

# RECORDING ARTISTS REVOLT



# AGAINST 'UNFAIR' CONTRACTS



Photography by James Minchin, III, Courtesy of FrontPage Publicity

**Increasingly, Artists Who Achieve a Degree of Commercial Success Demand to Renegotiate Their Contracts**

**by David Moser**

**A**t the beginning of 2002, the record industry is in a tumultuous state. Record sales were three percent lower in 2001 than in 2000, the first decrease in more than a decade.<sup>1</sup> In 2001, four of the five major record labels (which account for close to 90 percent of worldwide record sales) lost money, and all five have consolidated, resulting in substantial job losses.<sup>2</sup> If that weren't enough for record company executives to worry about, artists such as Courtney Love and the Dixie Chicks are revolting against their record companies through lawsuits and by forming organizations to represent their interests.

## **Record Contracts**

Virtually every musical artist's dream is to be signed to a record contract with one of the major record companies. However, that dream often turns into a nightmare as illustrated by the frequent complaints by artists about the unfairness of such contracts and several recent lawsuits by successful artists trying to get out of their contracts.

Since a contract basically involves two parties forming their own legal rules, the party with the most bargaining power usually obtains the better end of the deal. In the music industry, when one of the major record labels offers an unknown artist a record contract, the label normally has much more bargaining power than the artist primarily due to the simple economic rule of supply and demand.<sup>3</sup> The harsh reality is that there are many more artists seeking record contracts than record

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contracts available.

The typical major label record contract exceeds 50 pages in length, much of which is written in legal language that even artists with the inclination and endurance to read all the way through would not be able to comprehend. However, the basic contractual relationship can be summarized as follows. The artist agrees to record exclusively for the record company, which means that the artist cannot record for anyone else during the term of the contract. In return for acquiring the artist's recording services, the record company agrees to pay to produce recordings and to try to sell those recordings. Additionally, the record company agrees to pay the artist a percentage of the income earned from sales of the artist's recordings, known as the artist's royalty, and often pays the artist advances against that royalty.

### Recent Lawsuits by Artists against Record Labels

Although artists' complaints about the unfairness of record contracts are not a new phenomenon,<sup>4</sup> artists are increasingly challenging the legality of various record contract provisions. Surprisingly, there have been no important lawsuits by artists that have ever proceeded through a full trial and resulted in any kind of legal precedent governing the artist/record company relationship. The main reason for this lack of precedent is that lawsuits are often used as a renegotiation tactic by artists and are settled before a trial takes place. It has become a common practice for artists who achieve a degree of commercial success to demand to renegotiate their record contract. Record companies will often agree to renegotiate some of the terms of a successful artist's contract, usually by increasing the artist's royalty rate and making additional advance payments to the artist.

If a record company refuses to renegotiate or fails to renegotiate to the extent of the artist's wishes, the artist might file a lawsuit claiming that the record company has violated the contract in some way. The lawsuit operates as leverage the artist can use against the record company. To avoid what can be a long and expensive legal battle, the record company may make the artist a better offer than it was willing to make prior to the lawsuit. Further, record companies don't want to risk a legal precedent's being established which could be used against them by other artists. At the same time, artists don't want

to spend years and large sums of money fighting their record companies in court while their careers are on hold. Consequently, virtually all of these lawsuits end up being settled.

### Courtney Love versus Universal Music Group

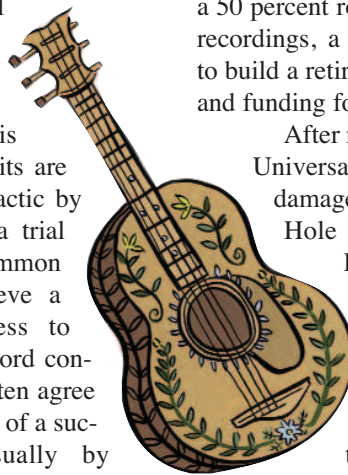
Courtney Love is the lead singer of a rock band called "Hole," which signed a recording contract with Geffen Records in 1992. According to Love, the band decided to sign with Geffen because Geffen had an artist-friendly reputation. Geffen, due to mergers and acquisitions, is now part of Interscope Records, a division of the Universal Music Group, the largest of the five major record labels.<sup>5</sup> Ironically, Love turned down a record contract offer from Interscope when she signed with Geffen.

Like most litigation by artists against their record companies, Love's dispute with Universal arose from a contract renegotiation. Reportedly, Love was upset that Universal didn't offer her the same deal as they renegotiated with another artist, Beck, after he had a highly successful album.<sup>6</sup> During the course of negotiations, Love allegedly behaved erratically and made some ridiculous demands. At a dinner meeting, she reportedly ordered a \$12,000 bottle of wine and scribbled her contractual demands on a napkin. These demands included a 50 percent royalty rate, sole ownership of her recordings, a multimillion dollar commitment to build a retirement home for recording artists, and funding for an artists' union.<sup>7</sup>

After negotiations proved unsuccessful, Universal filed suit against Love seeking damages for lost profits, claiming that Hole owed Universal five albums.<sup>8</sup>

Love countersued, seeking to have her record contract dissolved and alleging several other legal claims.

The most controversial of Love's claims revolves around the term provision of record contracts, which specifies how long the contract will last. Most record contracts, instead of specifying a specific time period, base the term of the contract on the delivery of a specified number of albums.<sup>9</sup> The typical record contract gives the record company the option to require the artist to record up to seven albums. This does not mean that an artist will actually record seven albums. Instead, the record company will usually have the artist record one album and see how it sells. If it sells well or the record company still believes strongly in the artist despite lackluster sales, the record company will exercise its option to record another album. On the other hand, if an album does not



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sell well and the label loses faith in the artist, it will usually terminate the contract.

One of the most common complaints among artists is that the typical record contract term allows record companies to keep them under contract for an excessive time period. A seven-album deal would normally last more than 10 years since most artists record and release an album every 18 months to two years.

Under California Labor Code § 2855 (the “Seven Year Statute”), a personal service contract such as a record contract cannot exceed seven years. However, in 1987, the Recording Industry Association of America secured an amendment to the Seven Year Statute that allows record companies to sue for damages if an artist terminates a contract after seven years, but fails to deliver the number of albums promised under the contract.<sup>10</sup>

Like most record contracts, Courtney Love’s contract obligates her band to record up to seven albums. Love and other artists contend that it is impossible for an artist to fulfill this obligation in seven years. To do so, an artist would have to average an album per year, which is impractical if not impossible. The life span of a successful album can exceed two years, and a record company will usually not want to release a new album by an artist until the previous album’s sales have peaked. Additionally, artists spend a considerable amount of time after releasing an album touring and promoting it,

making it difficult to record a new album within a year.

Recently, the Recording Artists Coalition, an organization made up of successful recording artists, has lobbied to repeal the 1987 amendment allowing record companies to sue artists who attempt to terminate their record contracts under the Seven Year Law. On January 8, 2002, California senator Kevin Murray announced he is sponsoring a bill that would do just that.<sup>11</sup> Murray’s bill resulted after a hearing was conducted in Sacramento where artists, including Courtney Love, testified about the unfairness of the 1987 amendment.

Even if Murray’s bill is passed, the Seven Year Law is of limited value since it only applies in California. Consequently, the Recording Artists Coalition has also begun lobbying in Congress for a federal seven-year law. Rep. Mark Foley (R-Fla.), chair of the House of Representatives’ Entertainment Industry task force, has indicated that he is interested in holding hearings on record contracts in the near future. Additionally, Rep. John Conyers, Jr. (D-Mich.), has stated that a federal seven-year statute may be needed to protect recording acts.<sup>12</sup>

If a federal seven-year statute is not passed, a ruling on whether Love is liable to Universal for damages based on the five albums she con-

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tractually committed to but has not delivered will set an important legal precedent. If the court somehow determines that she is not liable, artists will continue to use the Seven Year Statute to terminate or renegotiate their contracts. Record companies will likely respond by relocating some of their operations to other states where the Seven Year Statute does not apply. If Love loses, record companies may be much less flexible in renegotiating record contracts with artists.

Another one of Courtney Love's claims against Universal alleges that Hole's latest album, *Celebrity Skin*, was not adequately marketed by Universal and therefore did not sell as well as the band's previous album. Love is not likely to succeed on this claim since record contracts rarely contain any definite marketing commitments. Regardless of the probable lack of a contractual obligation, Universal likely spent at least several hundred thousand dollars on radio, video, and retail promotion to market *Celebrity Skin*. It is unlikely that the court would find such a substantial expenditure sufficiently inadequate to justify terminating the contract.

Love's lawsuit also challenges a provision contained in record contracts known as an assignment clause. This clause gives the record company the right to sell or assign the contract to another record company. In Love's view, when a record company sells itself to another company, all of the artists should be able to choose whether or not their contracts are subject to the sale. However, such a rule would make it difficult for record companies to be bought and sold since the main assets purchased are the record company's recordings and its contracts with artists. It seems unlikely that the court will rule in Love's favor on this claim due to the fact that her contract apparently contains an assignment clause and does not give Love any approval rights over assignment. Although Love is obviously not happy with the fact that she and her band have been shuffled among several record companies as a result of corporate mergers and acquisitions, she doesn't appear to have any contractual right to prevent this.

Courtney Love claims that she will pursue

her case through trial in order to revolutionize the record industry and liberate the downtrodden artists. Although she portrays herself as an artist-rights activist, Love's motives may not be as altruistic as she would like people to believe. Ironically, Love was recently sued by the remaining members of the band Nirvana, which was headed by her husband, Kurt Cobain, who committed suicide. This lawsuit alleges that Love is trying to obtain sole ownership of Nirvana's recordings and to cut out the other members.<sup>13</sup> In some ways, the claims asserted against Love are quite similar to some of the claims she has asserted against Universal.

### The Dixie Chicks versus Sony Music

Another recent suit by an artist against a record company involves the Dixie Chicks, a highly successful country trio. The Dixie Chicks sued Sony Music Entertainment, claiming that Sony has underpaid them by more than \$4 million in royalties. The Dixie Chicks' suit against Sony was in response to a lawsuit filed by Sony after the Dixie Chicks notified Sony that they were terminating their record contract. Sony claims that the Dixie Chicks have breached their record contract and owe Sony more than \$100 million for five undelivered albums.

The Dixie Chicks' first album, *Wide Open Spaces*, was a huge commercial success. Based on this success, the Dixie Chicks renegotiated their record contract with Sony. After their second album, *Fly*, also proved to be a sales success, the Dixie Chicks again demanded to renegotiate, but this time Sony ultimately refused.

The Dixie Chicks' suit is primarily a dispute over royalties. In many record contracts, the royalty provisions can run more than 15 pages. Entertainment attorneys who represent artists have come up with an informal rule to explain the length of these provisions—the first paragraph tells what

the artist's royalty is, and the remaining 15-odd pages tell how the record company will take it away.<sup>14</sup> Essentially, the typical record contract results in the record company's paying the artist a royalty of about 10 percent of the income the company receives, which usually equates to approximately one dollar per compact disc. However, before the artist actually receives any royalty payments, the artist's royalty is used to pay back or recoup many of the expenses the



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record company paid, such as recording costs, and 50 percent of certain marketing costs (i.e., video production, independent radio promotion, and tour support).<sup>15</sup>

Recoupable costs can easily exceed half a million dollars per album, which is why the vast majority of artists never receive any royalties. An extremely unfair result is that the few artists whose records actually sell enough to pay back all of the recoupable costs end up paying all of the costs of producing the record as well as some of the marketing costs, while the record company still owns the recording.

The difference of opinion as to the amount of royalties owed to the Dixie Chicks by Sony likely revolves around the extremely complicated and confusing nature of record contract royalty provisions. Due to the many deductions and formulas used to compute royalties, figuring out how much an artist is owed can be extremely difficult. However, even if the Dixie Chicks are successful in proving that Sony has underpaid their royalties, that doesn't mean they will be freed from their contract with Sony. Unless the Dixie Chicks can prove that Sony has engaged in some type of fraud, a court is much more likely to order the record company to simply pay the amount owed.

### What Lies Ahead?

It will be interesting to see whether the Courtney Love and Dixie Chicks lawsuits proceed to trial and, if so, what results are reached. It is unlikely that artists will achieve any major court victories since they obligated themselves to the contracts they are trying to break. Unless extreme circumstances justify it, courts are hesitant to rewrite or terminate contracts. Artists may ultimately benefit much more from the lobbying efforts they have recently begun to undertake. The record industry, through the Recording Industry Association of America, has historically been very effective at lobbying in order to influence Congress to pass laws favorable to the record industry. Although artists have only recently begun to lobby in Congress and state legislatures such as California, their efforts appear to be generating significant publicity as well as government interest. Whatever the ultimate result turns out to be, it seems likely that the battle between artists and record companies has only just begun. ■

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### Notes

1. Brian Garrity, "The Year in Business: Shuffling Staffs, Dealing with Lawsuits and Making Cuts, the Industry Wonders What's in the Cards for Next Year," *Billboard*, December 29, 2001, p. 29.

2. *Id.*

3. The only exceptions occur when several record companies are interested in a new artist and a "bidding war" results or when an artist has already proven its value by selling millions of records. For example, Mariah Carey reportedly signed an \$80 million-plus deal with Virgin Records, which outbid her former record label, Sony Music. While signed to Sony, Carey's recordings sold more than 120 million copies.

4. For example, the Beatles spent more than 10 years in litigation with Capitol Records, which ultimately resulted in a settlement.

5. Geffen, originally an independently owned record company, was first sold to MCA, purchased by Japanese electronics firm Matsushita in 1990. Matsushita later sold MCA to Canadian beverage company Seagram, which merged MCA with Polygram Records to form the Universal Music Group, recently purchased by French media company Vivendi.

6. Fred Goodman, "Courtney Love vs. the Music Biz: Declaring War on the Record Industry, Hole Singer Sues Label and Calls for an Artists Union," *RollingStone.com*, June 7, 2001.

7. *Id.*

8. *Geffen Records, Inc., v. Courtney Love*, Superior Ct. L.A. County Case No. BC223364.

9. In the past, the term of record contracts was for a specified number of years. However, artists near the end of their contracts would sometimes refuse to record and wait until their contract expired in order to sign a better deal with another record company. To avoid this result, record companies started basing the term of record contracts on delivery of albums.

10. California Labor Code § 2855 (b).

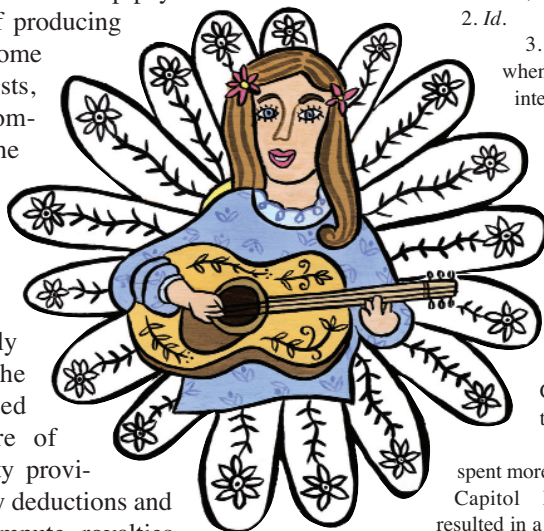
11. Brooks Boliek and Tamara Conniff, "Calif. Bill Targets '7-Year' Law," *The Hollywood Reporter*, January 8, 2002.

12. Goodman, *RollingStone.com*.

13. Chuck Philips, "Posing a Challenge to Love's Case: Nirvana's Members Accuse Kurt Cobain's Widow of Trying to Control the Band's Legacy," *Los Angeles Times*, December 13, 2001 ([www.latimes.com/business/custom/cotown/la-000099039dec13\\_story?coll=la%2Dheadlines%2Dbusiness%2Dcenter](http://www.latimes.com/business/custom/cotown/la-000099039dec13_story?coll=la%2Dheadlines%2Dbusiness%2Dcenter)).

14. Record contracts reduce the royalty payable to artists in various ways including reduced royalty rates for foreign sales, record club sales, and sales of recordings in new formats.

15. Out of the remaining 90 percent of income, the record company must pay many other expenses such as manufacturing costs, non-recoupable marketing costs, publishing royalties, and general overhead.



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