of his trust or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other—except in the exercise of utmost good faith.¹⁴⁰

Normally, contractual relationships are not subject to fiduciary duties, primarily because parties to contracts have other remedies. Additionally, it is commonly asserted that fiduciary responsibilities have little to do with commercial relations.¹⁴¹ However, contractual commercial relationships often give rise to fiduciary duties.¹⁴² Some argue, in fact, that fiduciary obligation properly applies to the entire commercial sphere.¹⁴³ This would happen, for example, in a circumstance where one party has sole control over the information necessary to determine if there has been a breach of contract.¹⁴⁴

While it is not entirely clear when fiduciary duties arise out of a contractual relationship,

additional factors are necessary to convert a conventional business relationship into a fiduciary relationship.¹⁴⁵ A “simple contract” does not create a fiduciary relationship giving rise to special duties.¹⁴⁶

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However, the distinction between contract and fiduciary relations has no readily discernable definition.¹⁴⁷ Since fiduciary duties are based on principles of equity and fairness, courts have refused to define precise parameters and circumstances from which they arise.¹⁴⁸ Nevertheless, courts have consistently examined several factors when distinguishing between an every day contractual relationship and a fiduciary relationship: (1) the trust or confidence existing between the parties, (2) superiority, influence, or control by one party over another as a result of the relationship, and (3) other special facts indicating a need for special duties.¹⁴⁹

B. The Artist-Record Company Relationship Could Warrant Treatment as a Fiduciary Relationship for Royalty Accounting Purposes

The facts and circumstances surrounding royalty accounting, collection, and distribution by record labels on behalf of their artists suggest that the fiduciary relationship is applicable. California Senator Kevin Murray worked as an agent before he became a senator and is, therefore, very familiar with the working relationship between artists and labels. When describing the relationship, he has used the analogy of a husband and wife, (rather than a mere contractual relationship made at arms length). He

is quoted as saying, “the artists and the record companies are supposed to be allies and partners. It is as if one spouse began secretly moving assets in order to benefit him or herself to the detriment of the other spouse.”¹⁵⁰ Record labels and their recording artists have a special relationship that goes beyond a simple contract when labels take on the duty to control the collection and distribution of royalties on behalf of artists. For example, the record company has sole control over all sales and accounting data.¹⁵¹ Consequently, the artist has no easily accessible and independent means to judge whether or not the royalty statement is accurate or if there is a breach.¹⁵² While there is a right to audit, it is an expensive and time consuming process and in most contracts is severely limited so as to make it incomplete at best.

Before a court will uphold a claim for a breach of fiduciary duty, the party making the claim must show specific conduct or circumstances which implicate the necessary trust elements.¹⁵³ Evidence that special circumstances exist is necessary to establish a fiduciary relationship exists between a

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recording company and a recording artist.¹⁵⁴ Merely making conclusory allegations that a fiduciary duty is owed by a record label will not survive a motion to dismiss in the context of artists and labels.¹⁵⁵ In fact, in the past many claims by recording artists for breach of fiduciary duty were unsuccessful because they failed to allege any special circumstances establishing a fiduciary duty outside of the basic obligations of the contract.¹⁵⁶ When determining whether a fiduciary relationship exists, courts may examine several factors, including: (1) the trust or confidence existing between the parties, (2) superiority, influence, or control by one party over another as a result of the relationship, and (3) other special facts indicating a need for special duties.¹⁵⁷

(I) A Relationship of Trust by One Person in the Integrity of Another

A fiduciary relationship is based on trust or confidence by one person in the fidelity and integrity of another.¹⁵⁸ The origin of the confidence or trust is immaterial—the term is broad.¹⁵⁹ The rule includes both technical fiduciary relations and informal relations (those that exist whenever one person relies on and trusts in another).¹⁶⁰ A fiduciary relationship, whether formal or informal, might exist in appropriate circumstances such as between close friends or where confidence is based on prior business dealings.¹⁶¹

In *CBS, Inc. v. Ahern*,¹⁶² the court held that a fiduciary duty existed between a major recording company and a rock group.¹⁶³ The parties’ agreement stipulated the record company was to hold previously earned royalties in special accounts for the group’s benefit.¹⁶⁴ The court held that when the record company took the royalties for itself that it had promised to hold for the artists, it had breached

a fiduciary duty to the rock group with respect to the monies.¹⁶⁵ Other courts have found existing fiduciary duties in similar situations where one party has had a duty to handle money for another.¹⁶⁶ For example, the defendant in *Irving Trust Co. v. McKeever*¹⁶⁷ was deemed to be a fiduciary when he

agreed to invest money and property given over by plaintiff.¹⁶⁸ Likewise, a court held that a cause of action for breach of fiduciary duty was sufficiently alleged in *Teledyne Industries, Inc. v. Eon Corp.*,¹⁶⁹ where the plaintiff alleged that the defendant had a duty to place money in a special account in order to pay the plaintiff.¹⁷⁰

In *Apple Records, Inc. v. Capitol Records, Inc.*,¹⁷¹ a dispute between the Beatles and their record company, the court found a fiduciary relationship existed.¹⁷² The court based its finding on the extensive business dealings between Capitol Records and the Beatles.¹⁷³ The Beatles entrusted their musical talents to the label before they became successful, and remained with the label after the

Beatles gained popularity.¹⁷⁴ The court held that the long and enduring relationship created a special relationship of trust and confidence that existed independent of the contract.¹⁷⁵ The trust, the court held, was betrayed by the label's committing fraud, selling copies of the records that had allegedly been scrapped, and giving away promotional copies of Beatles' albums in order to benefit other aspects of the label's business.¹⁷⁶

(2) Superiority, Influence, Control, or Responsibility Over Another

A fiduciary relationship arises when one has reposed trust or confidence in the integrity or fidelity of another who thereby gains a resulting superiority or influence over the first, or when one assumes control and responsibility over another.¹⁷⁷ In *Gordon v. Bialystoker Center*,¹⁷⁸ for example, the court held that a fiduciary relationship existed between a plaintiff and her caregiver because, in exchange for substantial consideration, the defendant assumed complete control, care, and responsibility for the plaintiff, and the plaintiff was not expected to receive assistance from any other source.¹⁷⁹

Similarly, when a record company and a recording artist enter into an agreement, the record company exercises control over the recording artist's royalties. The recording artist no longer has any control over the collection of his or her royalties and must depend entirely on the recording company to be responsible for accounting and distributing this income. Also, because the record company has exclusive control of the artist's services (and therefore, the artist's primary source of income) the record company is in control of the artist's financial well-being. This is particularly evident in the context of recoupables. The artist stands the risk of being indebted to the record company for millions of dollars if the record company has not allocated royalty incomes accurately. An artist may be forced into bankruptcy or forced

into signing a longer record deal with the label with a cross-collateralization clause as a means of recouping earlier debts.

(3) Other Special Circumstances Involved in the Recording Artist/Record Company Relationship

In the dispute between the Beatles and their record label, the court held that a fiduciary relationship existed because the two parties had continued their relationship through thick and thin (that is, before the Beatles gained fame as well as afterwards).¹⁸⁰ This is probably true of almost any artist/recording company relationship by the time an artist has decided to file a lawsuit. Almost all artists are signed by a record label before they gain success, just as the Beatles were. In addition to the existence of a continuing relationship, other factors such as the parties' relative bargaining power and the historical trend in the industry for labels to act opportunistically in their royalty accounting and distribution indicate that the label-artist relationship might be one where imposition of fiduciary duties might be appropriate in the context of royalty accounting.

C. The Importance of the Existence of a Fiduciary Relationship

The existence of a fiduciary relationship between artists and their labels will allow artists

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more options and potentially a greater chance of success when seeking recovery against record companies. Where a fiduciary relationship exists, breach of the duty can result in punitive damages or even rescission of the contract. This increased potential for liability will, in turn, create an incentive for record labels to improve their accounting practices. No longer will one artist achieve success in the courtroom, just to have record labels resume business as usual.

Inserting a fiduciary duty into the record label-artist accounting relationship offers artists several benefits to protect against bad accounting practices. One alternative available to artists with the recognition of a fiduciary relationship is the right to an accounting. Once a party is deemed a fiduciary, they are compelled to account for the property they are exercising control over.¹⁸¹ This means the party who has granted control over his or her property is entitled to an accounting. In *Irving Trust Company v. McKeever*, the plaintiff had entrusted many of her investments to the defendant, expecting him to buy and sell in her best interests.¹⁸² When he would not return the investments to her, she had no way of telling what was left or what she was entitled to as damages.¹⁸³ The court granted her an accounting so she could determine whether or not the defendant had breached any of his obligations and whether she was entitled to anything.¹⁸⁴ As discussed earlier, it was often the case that artists were defeated in the early stages of their case against a record label because artists could not audit successfully and therefore could not plead wrongdoings with specificity.¹⁸⁵ Allowing for an accounting remedy will enable artists to be fully informed of the royalties to which they are entitled. If it is easier for artists to check their record label's books, perhaps record labels will decide to ensure they have accurate systems, rather than face liability.

Another door that can open to an artist if courts are willing to recognize a fiduciary duty is the option of making a claim for conversion. In order to establish a claim for conversion of money, the plaintiff must establish that (1) there is an obligation to treat specific money in a particular manner, and (2) the money converted was done so by someone who had a fiduciary duty in respect to it.¹⁸⁶ Even if a person is initially in rightful possession of property, he may be liable for conversion if he refuses the rightful owner's demand for the property.¹⁸⁷ Using this theory of liability, a record label may be liable

not only for any royalty payments wrongfully withheld, but also punitive damages since it is a tort action rather than an action under contract.

Another theory under which artists may be able to recover unpaid royalties is an action to impose a constructive trust based on a record company's receipt of an artist's royalties. A claim to establish a constructive trust must prove: (1) a confidential or fiduciary relation; (2) a promise, express or implied; (3) a transfer made in reliance on that promise; and (4) unjust enrichment.¹⁸⁸ A claim based on a constructive trust is not available unless a fiduciary relationship exists.

Additionally, breach of a fiduciary duty by a record label might allow an artist to seek a rescission of the recording agreement. When a fiduciary relationship exists between parties, transactions between them are scrutinized with extreme vigilance, and clear evidence is required that the transaction was understood and that there was no fraud, mistake or undue influence. Where those relations exist, there must be clear proof of the integrity and fairness of the transaction.¹⁸⁹ Otherwise the instrument obtained will be set aside or held as invalid between the parties.¹⁹⁰ Therefore, if an artist can prove that he or she was fraudulently induced to enter into a recording contract, a court might set the contract aside.¹⁹¹ For example, an artist could claim that he or she was induced to enter into an agreement by a record company's representation that it would render timely, accurate and honest accountings, would pay all amounts due, and would permit the artist to conduct meaningful audits to determine the accuracy of its accountings.¹⁹² If the artist can show the record company had no intention of following through with these representations at the time it made them, the record label's actions might constitute fraud.¹⁹³ Fraud in the face of a fiduciary duty—a duty separate from the duty to perform under the contract—will entitle the artist to seek special damages such as rescission of the contract.¹⁹⁴

D. Courts are Slow to Recognize Fiduciary Relationships

The artist-label relationship encompasses a great deal more than the collection and allocation of royalties. It would be impractical to define the *entire* artist-label relationship as a fiduciary relationship. In fact, it might be *impossible* to expect a record company to maintain a general fiduciary

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duty to any one artist because there are differing artist priorities, conflicts with release dates, and competition within the label for artists' releases in different quarters.¹⁹⁵ As a result, it has been difficult for artists to establish that a fiduciary duty exists with their record company.

Courts applying New York law, for example, have often refused to recognize a fiduciary relationship between artists and recording companies, or between parties in relationships similar to those between artists and recording companies.¹⁹⁶ Instead, these courts have characterized the relationship between the parties as a purely commercial, arms-length business transaction.¹⁹⁷ At least one court applying California law is in accord.¹⁹⁸ In *Wolf v. Superior Court*,¹⁹⁹ the plaintiff assigned the rights in his novel and the character on which the novel was based to Walt Disney Pictures and Television, while Disney agreed to pay the plaintiff

the record companies' obligation to accurately account for royalties earned under a recording contract is a fiduciary duty.²⁰² The bill passed the full California Senate, but was withdrawn before it could be voted on by the Assembly.²⁰³ At the time of publication, Senator Murray has plans to reintroduce the bill in 2004.²⁰⁴

IV. Conclusion

After resolving the year-long dispute with Sony, Recording Artist Coalition member and manager of the Dixie Chicks, Simon Renshaw, declared, "[c]hange is inevitable... Once people have a true understanding of what's involved, the labels will be forced to reform."²⁰⁵ Unless the change comes that he and other supporters of the Artist Rights Movement hope for, artists will continue to enter

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into agreements that favor record companies and continue to tolerate industry accounting practices that many believe consistently take advantage of artists. Without change, the best an underpaid artist can hope for is to incur the expenses of a limited audit and litigation, only to receive at most something close to what they were entitled to in the first place.

The added potential liability that comes with recognizing

royalties.²⁰⁰ The court held that the contractual right to contingent compensation in the control of another has never, by itself, been sufficient to create a fiduciary relationship and affirmed dismissal of the plaintiff's breach of fiduciary duty claim.²⁰¹

While courts in New York and California have been slow to recognize the existence of a fiduciary relationship between artists and record labels, the legislature of California has recently been moving in a different direction. Last year, as a potential solution to the current inequity in royalty accounting practices, California State Senator Kevin Murray introduced legislation that would declare that

a fiduciary relationship between artists and record labels in the context of royalty accounting will serve as an incentive for labels to take the steps necessary to ensure their royalty accounting practices are accurate and transparent. Otherwise, labels may be liable for punitive damages and may even stand to lose valuable artists who could ask a court to rescind the recording agreement. In fact, even the threat of legislation, which would impose a fiduciary duty on recording companies, has inspired some labels to change their ways. Executives at Warner Music Group, for example, told legislators in California that they intend to make changes in their accounting

practices that will put “teeth” in their recent commitment to report accurate royalties.²⁰⁶ Warner proposes to simplify royalty calculations and make it easier for acts to determine what they are owed.²⁰⁷ Among the changes Warner executives discussed are eliminating outdated royalty deductions like the “container” deduction, allowing auditors access to all manufacturing documents, paying interest at prime rates to artists on unpaid royalties found in an audit, and even reimbursing acts for costs of any audit that reveals under-crediting of royalties exceeding ten percent.²⁰⁸ These are positive changes. If courts begin to recognize a fiduciary relationship in the context of royalty accounting, or state legislatures impose a similar fiduciary duty, other major record companies will follow Warner’s lead and make significant changes in the way they allocate royalties to their artists.

ENDNOTES

¹ J.D. Candidate, Vanderbilt University Law School, 2004; B.B.A. Belmont University, 2001. I would like to thank all of the editors who worked on my note for their support and contributions, especially Devin Gordon and Nicole D’Amato.

² Chuck Philips, *Music Labels Urged to Revise Royalties: A state Senate panel criticizes record firms’ accounting and threatens to take action*, L.A. TIMES, Dec. 3, 2002, at C1.

³ Jonathon Cohen, *Labels’ Accounting Practices Under Fire*, DAILY MUSIC NEWS, July 24, 2002.

⁴ Senator Kevin Murray, *Recording Industry Practices Hearing Summary*, available at <http://democrats.sen.ca.gov/senator/murray> (last visited Mar. 25, 2004).

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ Edna Gundersen, *Rights issue rocks the music world*, USA TODAY, Sept. 16, 2002, at D1.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² See *Sony Music Entm’t, Inc. v. Robison*, No. 01 CIV. 6415(LMM), 2002 WL 272406, at *2 (S.D.N.Y. Feb. 26, 2002).

¹³ Gundersen, *supra* note 8, at D1.

¹⁴ *Id.*

¹⁵ Murray, *supra* note 4.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² Gundersen, *supra* note 8, at D1.

²³ In a few instances, individual artists have taken their labels to court over accounting practices and received cash settlements and new contracts to make up for royalties their labels owed them. While this benefits those artists who have become successful enough to gain the bargaining power necessary to win in a label dispute, it does nothing for the rest of the industry.

²⁴ AFTRA is a union representing more than 80,000 actors, musicians and other entertainment workers. Gundersen, *supra* note 8, at D1.

²⁵ *Id.*

²⁶ ENTERTAINMENT INDUSTRY CONTRACTS § 159.01 (Donald C. Farber ed., 2002).

²⁷ *Id.* § 140.01[1].

²⁸ *Id.* § 159.05[1].

²⁹ *Id.* § 140.01[1].

³⁰ Lynn Morrow, *The Recording Artist Agreement: Does it Empower or Enslave?*, 3 VAND. J. ENT. L. & PRAC. 40, 42-43 (2001).

³¹ *Id.* at 43.

³² *Id.* Formerly, the term of exclusive recording contracts was for a certain number of years. *Id.* However, most exclusive recording contracts today begin at the delivery of the recordings and remain effective through the delivery of a specific number of albums. *Id.*

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

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⁴⁰ *Id.* at 45

⁴¹ *Id.*

⁴² XAVIER M. FRASCOGNA & H. LEE HETHERINGTON, *THIS BUSINESS OF ARTIST MANAGEMENT* 136 (1997). There is, however, a recent trend among major record labels to begin paying artists a percentage of the wholesale price actually received from retailers, rather than the suggested retail price of a CD. See, e.g., Chuck Philips, *Warner Rolls Out Royalty Reforms: record company says move will make it easier for acts to determine what they are owed*, L.A. TIMES, Mar. 20, 2003, at C1. For example, during March of 2003, Warner Music Group announced that a new, shortened contract for its Warner Bros., Elektra and Atlantic labels would use the wholesale price of CDs rather than a CD's SRLP, to compute artist royalties. *Id.*

⁴³ Morrow, *supra* note 30, at 45.

⁴⁴ *Id.* When the artist royalty is based on wholesale price rather than SRLP, the rate roughly doubles. *Id.* For example, a twelve percent rate based on the SRLP would be comparable to a twenty-two percent royalty based on the wholesale price. *Id.*

⁴⁵ *Id.*

⁴⁶ FRASCOGNA & HETHERINGTON, *supra* note 42, at 136.

⁴⁷ Morrow, *supra* note 30, at 46.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ FRASCOGNA & HETHERINGTON, *supra* note 42, at 136; see also JEFFREY BRABEC & TODD BRABEC, *MUSIC MONEY, AND SUCCESS: THE INSIDER'S GUIDE TO THE MUSIC INDUSTRY* 79 (1994).

⁵² FRASCOGNA & HETHERINGTON, *supra* note 42, at 136.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ FRASCOGNA & HETHERINGTON, *supra* note 42, at 136; see also BRAKEC & BRABEC, *supra* note 51, at 79.

⁵⁶ Murray, *supra* note 4.

⁵⁷ Morrow, *supra* note 30, at 45.

⁵⁸ This chart was formulated based on an example in Lynn Morrow's article, *The Recording Artist Agreement: Does it Empower or Enslave?*, 3 VAND. J. ENT. L. & PRAC. 40, 50 (2001).

⁵⁹ *Id.* at 43.

⁶⁰ *Id.* at 44.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 49.

⁶⁴ *Id.*

⁶⁵ *Id.* at 45.

⁶⁶ *Id.* at 44.

⁶⁷ Artist royalties for a Gold album (assuming a royalty of \$0.78 for each album sold) will total \$351,000 (\$0.78 x 450,000, the number of albums for which the label will pay a royalty after the 10% across the board deduction discussed above). Artist royalties for a Platinum album (assuming a royalty of \$0.78 for each album sold) will total \$702,000 (\$0.78 x 900,000, the number of albums for which the label will pay a royalty after the 10% across the board deduction discussed above). It is likely that the artist's recoupable costs such as advances, video costs, promotion costs, tour support, and recording costs will total more than \$351,000 or even \$702,000.

⁶⁸ Murray, *supra* note 4.

⁶⁹ See Courtney Love, *Courtney Love Does the Math*, Salon.com, at <http://dir/salon.com/tech/feature/2000/06/14/love/index.html> (June 6, 2000).

⁷⁰ *Id.*

⁷¹ Murray, *supra* note 4.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Murray, *supra* note 4.

⁷⁵ BRAKEC & BRABEC, *supra* note 51, at 80.

⁷⁶ *Id.*

⁷⁷ Murray, *supra* note 4.

⁷⁸ BRAKEC & BRABEC, *supra* note 51, at 80-81.

⁷⁹ *Id.* at 81.

⁸⁰ *Id.*

⁸¹ *Id.* Here is a sample clause that illustrates the common restrictions on artists who want to audit:

All royalty statements rendered by Company shall be conclusively binding upon you and not subject to any objection by you for any reason unless specific objection in writing, stating the basis thereof, is given to Company within (number) (no.) years from the date such statement is rendered. Each statement shall be deemed rendered when due unless you notify Company to the

contrary within (e.g., sixty (60)) days after the applicable due date specified in Clause 8.01 above. Failure to make specific objection within the (e.g., two (2)) years time period shall be deemed approval of such statement. You will not have the right to sue Company in connection with any royalty accounting, or to sue Company for royalties on Records sold during the period a royalty accounting covers, unless you commence the suit within that two years after the date rendered. You may, at your own expense, directly audit Company's books and records relating to this agreement that report the sales of Phonograph Records or other exploitation of Masters for which royalties are payable hereunder. You may make such audit only for the purpose of verifying the accuracy of statements sent to you hereunder and only as provided herein. You shall have the right to audit said books by notice to Company at least (e.g., thirty (30)) days prior to the date you intend to commence your audit. Said audit shall be conducted by a reputable independent certified public accountant experienced in recording industry audits, shall be conducted in such a manner so as not to disrupt Company's other functions and shall be completed promptly. You may make such an examination for a particular statement only once and only within (e.g., two (2)) years after the date any such statement is due. Any such audit shall be conducted only during Company's usual business hours and at the place where it keeps the books and records to be examined. Your auditor shall review his tentative findings with a member of Company's finance staff designated and made available by Company before rendering a report to you so as to remedy any factual errors and clarify any issues that may have resulted from misunderstanding.

ENTERTAINMENT INDUSTRY CONTRACTS §159.05[10] (Donald C. Farber ed., 2002).

⁸² Chuck Philips, *Warner Rolls Out Royalty Reforms: record company says move will make it easier for acts to determine what they are owed*, L.A. TIMES, Mar. 20, 2003, at C1.

⁸³ *Id.*

⁸⁴ Murray, *supra* note 4.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Gundersen, *supra* note 8, at D1.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ ENTERTAINMENT INDUSTRY CONTRACTS § 159.05[10] (Donald C. Farber ed., 2002).

⁹⁵ Murray, *supra* note 4.

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² BRAKEC & BRABEC, *supra* note 51, at 93-94.

¹⁰³ Philips, *supra* note 2, at C1.

¹⁰⁴ *Id.*

¹⁰⁵ See e.g., Chuck Philips, *Dixie Chicks, Sony End Feud With New Deal*, L.A. TIMES, June 17, 2002, at C2.

¹⁰⁶ Recognizing this conflict, when faced with accusations that his client, Michael Jackson was joining the Artist Rights Movement only to work out his own record contract, attorney Johnny Cochran defended, "[i]t's not about any one artist, but the whole industry." Maggie Farley & Chuck Philips, *Jackson Takes Glove Off to Battle Sony*, L.A. TIMES, June 6, 2002, at C1.

¹⁰⁷ See *Sony Music Entm't, Inc. v. Robison*, No. 01 CIV. 6415(LMM), 2002 WL 272406 (S.D.N.Y. Feb. 26, 2002).

¹⁰⁸ *Id.* at *1.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.* at *4.

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- ¹¹⁵ *Id.*
- ¹¹⁶ *Id.*
- ¹¹⁷ *Id.*
- ¹¹⁸ *Id.*
- ¹¹⁹ *Id.*
- ¹²⁰ *Id.*
- ¹²¹ *Id.*
- ¹²² *Id.*
- ¹²³ *Id.*
- ¹²⁴ *Id.*
- ¹²⁵ Murray, *supra* note 4.
- ¹²⁶ Robert Flannigan, *Commercial Fiduciary Obligation*, 36 ALBERTA L. REV. 905, 906 (1998).
- ¹²⁷ *Id.* at 906.
- ¹²⁸ *Id.*
- ¹²⁹ *Id.*
- ¹³⁰ *Id.*
- ¹³¹ 37 AM JUR. 2D *Fraud and Deceit* § 32 (2002).
- ¹³² *Id.*
- ¹³³ *Id.*
- ¹³⁴ *Id.*
- ¹³⁵ *Id.*
- ¹³⁶ *Id.*
- ¹³⁷ *Id.*
- ¹³⁸ CBS, Inc. v. Ahern, 108 F.R.D. 14, 25 (S.D.N.Y. 1985).
- ¹³⁹ *Id.*
- ¹⁴⁰ *Id.*
- ¹⁴¹ Flannigan, *supra* note 126, at 905.
- ¹⁴² *Id.*
- ¹⁴³ *Id.*
- ¹⁴⁴ *Id.*
- ¹⁴⁵ Sony Music Entm't, Inc. v. Robison, No. 01 CIV. 6415(LMM), 2002 WL 272406 (S.D.N.Y. Feb. 26, 2002); Reuben H. Donnelly Corp. v. Mark I Mktg. Corp., 893 F.Supp. 285, 289 (S.D.N.Y. 1995).
- ¹⁴⁶ CBS, Inc. v. Ahern, 108 F.R.D. 14, 25 (S.D.N.Y. 1985).
- ¹⁴⁷ *Id.*
- ¹⁴⁸ *Id.*
- ¹⁴⁹ 37 AM JUR. 2D *Fraud and Deceit* § 32 (2002).
- ¹⁵⁰ Murray, *supra* note 4.
- ¹⁵¹ *Id.*
- ¹⁵² *Id.*
- ¹⁵³ Mellencamp v. Riva Music Ltd., 698 F.Supp. 1154 (S.D.N.Y. 1998).
- ¹⁵⁴ See Carter v. Goodman Group Music Publishers, 848 F. Supp. 438, 444 (S.D.N.Y. 1994) ("In the absence of special circumstances, no fiduciary duty exists between a music publisher and composer as a matter of law.")
- ¹⁵⁵ Cooper v. Sony Records Int'l, No. 00 CIV. 233(RMB), 2001 WL 1223492, at *5 (S.D.N.Y. Oct. 15, 2001).
- ¹⁵⁶ See, e.g., Cooper, 2001 WL 1223492, at *5; Mellencamp, 698 F. Supp. at 1154; Sony Music Entm't, Inc. v. Robison, No. 01 CIV. 6415(LMM), 2002 WL 272406 (S.D.N.Y. Feb. 26, 2002).
- ¹⁵⁷ 37 AM JUR. 2D *Fraud and Deceit* § 32 (2002).
- ¹⁵⁸ Apple Records, Inc. v. Capitol Records, Inc., 137 A.D.2d 50, 57 (N.Y.App. Div. 1988).
- ¹⁵⁹ *Id.*
- ¹⁶⁰ *Id.*
- ¹⁶¹ *Id.*; Penato v. George, 52 A.D.2d 939, 942 (N.Y.App. Div. 1976).
- ¹⁶² CBS, Inc. v. Ahern, 108 F.R.D. 14 (S.D.N.Y. 1985).
- ¹⁶³ *Id.* at 14, 24-25.
- ¹⁶⁴ *Id.* at 24-25.
- ¹⁶⁵ *Id.*
- ¹⁶⁶ See Teledyne Indus., Inc. v. Eon Corp., 373 F.Supp. 191, 199-202 (S.D.N.Y. 1974) (applying California law.); Irving Trust Co. v. McKeever, 44 F. Supp. 842, 845-46 (E.D.N.Y. 1942); *In re Primiano Constr. Co.*, 117 Misc. 2d 523, 524 (N.Y. Sup. Ct. Nassau Ct. 1982).
- ¹⁶⁷ Irving, 44 F. Supp. at 842 (E.D.N.Y. 1942).
- ¹⁶⁸ *Id.* at 845-46.

¹⁶⁹ *Teledyne Indus., Inc. v. Eon Corp.*, 373 F.Supp. 191 (S.D.N.Y. 1974) (applying California law).

¹⁷⁰ *Id.* at 199-202.

¹⁷¹ *Apple Records, Inc. v. Capitol Records, Inc.*, 137 A.D.2d 50 (N.Y.App.Div. 1988).

¹⁷² *Id.* at 57.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 57-58.

¹⁷⁶ *Id.*

¹⁷⁷ *Cooper v. Sony Records Int'l*, No. 00 CIV. 233(RMB), 2001 WL 1223492, at *5 (S.D.N.Y. Oct. 15, 2001); *Gordon v. Bialystoker Ctr.*, 45 N.Y.2d 692, 698 (1978).

¹⁷⁸ *Gordon*, 45 N.Y.2d at 692.

¹⁷⁹ *Id.* at 698.

¹⁸⁰ *Id.*

¹⁸¹ *Irving Trust Co. v. McKeever*, 44 F.Supp. 842, 846 (E.D.N.Y. 1942).

¹⁸² *Id.* at 843-44.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ See, e.g., *Sony Music Entm't, Inc. v. Robison*, No. 01 CIV. 6415(LMM), 2002 WL 272406 (S.D.N.Y. Feb. 26, 2002).

¹⁸⁶ *CBS, Inc. v. Ahern*, 108 F.R.D. 14, 35 (S.D.N.Y. 1985).

¹⁸⁷ *Id.* at 26.

¹⁸⁸ *Rodgers v. Roulette Records, Inc.*, 677 F.Supp. 731, 739 (S.D.N.Y. 1988).

¹⁸⁹ *Gordon v. Bialystoker Ctr.*, 45 N.Y.2d 692, 698 (N.Y. 1978).

¹⁹⁰ *Id.*

¹⁹¹ See *id.*

¹⁹² See, e.g., *Sony Music Entm't, Inc. v. Robison*, No. 01 CIV. 6415(LMM), 2002 WL 272406 (S.D.N.Y. Feb. 26, 2002). In *Robison*, the Dixie Chicks claimed that Sony's misrepresentations at the time they entered into the recording agreement constituted fraud in the inducement. The court held that without a fiduciary relationship between the parties, a contractual promise made with the undisclosed intention not to perform could not constitute fraudulent inducement. *Id.*

¹⁹³ See *id.*

¹⁹⁴ See *id.*

¹⁹⁵ Murray, *supra* note 4.

¹⁹⁶ See, e.g., *Arnold Prod., Inc. v. Favorite Films Corp.*, 298 F.2d 540, 542 (2d Cir. 1962) (agreement between motion picture owner and distributor giving distributor the exclusive right to exploit films and requiring it to pay a percentage of revenues to the owner was not a fiduciary relationship, but one of "simple contract"); *Cusano v. Klein*, 280 F.Supp. 2d 1035, 1040 (C.D. Cal. 2003) (applying New York law); *Sony Music Entm't, Inc. v. Robison*, No. 01 CIV. 6415(LMM), 2002 WL 272406 (S.D.N.Y. Feb. 26, 2002) (contract between record company and recording artists did not create a fiduciary relationship between the parties); *Cooper v. Sony Records Int'l*, No. 00 CIV. 233(RMB), 2001 WL 1223492, at *5 (S.D.N.Y. Oct. 15, 2001).

¹⁹⁷ See *Cusano*, 280 F.Supp at 1040; *Robison*, 2002 WL 272406 at *3; *Rodgers v. Roulette Records, Inc.*, 677 F.Supp. 731, 739 (S.D.N.Y. 1988).

¹⁹⁸ See *Wolf v. Superior Court*, 107 Cal.App. 4th 25 (Cal. Ct. App. 2003).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 28.

²⁰¹ *Id.*

²⁰² Press Release, Senator Kevin Murray, Bill to Require Labels to Accurately Account Royalties Will Resume in January (May 29, 2003), available at <http://democrats.sen.ca.gov/senator/murray> (last visited Mar. 26, 2004).

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Gundersen, *supra* note 8, at D1.

²⁰⁶ Philips, *supra* note 2, at C1.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

Fiduciary duty is a requirement that a person in a position of trust, such as a real estate agent, broker or executor, must act in good faith and honesty on behalf of a client. Deeper definition. Fiduciary duty is a legal obligation of the highest degree for one party to act in the best interest of another. The party charged with the obligation is the fiduciary, or one entrusted with the care of property or money. The person to whom a fiduciary owes his or her duty is known as the principal or beneficiary. Fiduciary duties appear in a wide variety of common business relationships, including: Trustee and beneficiary (the most common type). Corporate board members and shareholders. Registered investment advisors have a fiduciary duty to clients; broker-dealers just have to meet the less-stringent suitability standard, which doesn't require putting the client's interests ahead of their own. Board Member/Shareholder.