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## Freedom: Long Term Recording Agreements and the International Music Industry

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# NOTE

## FREEDOM:<sup>1</sup> LONG TERM RECORDING AGREEMENTS AND THE INTERNATIONAL MUSIC INDUSTRY

### I. INTRODUCTION

Recording agreements have the potential to bind artists to recording companies for long periods of time.<sup>2</sup> Artists sign such contracts at the beginning of their careers, when they have little bargaining power.<sup>3</sup> These contracts often become burdensome to the artists.<sup>4</sup> It is no surprise that once an artist becomes successful, the artist attempts to renegotiate his or her contract.<sup>5</sup> If the artist cannot negotiate more favorable terms, he or she may attempt to rescind the contract.<sup>6</sup> In the event the record company does not allow the artist to rescind the contract, the artist may seek judicial redress claiming the contract to be in "restraint of trade."<sup>7</sup>

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<sup>1</sup> GEORGE MICHAEL, *Freedom*, on LISTEN WITHOUT PREJUDICE VOL 1 (Columbia Records 1990).

<sup>2</sup> Chris White & Dominic Pride, *Michael/Sony Verdict Resolution*, BILLBOARD, July 2, 1994, at 1, 116-17.

<sup>3</sup> *Id.*

<sup>4</sup> Lisa Gubernick, *The Olivia de Havilland of Rock*, FORBES, Jan. 3, 1994, at 87.

<sup>5</sup> *Id.* See also, Nicholas Wapshott, *Bound to Sing Sony's Tune*, THE TIMES (London), June 22, 1994; *Bad Faith*, THE ECONOMIST, Oct. 16, 1993 at 78.

<sup>6</sup> Patrick Isherwood, *Why 'Slavery' is Fair Trade*, THE TIMES (London), June 28, 1994. See generally *Zang Tumb Tumm Records Ltd. v. Holly Johnson*, (C.A. August, 1989) (LEXIS, Enggen Library, Cases File).

<sup>7</sup> Isherwood, *supra* note 6.

One commentator has compared long term movie contracts to long term record contracts, stating:

In the 1930's and 1940's, the motion picture industry in the U.S. looked just like today's worldwide record industry. Major stars signed long-term contracts, and studios spent tons of money promoting and de-

The most recent English case involving an artist's attempt to have his recording contract declared in restraint of trade involves the international recording artist, songwriter and performer Georgios Panayiotou, professionally known as George Michael [hereinafter Michael], who sued his record company, Sony Music Entertainment (U.K.) [hereinafter Sony].<sup>8</sup> Michael argued that the recording agreements he signed with Sony in 1988 were unenforceable as they were in restraint of trade,<sup>9</sup> violative of Article 85 of the Treaty establishing the European Economic Community,<sup>10</sup> and, thereby, preventing competition

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veloping them. Studios argued that they could not afford to promote new stars unless they were assured the benefit of their success in later years.

Donald Passman, *Commentary: Michael Trial Has No Bearing On U.S.*, BILLBOARD, Aug. 6, 1994, at 6.

"Although George Michael renegotiated his contract after his recording success, the first contract he signed still affected the market value he could have achieved if he was free to negotiate at the peak of his career." Dominic Pride, *Decision Does Not End Issues Debate*, BILLBOARD, July 2, 1994, at 116. See *Olivia de Havilland v. Warner Bros. Pictures*, 153 P.2d 983 (Calif. 1944).

Similar arguments arise today with regards to recording contract disputes. There have been a number of cases involving English recording contracts in which "courts have looked at the fairness and enforceability of such agreements in the context of the manner in which they were negotiated." Isherwood, *supra* note 6. In these cases, courts have found contracts to be in restraint of trade where restrictions are oppressive to the artist and, thus, unjustifiable. See *O'Sullivan v. Management Agency and Music Ltd.*, [1984] 3 W.L.R. 448; *Clifford Davis Management Ltd. v. W.E.A. Records Ltd.*, [1975] 1 W.L.R. 61 (C.A.); and *A. Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308.

<sup>8</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS Enggen Library, Cases File). Sony Music contended Michael affirmed the 1988 agreement and that as a matter of public policy, he could not allege that the agreement was in restraint of trade. *Id.* at 4. To support this argument, Sony stated:

the 1988 agreement effectively replaced an earlier agreement made between Mr. Michael and CBS (U.K.) in 1984 and that the 1984 agreement was in turn concluded as part of the arrangements for the compromise of proceedings between Michael and a third party in which Michael was alleging that a recording agreement between himself and that third party was itself void or unenforceable as being (among other things) in restraint of trade.

*Id.*

Michael denied affirming the 1988 agreement, and claimed that Sony Music violated public policy by behaving unfairly and unconscionably. *Id.*

<sup>9</sup> *Id.* at 3.

<sup>10</sup> TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, [hereinafter EEC TREATY] art. 85.

within the common market.<sup>11</sup> The Chancery Court ruled in favor of Sony, holding that the 1988 agreement neither restrained trade nor violated article 85 of the EEC Treaty.<sup>12</sup>

Part II of this Note discusses restraint of trade issues in English recording and publishing contract disputes. Part II then discusses Article 85 issues in relation to disputes concerning entertainment contracts. Part III develops the procedural history by describing the facts involved in the Michael litigation, and it briefly summarizes the Chancery Division's holding. This Note then analyzes the Chancery Division's holding in *Panayiotou* and its impact on the international music industry.

## II. BACKGROUND

### A. *Restraint of Trade*<sup>13</sup>

Beginning in the early fifteenth century, contracts that imposed an unreasonable restraint of trade were considered

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<sup>11</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*181 Enggen Library, Cases File).

<sup>12</sup> *Id.* After the Chancery Court decision, Michael stated that he would appeal the ruling. Michael's appeal was set for February 1996. However, on July 13, 1995, Michael resolved his dispute with Sony in London; Michael was released from the Sony contract. Subsequently Michael signed contracts with Virgin and Dreamworks. According to BILLBOARD, Sony will receive between \$30 million and \$40 million in exchange for releasing Michael. This sum will be paid by Dreamworks and Virgin from the profits earned by the release of Michael's two upcoming albums.

Unlike the contract he signed with Sony, Michael will be able to renegotiate or sign with another record company after the release of two albums. Dreamworks and Virgin will reportedly be paying Michael a royalty rate of 20% or higher. Virgin has offered Michael concessions similar to those he was seeking from Sony.

Sony retained the rights to release a greatest-hits compilation. This compilation will include tracks from the album Michael recorded for Virgin-Dreamworks, tracks that will be licensed back to Sony. Sony currently holds the rights to FAITH (Columbia Records 1987) and LISTEN WITHOUT PREJUDICE VOL. 1 (Columbia Records 1990). Besides his recording contracts with Virgin and Dreamworks, Michael has contracted with Dick Leahy Music, "which has a worldwide sub-publishing pact with Warner/Chappell Music." See Adam White and Dominic Pride, *George Michael Arrives at Dreamworks / Virgin, Sony Suit Settled*, BILLBOARD, July 22, 1995.

<sup>13</sup> Restraint of trade occurs when a contract's terms go beyond what can be characterized as "reasonable" in a commercial context. Such a contract is in restraint of trade and, therefore, contrary to public policy. RICHARD WHISH, COMPETITION LAW 26-27 (1985).

In a free market economy, companies and individuals strive to eliminate competition and maximize profits. One way of achieving these ends is through

against public policy and, therefore, void.<sup>14</sup> Today, this basic policy reasoning remains intact, as English courts still use 'reasonableness' as a critical element in deciding restraint of trade cases.<sup>15</sup> In deciding such cases, courts are interested in promoting competition, and maintaining the ability of companies and natural persons to contract.<sup>16</sup> Courts must then balance these policy considerations against "other legitimate interests, such as the interest of a business purchaser in precluding the seller from establishing a competing enterprise in the same locality, or, similarly, the interest of a tradesman or professional who trains an apprentice in a highly skilled trade."<sup>17</sup>

### 1. *Contracts in Restraint of Trade*

English courts apply a two part test in determining whether a contract is in restraint of trade: "(1) whether the restrictive agreement was compatible with the public interest; and (2) whether it was reasonable as between the parties."<sup>18</sup>

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monopolies, where competitors are forced out of the market. Another way of maximizing profits is "to reach an agreement with the other competitors to fix the price of goods [charged by] each competitor thus maximizing the profits on its own share of the market." Gabriele Dara, *Antitrust Law in the European Community and the United States: A Comparative Analysis*, 47 LA. L. REV. 761, 761 (1987). Courts will not enforce those agreements which go beyond "reasonableness" and, therefore, restrain trade. *Id.*

<sup>14</sup> Dara, *supra* note 13, at 762. See generally *Dyer's Case*, Y.B. II Henry 5, fol. 5, pl. 26 (1414).

<sup>15</sup> WHISH, *supra* note 13, at 27. The Chancery Court stated that the court "does not have to be satisfied that the defendant has behaved in a morally reprehensible way" to declare that a contract is unenforceable as a restraint of trade. *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division 1994) (LEXIS \*71 Enggen Library, Cases File).

<sup>16</sup> A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany, and the United States*. 14 LOY. L.A. INT'L & COMP. L.J. 455, 464 (1992).

<sup>17</sup> *Id.* at 464. The reasonableness test is the defining issue in restraint of trade cases and emerged in the *Nordenfelt* case. This test states that the contract: must be reasonable in the interests of the contracting parties, and secondly it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favor it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the interests of the public. Angelo & Ellinger, *supra* note 16, at 464.

<sup>18</sup> Angelo & Ellinger, *supra* note 16, at 464. "The second test derives from unconscionability: whether a specific agreement is reasonable between the contracting parties depends on whether it involves a restriction that is no broader

Over the past eighty years, there have been a number of cases decided by English courts involving this test and its application to exclusive dealing agreements.

The first important English decision involving the restraint of trade doctrine was the 1916 House of Lords case *Herbert Morris Ltd. v. Saxelby*.<sup>19</sup> In *Herbert Morris*, a leading manufacturer of hoisting machinery in the United Kingdom sued a company draftsman after he left the company.<sup>20</sup> Originally, the company hired the defendant as an engineer after several years of service.<sup>21</sup> He was hired on the condition that he would not "carry on either as principal, agent, servant in connection with any other person, firm or company or assist directly or indirectly in the sale or manufacture of pulley blocks, hand overhead runways, electric overhead runways or had overhead traveling cranes"<sup>22</sup> for a period of seven years after leaving the company.<sup>23</sup> The House of Lords held that the covenant was in restraint of trade because it was more extensive than that which was required for the protection of the company.<sup>24</sup> As such, the contract was unenforceable.

Forty-nine years later, in *Petrofina (Gr. Britain) Ltd. v. Martin*,<sup>25</sup> the plaintiffs sought an injunction to restrain the defendant from selling their competitor's petrol.<sup>26</sup> The Chancery Court denied the injunction and held that the agreement restricted the use of the owner's property without any mortgage, lease or sale,<sup>27</sup> and, therefore, was in restraint of trade.<sup>28</sup> The Chancery Court held that in order to prove that the contract was binding, the company had to show that the restraints it imposed were reasonable as between the parties and not injurious

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than necessary for the contracting party's protection." Angelo & Ellinger, *supra* note 16, at 465. See also *Herbert Morris Ltd. v. Saxelby*, 1916 App. Cas. 688, 707 and *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co*, 1894 App. Cas. 489, 492.

<sup>19</sup> 1916 App. Cas. 688.

<sup>20</sup> *Id.* at 690.

<sup>21</sup> *Id.* at 689-90.

<sup>22</sup> *Id.* at 690.

<sup>23</sup> *Id.*

<sup>24</sup> *Herbert Morris, Ltd. v. Saxelby*, 1916 App. Cas. 688, 690.

<sup>25</sup> [1965] 1 Ch. 147.

<sup>26</sup> *Id.* at 148.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

to the public interest.<sup>29</sup> The agreement in *Petrofina* was unreasonable between the parties, and therefore, in restraint of trade.

In 1966, the House of Lords in *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*,<sup>30</sup> considered agreements in which the appellants sold motor fuels to the respondents. The House of Lords held that a contract for twenty-one years was longer than necessary because it went beyond any period for "which developments were reasonably foreseeable and in the absence of evidence of some advantage to the appellants for which a shorter period would not be adequate, the agreement was void."<sup>31</sup>

## 2. Unequal Bargaining Power

Additionally, English courts have addressed the restraint of trade issue in the context of unequal bargaining power as well. This is often a critical issue for a young and inexperienced recording artist or group signing a contract with a record company for the first time. Issues of unequal bargaining power were addressed in *Binder v. Alachouzos*,<sup>32</sup> *Colchester Borough Council v. Smith*,<sup>33</sup> and *Alec Lobb (Garages) Ltd. v. Total Oil (Gr. Britain) Ltd.*<sup>34</sup>

In *Binder*, Alachouzos borrowed money from Binder.<sup>35</sup> Binder sued to recover the loan.<sup>36</sup> On the night before trial, the parties settled.<sup>37</sup> The settlement agreement stated that the parties had been advised by solicitors and counsel.<sup>38</sup> The Court of Appeal focused on the fact that there was a bona fide agreement, and held that where both sides were advised by competent counsels, there was a fair, arguable case for each party.<sup>39</sup> As such, the agreement was held fair and reasonable.<sup>40</sup>

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<sup>29</sup> *Id.* at 147.

<sup>30</sup> 1968 App. Cas. 269.

<sup>31</sup> *Id.* at 271.

<sup>32</sup> 1972 Q.B. 151.

<sup>33</sup> 1992 Ch. 421.

<sup>34</sup> [1985] 1 W.L.R. 173.

<sup>35</sup> *Binder v. Alachouzos*, 1972 Q.B. 151, 156.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 157.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 158.

<sup>40</sup> *Binder v. Alachouzos*, 1972 Q.B. 151, 158.

In *Colchester Borough Council v. Smith*, Smith asserted that he acquired title over Colchester Borough Council's land by adverse possession.<sup>41</sup> The Court of Appeal held that there was a bona fide compromise and that Smith, who was advised by solicitors at the time of the agreement, and who subsequently signed the agreement, was estopped from litigating the enforceability of the agreement.<sup>42</sup>

In *Alec Lobb (Garages) Ltd. v. Total Oil (Gr. Britain) Ltd.*,<sup>43</sup> the English Court of Appeal considered the validity of a lease back agreement for a garage and petrol filling station.<sup>44</sup> Alec Lobb (Garages) Ltd. [hereinafter Garages], owned a filling station.<sup>45</sup> Total Oil (Gr. Britain) Ltd. [hereinafter Total Oil], advanced money to Garages, and took mortgages on Garages' property as security.<sup>46</sup> In 1969, Garages was in financial difficulties, yet was subject to a valid four-year contract to accept gasoline exclusively from Total Oil.<sup>47</sup> Against the advice of their solicitors, Garages entered into a transaction with Total Oil, in which Garages granted a lease of its property to Total Oil for fifty-one years.<sup>48</sup> Ten years later, Garages claimed that the transaction was void as an agreement in restraint of trade.<sup>49</sup> The Court of Appeal stated that although the parties had unequal bargaining power at the time they entered into the agreement because of Garages financial distress, Total Oil's conduct in relation to the transaction was not unconscionable, coercive, nor oppressive. Therefore, Garages' claim in equity was invalid.<sup>50</sup>

The decisions in *Alec Lobb (Garages) Ltd.*, *Binder* and *Colchester Borough Council* show that agreements will be valid and enforceable in English courts, if the negotiations leading to the execution of the agreement were fair and reasonable. The courts decided the restraint of trade issue in each of these cases

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<sup>41</sup> *Colchester Borough Council v. Smith*, 1992 Ch. 421, 422.

<sup>42</sup> *Id.* at 435.

<sup>43</sup> [1985] 1 W.L.R. 173.

<sup>44</sup> *Id.* at 176.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 176.

<sup>48</sup> *Alec Lobb (Garages) Ltd. v. Total Oil (Gr. Britain) Ltd.*, [1985] 1 W.L.R. 173, 176.

<sup>49</sup> *Id.* at 177.

<sup>50</sup> *Id.* at 183.



by focusing on whether each party was represented adequately and competently by counsel.

## B. *English Recording Contracts and Restraint of Trade*

### 1. *The English Music Trilogy*<sup>51</sup>

English courts addressed recording contracts and the restraint of trade issue in three cases, known as the music trilogy. The english music trilogy consists of *A. Schroeder Music Publishing Co. Ltd. v. Macaulay*,<sup>52</sup> *Clifford Davis Management Ltd. v. WEA Records Ltd.*,<sup>53</sup> and *O'Sullivan v. Management Agency and Music Ltd.*<sup>54</sup> In each case, the artists signed form contracts early in their musical careers, and subsequently became successful.<sup>55</sup>

#### a. *Schroeder*

*A. Schroeder Music Publishing Co. Ltd. v. Macaulay* involved a songwriter who signed a contract in which he assigned the publisher a copyright in every musical work he composed for ten years.<sup>56</sup> The publishing company would only pay Macaulay if his work was published.<sup>57</sup> Additionally, Macaulay could not amend the agreement or have his copyrights returned to him if the publisher decided not to publish his songs.<sup>58</sup> The court found that the publishing contract constituted an unreasonable restraint of trade and was contrary to public policy<sup>59</sup> because Schroeder Music was not bound to use the songs Macaulay composed.<sup>60</sup> Lord Reid stated that the publisher could

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<sup>51</sup> Michael I. Yanover and Harvey G. Kotler, Q.C., *Artist/Management Agreements and the English Music Trilogy: Another British Invasion?*, 9 *LOY. L.A. ENT. L.J.* 211, 214 (1989).

<sup>52</sup> [1974] 3 All E.R. 616. *See also* *A. Schroeder Music Publishing Co., Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308.

<sup>53</sup> [1975] 1 All E.R. 237 (C.A.).

<sup>54</sup> [1984] 3 W.L.R. 448.

<sup>55</sup> *See* *O'Sullivan v. Management Agency and Music Ltd.*, [1985] 3 All E.R. 351 (C.A.); *Clifford Davis Management Ltd.*, [1975] 1 All E.R. 237 (C.A.); *A. Schroeder Music Publishing Co., Ltd. v. Macaulay, Ltd.*, [1974] 1 W.L.R. 1308.

<sup>56</sup> *A. Schroeder Music Publishing Co., Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308, 1314H.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 1315A.

<sup>59</sup> *Id.* at 1315A.

<sup>60</sup> *Id.* at 1313C-D.

have just "put [the artist's songs] in a drawer and leave them there."<sup>61</sup> The House of Lords held that this contract was neither freely made, nor bargained for on equal terms. Further, it recognized that "established composers who can bargain on equal terms can and do make their own contracts."<sup>62</sup> Lord Diplock also noted that bargaining power depends on whether an artist is successful because music publishers who negotiate with successful artists do not insist in negotiating under the standard contract originally offered to the artist.<sup>63</sup> In the case of *Schroeder*, the House of Lords found the contract at issue to be in restraint of trade, and thus, void.<sup>64</sup>

b. Davis

One week after the House of Lords handed down the *Schroeder* decision, the English Court of Appeal<sup>65</sup> decided *Clifford Davis Management Ltd. v. WEA Records Ltd.*<sup>66</sup> *Davis* involved the publishing agreements of the English pop group Fleetwood Mac.<sup>67</sup> The issue before the court was whether the publishing agreements signed by Fleetwood Mac were funda-

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<sup>61</sup> *A. Schroeder Music Publishing Co., Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308, 1313D.

<sup>62</sup> *A. Schroeder Music Publishing Co., Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308, 1314G (citing *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*, 1968 App. Cas. 269). In *Esso*, the House of Lords ruled that "a tie of 21 years went beyond any period for which developments were reasonably foreseeable and in the absence of evidence of some advantage to the appellants for which a shorter period of time would not be adequate, the agreement was void." *Esso*, 1968 App. Cas. 269.

The *Schroeder* court noted that:

[a]ny contract by which a person engages to give his exclusive services to another for a period necessarily involves extensive restrictions during that period of the common law right to exercise any lawful activity he chooses in such a manner as he thinks best . . . . But if contractual restrictions appear to be unnecessary or to be reasonably capable of enforcement in an oppressive manner, then they must be justified before they can be enforced.

[1974] 1 W.L.R. at 1314G-H.

<sup>63</sup> *Schroeder*, [1974] 1 W.L.R. at 1316F-G.

<sup>64</sup> *Id.* at 1317A. Although the unequal bargaining power between the parties in this case did not raise a presumption of unconscionability, English courts, when confronted with such a situation, are vigilant to make sure that the contract was not unconscionable. *Id.* at 1316G-H.

<sup>65</sup> The House of Lords hears appeals from the English Court of Appeal.

<sup>66</sup> [1975] 1 All E.R. 237 (C.A.).

<sup>67</sup> *Id.* at 238.

mentally unfair to the group.<sup>68</sup> Under the publishing agreements, if the group's songs were published, the group would receive ten percent of the retail price of the sheet music and fifty percent of the royalties from the sale of records.<sup>69</sup> The court held that the publishing agreements gave the publisher or manager "a stranglehold over each of the composers."<sup>70</sup> In describing the similarities between the *Davis* agreement and the *Schroeder* agreement, the court found the *Davis* agreement fundamentally unfair.<sup>71</sup> Under the *Davis* agreement, each composer had an obligation to the publisher for ten years without any promise from the publisher other than to use best efforts.<sup>72</sup> The court held that the ten year contract was unfair, just as the twenty-one year agreement for a garage in *Esso Petroleum Co. Ltd. v. Harpers Garage (Stourport) Ltd.*<sup>73</sup> The court focused on the fact that the group neither consulted a lawyer, nor had legal advisors.<sup>74</sup> The court reasoned that there was inequality of bargaining power, and held that neither the agreement, nor the assignment of copyright was enforceable.<sup>75</sup>

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<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 239.

<sup>70</sup> *Id.*

The court held that:

In every work which the composer produces over a period of ten years, the copyright is vested in the publisher. The publisher had the right for six months to reject any work without payment. If he did not reject it, he was held to have retained it. But even when he retained it, he was not under any positive obligation to exploit it . . . .

*Id.*

<sup>71</sup> *Clifford Davis Management Ltd. v. WEA Records Ltd.*, [1975] 1 All E.R. 237, 239-40 (C.A.).

<sup>72</sup> *Id.* at 240.

<sup>73</sup> 1968 App. Cas. 269. In *Esso Petroleum*, the House of Lords asked whether two exclusive purchasing agreements were enforceable. The initial problem was to decide whether the agreements were subject to the restraint of trade doctrine at all. *Id.* at 271.

The Lordships all agreed that they were, but provided three different explanations of why this was so. The explanation given by the majority involves the 'opening the door' test. This test states that if a contract fetters an existing freedom whereby the respondent had agreed to acquire petrol from the appellant, it can be said to restraint trade. If however it simply opens a door providing the covenantor with a new economic opportunity, it can not.

RICHARD WHISH, COMPETITION LAW, 29 (1985).

<sup>74</sup> *Clifford Davis Management Ltd. v. WEA Records Ltd.*, [1975] 1 All E.R. 237, 241 (C.A.).

<sup>75</sup> *Id.*

c. O'Sullivan

*O'Sullivan v. Management Agency and Music Ltd.*, was decided by the English Court of Appeal in 1984.<sup>76</sup> Raymond O'Sullivan, a composer, signed management contracts with Gordon Mills, an internationally known manager, who was also a shareholder in a management agency publishing company and record company.<sup>77</sup> O'Sullivan was inexperienced in business matters and relied on Mill's advice when he entered into the agreements.<sup>78</sup> Mills never informed O'Sullivan to obtain independent legal advice.<sup>79</sup> The court noted that there was inequality of bargaining power between the parties.<sup>80</sup> The court held that Mills and his companies had a fiduciary duty to O'Sullivan and, therefore, all of the agreements signed by O'Sullivan were obtained by undue influence.<sup>81</sup>

2. *Post-Trilogy Cases*

a. Elton Hercules John

Two years after *O'Sullivan*, the Chancery Court decided issues similar to those addressed in the trilogy cases.<sup>82</sup> Elton John and Bernie Taupin were minors when they signed an agreement with Dick James Music [hereinafter DJM].<sup>83</sup> After Elton John became a popular recording artist, Mr. James sought to renegotiate all of the existing contracts and told John that he wanted him to be represented by legal counsel in future music dealings.<sup>84</sup> Because of this renegotiation, John and

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<sup>76</sup> [1985] 1 Q.B. 428 (C.A.).

<sup>77</sup> *Id.* at 444. Clause 6 of the management agreement gave Mills complete "discretion to appoint any agent for the purpose of obtaining engagements or furthering O'Sullivan's career. . . ." *Id.* at 448.

<sup>78</sup> *Id.* The lower court held that Mills did not advise O'Sullivan to seek independent legal counsel out of fear that he would not be able to maintain the companies' strong hold over O'Sullivan. As a result, the agreements were deemed void and unenforceable as restraints of trade based on the *Schroeder* ruling. *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 449.

<sup>81</sup> [1985] 1 Q.B. 428, 449 (C.A.).

<sup>82</sup> *Elton Hercules John v. Richard Leon James*, High Court of Justice, Chancery Division, 1982 J. No. 15026 (Nov. 29, 1985).

<sup>83</sup> Yanover and Kotler, *supra* note 51, at 226.

<sup>84</sup> *Elton Hercules John v. Richard Leon James*, High Court of Justice, Chancery Division, 1982 J. No. 15026, 2 (Nov. 29, 1985).

Taupin sued DJM on the basis of undue influence,<sup>85</sup> claiming that the publishing agreements should be set aside.<sup>86</sup> The Chancery Court held that the Mr. James and DJM were fiduciaries.<sup>87</sup> Thus, the court allowed DJM to retain a percentage of the profits, without ordering the return of copyrights nor the delivery of master recordings.<sup>88</sup>

b. Holly Johnson

The most recent English music dispute case dealing with restraint of trade prior to *Panayiotou*, involved the recording group Frankie Goes to Hollywood. In 1989, the English Court of Appeal in *Zang Tumb Tumm Records Ltd. v. Holly Johnson*<sup>89</sup> held that the recording and publishing agreement between the group Frankie Goes to Hollywood and their record company was in restraint of trade.<sup>90</sup> The court described the recording artists at the time of contracting as "young men in fairly humble circumstances and of little business experience."<sup>91</sup> The court noted that the pop group was now represented by a solicitor in negotiations with the record company.<sup>92</sup> Holly Johnson argued that the terms of the recording and publishing agreements, even after concessions were made during the negotiations, were so unfair that they could not be enforced.<sup>93</sup>

The court agreed with Johnson and concluded that the recording agreement was unenforceable because it was an unreasonable restraint of trade.<sup>94</sup> Under the terms of the contract, a member of the band could only form a new group if the recording company approved of his new partners who agreed to be bound by all the outstanding terms of the recording agree-

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<sup>85</sup> Yanover and Kotler, *supra* note 51, at 228. "Initially, John and Taupin claimed that the agreements were an unreasonable restraint of trade, but later abandoned that claim." Yanover and Kotler, *supra* note 51, at 228.

<sup>86</sup> Yanover and Kotler, *supra* note 51 at 228.

<sup>87</sup> *Elton Hercules John v. Richard Leon James*, High Court of Justice, Chancery Division, 1982 J. No. 15026, 61 (Nov. 29, 1985).

<sup>88</sup> *Id.* at 64-76.

<sup>89</sup> *Zang Tumb Tumm Records Ltd. v. Holly Johnson*, (C.A. August, 1989) (LEXIS \*15, Enggen Library, Cases File).

<sup>90</sup> *Id.* at 14-15.

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 3.

<sup>94</sup> *Zang Tumb Tumm Records Ltd. v. Holly Johnson*, (C.A. August, 1989) (LEXIS \*9, Enggen Library, Cases File).

ment.<sup>95</sup> Another provision stated that if the members of the group wanted another lead singer, they would have to find one the recording company found acceptable.<sup>96</sup> In addition, the new singer would be bound by all the outstanding terms of the recording agreement.<sup>97</sup> The recording agreement's terms regarding duration were found to be unfair and one-sided since the members of the group were bound collectively and individually.<sup>98</sup> Therefore, the English Court of Appeal ruled in favor of the pop group Frankie Goes to Hollywood, holding that the recording agreement violated restraint of trade principles.<sup>99</sup>

### C. Article 85 Claims and Exclusive Artist Agreements

European Community competition law "must be understood within the context of Community principles that attempt to break down the national boundaries between member states of the European Community and to complete the unification of the common market."<sup>100</sup> Article 85 of the Treaty of Rome,<sup>101</sup>

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<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* "Though the members of the group are exclusively bound to the recording company the recording company is not exclusively bound to them." *Id.* The court stated:

[p]op musicians are promoted by the sales of their records, and obviously a recording company has difficulty in promoting a little known group when there are so many others seeking fame and fortune. Stringent provisions such as many of those in the recording agreement may be justifiable in an agreement of short duration. But the onus must, in my judgment, be on the recording company to justify its length of the Term and the one-sidedness of the provisions as to duration in this recording agreement.

*Id.* at 9-10.

<sup>98</sup> *Zang Tumb Tumm Records Ltd. v. Holly Johnson*, (C.A. August, 1989) (LEXIS \*9, Enggen Library, Cases File). The recording company had discretion, for up to seven option periods after the seven month initial period, to exercise its options under Clause 3. *Id.*

The court described the contract as follows:

Each option period is to be for at least one year and possibly for up to 120 days or a third of a year or more. It is an agreement which could well last eight or nine years and during all that time, when their earning potential would be likely to be at its highest, the members of the group would be bound to record only for the recording company. But the recording company itself is free to terminate its obligations at any time by not exercising the next option.

*Id.*

<sup>99</sup> *Id.* at 10.

<sup>100</sup> Spencer Weber Waller, *Understanding and Appreciating EC Competition Law*, 61 ANTITRUST L. J. 55 (1992). The European Community "was created in

which embodies the above policy, was the first set of European rules designed to prevent and address anti-competitive behavior.<sup>102</sup> To invoke article 85, the agreement must be "between undertakings, decision by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market."<sup>103</sup>

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1957 in order to establish a new European common market and to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it." *Id.* at 56.

<sup>101</sup> EEC TREATY art. 85.

<sup>102</sup> *Dara*, *supra* note 13, at 762-63.

EEC TREATY article 85 reads:

Article 85

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member states and which have as their object of effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

EEC TREATY art. 85.

<sup>103</sup> *See* EEC TREATY art. 85.

An 'undertaking,'<sup>104</sup> for treaty application, may be a company or an individual, and, thus, applicable to recording artists, provided the natural person, otherwise out of reach of article 85, 'engages in economic activities.'<sup>105</sup>

Article 85 applies to contracts "which have as their object or effect the prevention, restriction or distortion of competition."<sup>106</sup> As a result, only "agreements which may affect trade between Member States are subject to the prohibitions of article 85."<sup>107</sup> This limitation applies regardless of the degree of impact an agreement, such as a recording contract, may have on competition.<sup>108</sup> The requirement that an agreement have an effect on trade between Member States is "the boundary between the areas respectively covered by Community law and the law of the member-states."<sup>109</sup>

Nevertheless, agreements can easily be found to violate this provision because courts and the European Commission construe this requirement broadly.<sup>110</sup> Courts consider this requirement met when a particular agreement "may have an influence, direct or indirect, actual or potential, on the pattern of trade between the Member States."<sup>111</sup> As such, article 85 attempts to address the "prevention, restriction or distortion of competition within the Common Market . . ."<sup>112</sup> "[I]n judging whether an agreement potentially may have an impact on the trade between Member States or may distort competition, its weight must be evaluated with respect to 'the economic and legal context in which such agreements . . . are to be found.'"<sup>113</sup>

Section two of article 85 states that all agreements made in violation of section one are void, "while section three provides

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<sup>104</sup> See *Dara*, *supra* note 13, at 765.

<sup>105</sup> See *Dara*, *supra* note 13, at 765. See generally *Reuter v. BASF A.G.*, [1976] 2 C.M.L.R. 44D.

<sup>106</sup> EEC TREATY art. 85. See also *Dara*, *supra* note 13, at 767.

<sup>107</sup> EEC TREATY art. 85.

<sup>108</sup> See *Dara*, *supra* note 13, at 767.

<sup>109</sup> *Hugin Kassaregister AB v. Commission*, [1979] 3 C.M.L.R. 345, 373.

<sup>110</sup> *Dara*, *supra* note 13, at 767.

<sup>111</sup> *Dara*, *supra* note 13, at 767. See *La Technique Miniere v. Maschinenbau Ulm*, [1966] C.M.L.R. 357, 375.

<sup>112</sup> EEC TREATY art. 85.

<sup>113</sup> *Dara*, *supra* note 13, at 769 (quoting *Brasserie de Haecht v. Vilkins*, [1968] C.M.L.R. 26, 40).



the possibility of an exemption from those sanctions."<sup>114</sup> In order to obtain the exemption, the agreement must satisfy four conditions:

- (a) contribution to the improvement of the production or distribution of goods or to the promotion of technical or economic progress;
- (b) allocation to consumers of a fair share of the benefit; (c) avoidance of unnecessary restrictions; and (d) less than complete elimination of competition 'in respect of a substantial part of the products in question.'<sup>115</sup>

In *ICI v. Commission*,<sup>116</sup> the European Court of Justice [hereinafter ECJ], attempted for the first time to define a concerted practice.<sup>117</sup> In this case, the ECJ found the presence of a concerted practice due to a "concordance of the rate and timing of the price increase made by the challenged companies and the existence of previous informal contacts between them."<sup>118</sup> Additionally, the ECJ described the differences between a concerted practice and an agreement.<sup>119</sup> The ECJ held that a concerted practice is a "form of co-ordination between undertakings which, without going so far as to amount to an agreement properly so called, knowingly substitutes a practical co-operation between them for the risks of competition."<sup>120</sup>

#### D. *Application of Article 85 to the Music Industry*

Article 85 of the Treaty of Rome sets the framework for situations in which the recording industry can easily become susceptible to claims regarding article 85 violations. Artists who meet the jurisdictional limitations imposed by the European Community, can seek protection from the anti-competition practices of their record companies in article 85.

The record music market:

is characterized by certain special features, including the heterogeneous nature and short life cycle of its products, the constant change in consumer preferences, based to some extent on changes

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<sup>114</sup> EEC TREATY art. 85, §§ 1-3.

<sup>115</sup> Dara, *supra* note 13, at 771.

<sup>116</sup> 1972 E.C.R. 619, [1972] 2 C.M.L.R. 557.

<sup>117</sup> *Id.* at 622. See also Dara, *supra* note 13, at 766.

<sup>118</sup> Dara, *supra* note 13, at 766.

<sup>119</sup> *ICI v. Commission*, 1972 E.C.R. 619, 622.

<sup>120</sup> *Id.* at 622.

in fashion, and the significance of individual articles or hit records to a record companies' profitability rather than the development of brand loyalty to individual record labels on the part of the ultimate consumer.<sup>121</sup>

As a result of the volatile nature of the recording industry, only the major recording companies can compete for major artists, some of whom can demand high advances, as in the case of Michael.<sup>122</sup> Although many record companies compete within the European market, "none have become significant market forces."<sup>123</sup> Based upon the recording industry's unpredictable and extreme concentration, it is not surprising that record companies in the European Community are often the subject of competition based litigation with regard to exclusive artist agreements.

This litigation involves the issue of whether the record company has effectively removed the artist from the market in which his or her services are being sought. Record companies often sign artists to lengthy contracts to keep the artist, once he or she becomes successful, from signing with a competing company. As such, the European Commission found that the structural features of the market(s) for recorded music may involve situations of collective dominance.<sup>124</sup>

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<sup>121</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*190 Enggen Library, Cases File).

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* For example, while there have been no entrants on the UK market in the last five years, their combined market share amounts to only 4% of the market for albums. *Id.*

<sup>124</sup> *Id.* The "Decision on the Merger Task Force" analyzed the market and competition between record companies in the European Community. The Commission concluded that the proposed acquisition would not create or strengthen a dominant position among the five major record companies as a result of which competition would be significantly impeded in the common market or a substantial part of it. The music recording industry is highly concentrated. The pop music market has been particularly concentrated since the latter half of the 1980's. Since 1988 at least six independent labels have been acquired by the top five major companies. Virgin is in fact the last remaining significant independent record company. *Id.*

The combined market share of the leading five companies - Thorn EMI, Sony, Polygram, Warner, and Bertelsmann (BMG) is currently estimated at 77% for the EEC as a whole and ranges from around 70% to 80% in individual member states. Each of Thorn EMI's major competitors are significant participants in the market. They are all active in most types of music and in every Member State. As a result of the disappearance of Virgin from the market, the level of concentration will increase. Thus, the top five companies will themselves control an estimated 83% of

Article 85 of the Treaty of Rome is, therefore, applicable to companies and artists involved in the music industry.<sup>125</sup> In

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the EEC market. In individual member states the level of concentration will range from around 70% to 95%. *Id.*

<sup>125</sup> Frank L. Fine, *The Impact of EEC Competition Law in the Music Industry*, 12 Nw. J. INT'L L. & BUS. 508 (1992).

Article 85 also applies to companies based outside the EEC: Companies based outside the EEC may be subject to Community jurisdiction in one of two ways. If the company has a subsidiary or other presence in the Common Market, the Commission may assert the 'single economic entity' theory by which the anti-competitive behavior of the EEC-based subsidiary or office is attributed to the third-country parent. Alternatively, jurisdiction may be imposed on a headquarter[s] outside the EEC where the anti-competitive agreement is implemented within the EEC. This latter assertion of jurisdiction does not require the company in question to have a legal presence in the EEC. *Id.* at 508.

Article 85(1) prohibits agreements and concerted practices which have the 'object or effect' of restricting competition within the Common Market, subject to the possibility of an exemption (individual or block) on public policy grounds pursuant to Article 85(3). In order to qualify for an exemption under Article 85(3), an agreement must satisfy two 'positive' and two 'negative' criteria. The 'positive' criteria are that the agreement must either contribute to improving the production or distribution of goods or to promoting technical or economic progress. The 'negative' criteria are that the agreement must not impose restrictions which are not 'indispensable' nor which may eliminate competition with respect to a 'substantial part' of the products or services in question. *Id.* at 509.

Article 85(1) applies to agreements which have as their 'object or effect' the restriction of competition. It is generally very difficult for the Commission to prove that the 'object' of the agreement is to restrict competition. A number of agreements are, however, by their very nature restrictive of competition, and in such cases the Commission does not hesitate to find that infringements *per se* have been committed. Examples of such cases include price fixing and export bans. *Id.* at 510.

Regardless of whether 'object' or 'effect' is relied upon by the commission, it is clear that Article 85(1) cannot be infringed where the agreement in question is incapable of having an 'appreciable' or substantial effect on competition. In the notice on Agreements of Minor Importance, published in 1986, the Commission established a *de minimis* rule which is applicable to Article 85(1). According to this notice, agreements do not normally fall within the prohibition of Article 85(1) where: i) The goods or services do not represent more than 5% of the total market for such goods or services in the area of the Common Market affected by the agreement ii) The aggregate annual turnover of the participating undertakings does not in the aggregate exceed 200 million ECU (\$250 million); and iii) Such market share or turnover is not exceeded by more than one-tenth during two successive financial years.

*Id.* at 509-11.

particular, exclusive artist agreements are subject to the restrictions of article 85.<sup>126</sup>

In *Re Unitel Film- Und Fernseh-Produktionsgesellschaft mbH & Co.*,<sup>127</sup> the European Commission held that exclusive artist agreements are subject to article 85.<sup>128</sup> In *Re Unitel*, four of La Scala's leading singers had exclusive contracts with Unitel, which prevented them from further commercializing their artistic performances in any of the EEC Member States.<sup>129</sup> Radio Televisione Italiana [hereinafter RAI], planned to broadcast the live La Scala performance of Don Carlos to a worldwide audience.<sup>130</sup> When RAI received Unitel's objections to this broadcast, it complained to the commission.<sup>131</sup> The Commission held that artist contracts like those between the La Scala singers and Unitel were subject to article 85.<sup>132</sup> The Commission ruled that artists are undertakings within the meaning of article 85(1) when they commercially exploit their artistic performances.<sup>133</sup> In addition, the Commission suggested that a non-competition clause may infringe upon article 85(1) if it has appreciable effects on competition.<sup>134</sup>

In 1981, the European Commission began negotiations with record company executives to develop a model recording agreement which did not violate article 85.<sup>135</sup> The record companies wanted to develop a recording contract that would not risk the commercial value of their recording agreements.<sup>136</sup> These negotiations, however, failed to produce the model agreements sought by the record companies.<sup>137</sup>

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<sup>126</sup> *Id.* at 511. In addition, Article 85 covers, "copyright licenses, mechanical rights agreements, exclusive distribution agreements, market division agreements; and joint venture agreements." *Id.*

<sup>127</sup> [1978] 3 C.M.L.R. 306.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 307.

<sup>130</sup> *Id.* at 306.

<sup>131</sup> *Id.*

<sup>132</sup> *Re Unitel Film- Und Fernseh-Produktionsgesellschaft mbH & Co.*, [1978] 3 C.M.L.R. 306, 308.

<sup>133</sup> *Id.* at 307.

<sup>134</sup> *Id.*

<sup>135</sup> Fine, *supra* note 125, at 512.

<sup>136</sup> Fine, *supra* note 125, at 512.

<sup>137</sup> Fine, *supra* note 125, at 512.

III: *PANAYIOTOU v. SONY MUSIC ENTERTAINMENT (UK) LTD.*<sup>138</sup>

In 1982, Michael's band, Wham!, signed a recording contract with Inner Vision Records.<sup>139</sup> Afterwards, doubting Inner Vision's professionalism and promotional skills,<sup>140</sup> Michael rescinded the Inner Vision Agreement, and signed with a "major,"<sup>141</sup> CBS (UK).<sup>142</sup> In 1984, he contracted with CBS to produce eight albums.<sup>143</sup> In December of 1986, Michael approached CBS (UK) to renegotiate the 1984 agreement to obtain financial returns equivalent of other world-famous pop musi-

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<sup>138</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS Enggen Library, Cases File).

<sup>139</sup> *Id.* at 10. At the time, Inner Vision Records had a licensing agreement with Sony Music (then CBS (UK)). *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 11. "Major" refers to the leading five companies in the music industry. These companies are Thorn EMI, Sony, Polygram, Warner and Bertelsmann (BMG). *Id.* at 189. In a 1983 letter, Michael's attorney stated that the Inner Vision agreement was void on grounds of restraint of trade. *Id.* at 11.

<sup>142</sup> *Id.* at 11. By rescinding this agreement, Michael was attempting to negotiate the release of his band from the Inner Vision Agreement which would enable the band to contract directly with CBS (UK). *Id.* Following a hearing regarding this dispute, Inner Vision, Michael and Ridgeley negotiated a deal in which Wham! signed directly with CBS(UK). The Chancery Court stated that Inner Vision's claims were effectively "bought off" by CBS(UK), resulting in the settlement of the Inner Vision action. *Id.* at 13.

<sup>143</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*13 Enggen Library, Cases File). The 1984 agreement provided for the delivery of master recordings for the first album during an initial contract period limited to last a maximum of three years, with options to CBS (UK) to extend the contract for up to a further seven contract periods, with master recordings for a further album to be delivered during each of those periods. *Id.* Michael was satisfied with the 1984 agreement, although, he believed Wham! could have negotiated better contract terms on the open market. *Id.* at 14. (The 1984 agreement was in fact renegotiated: a renegotiation which resulted in the 1988 agreement, the agreement challenged in this action). *Id.*

Michael's attorney, Tony Russell, during cross-examination stated that he believed that the 1984 agreement was a binding agreement, and that the "question of the 1984 agreement being in restraint of trade (a doctrine with which he was fully familiar and which was very fresh in his mind, having acted for Wham! in the Inner Vision Action) did not cross his mind." *Id.*

The singles, *Wake Me Up Before You Go* and *Careless Whisper* were released and are successful. *Id.* "In January 1985, CBS(UK) exercised the first of its seven options under the 1984 agreement, thus committing Wham! to deliver a second album." *Id.* at 15. From 1984 to 1986 Wham! released successful singles. *Id.* at 14-15.

cians.<sup>144</sup> In 1987, CBS released FAITH, which was a commercial success and one which made Michael a popular international solo artist.<sup>145</sup> Michael's efforts to renegotiate the 1984 agreement resulted in the 1988 agreement,<sup>146</sup> which terms Michael agreed to accept.<sup>147</sup> In September of 1990, Sony released LISTEN WITHOUT PREJUDICE - VOL I which was less successful in terms of sales than FAITH.<sup>148</sup> Michael alleged that the Sony Group failed to market the album properly.<sup>149</sup> In November of 1991, Michael unsuccessfully attempted to renegotiate the 1988 agreement.<sup>150</sup> In 1992 Michael sued Sony, alleging that the 1988 agreement was unenforceable as an unreasonable re-

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<sup>144</sup> *Id.* at 16.

<sup>145</sup> *Id.* at 21. Sales of *Faith* were four million by the end of 1987. By the end of 1992, more than fourteen million copies of *Faith* had been sold worldwide. *Id.*

<sup>146</sup> *Id.* at 26. Michael stated, "I felt that I had little alternative but to accept CBS' offer, as I needed CBS' maximum support for my new album [i.e. *Faith*] and I feared that I might antagonize Mr. Yetnikoff and put that support at risk if I made any further demands." *Id.* Michael further stated that the dealings with CBS had "run smoothly" and that CBS had not tried to interfere artistically. In early January 1988, Sony bought CBS, and CBS (UK) thereupon became Sony Music. During cross-examination, Michael, recalled that after the renegotiation, he was committed to perform his contractual obligations with CBS. *Id.*

<sup>147</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*26 Enggen Library, Cases File). "Mr. Michael was looking to Sony to treat him as he deserved - that is, in line with Sony's top U.S. artists . . . in those circumstances, he was happy for his advisors to attempt a simple renegotiation of the commercial terms of the 1988 agreement." *Id.*

<sup>148</sup> *Id.* at 38.

<sup>149</sup> *Id.* at 37. Michael stated that Sony's failure "[r]esulted from a deliberate policy decision to reduce it's efforts on that album because Mr. Michael had declined to appear in videos for the promotion of that album." *Id.* In August of 1990, the single *Praying for Time* was released in the U.S. Sony wanted to release another single from LISTEN WITHOUT PREJUDICE VOL I, entitled *Freedom*, as the "first single on the basis that it was more representative of Michael's previous style, but had on this occasion deferred to Mr. Michael's wishes." *Id.*

<sup>150</sup> *Id.* at 42. Michael's attorneys attempted a further renegotiation of the 1988 agreement limited to the royalty rate for compact discs. Sony proposed that Michael appear in three promotional videos. Michael considered this "an unreasonable demand," notwithstanding that it was not in fact a demand at all but a proposal put forward in response to a request by Mr. Michael that his financial terms be improved still further." *Id.* Sony Music alleged that since Michael requested payment of the advance for the third album, Michael affirmed the 1988 agreement. *Id.* at 44. In a fax, Michael stated that there had been a deterioration in Sony's attitude over a number of years. He concluded by stating: "I came into this business to make music, not software." *Id.* at 48.

straint of trade, and void as being in contravention of article 85 of the European Economic Treaty.<sup>151</sup>

### A. *Restraint of Trade*

In addressing the restraint of trade issue, the Chancery Court first determined whether the 1988 agreement "attracted" the doctrine.<sup>152</sup> Sony argued that the agreement did not "attract" the doctrine, because the agreement was in accord with standard recording agreements used in the business and was not unconscionable.<sup>153</sup> Sony also argued that the enforcement of its terms would not cause hardship to Michael, nor prevent his creative output from being released to the public.<sup>154</sup> Additionally, Sony claimed that it was not open to Michael, as a mat-

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<sup>151</sup> *Id.* at 48. In his opening statement, Mr. Cran, Michael's counsel, described this action in the following terms:

This case is not about money; it is not about the wish of somebody to benefit from being freed from a contract which he has freely entered into. It is about restraint of trade. It is about an agreement which binds George Michael for the whole of his professional career on terms which are capable of being worked to his substantial disadvantage.

*Id.* at 49.

During his cross-examination, Michael explained his reasons for commencing this action:

Q: . . . would you agree with me that the motives on your side for this litigation, the motives which are driving you in this litigation, have very little to do with the legal reasons which appear in the pleadings?

A: Yes.

Q: And that your reasons for this litigation is simply that you do not get on with Sony any more?

A: . . . My reason for wanting to part with Sony is because I don't believe that one particular area of the world which is very important to me [ie. the U.S.] has any belief in me or any motivation to exploit my work.

*Id.* at 49.

As the court stressed:

Mr. Michael's motive in challenging the 1988 Agreement (as varied) under the restraint of trade doctrine, and under Article 85 of the EEC Treaty, is to rid himself of a contract which-despite renegotiations in 1988 and 1990 - he now regards as being no longer in his interest. Although certain breaches of the 1988 Agreement are alleged, those allegations are made in the context of the restraint of trade issue. As Mr. Cran made clear at the start of the hearing 'the main thrust of this action is not about breaches of the agreement by Sony.'

*Id.* at 50.

<sup>152</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*92 Enggen Library, Cases File).

<sup>153</sup> *Id.* at 93.

<sup>154</sup> *Id.*

ter of public policy, to plead that the 1988 agreement was in restraint of trade because the 1984 agreement was entered into as the result of a compromise from the Inner Vision Action.<sup>155</sup>

The court agreed with Sony and held that the 1988 agreement should not be treated as a new agreement because it was a renegotiation of a pre-existing agreement.<sup>156</sup> Additionally, the court held that the agreement did not violate public policy.<sup>157</sup> The court then stated that the conclusion it reached on the public policy argument made it unnecessary to consider the restraint of trade issue.<sup>158</sup> Nevertheless, the court examined the remaining questions dealing with the restraint of trade issue under the test from *Nordenfelt*<sup>159</sup> in the event that the 1988 agreement did attract the doctrine of restraint of trade.<sup>160</sup> Sony identified twelve "legitimate interests" for the purposes of the *Nordenfelt* test.<sup>161</sup>

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<sup>155</sup> *Id.* It was in this action that Mr. Michael alleged that his then existing agreement (the Inner Vision agreement) was in restraint of trade. *Id.*

<sup>156</sup> *Id.* at 94.

<sup>157</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*96 Enggen Library, Cases File).

<sup>158</sup> *Id.* at 100.

<sup>159</sup> *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.*, 1894 App. Cas. 565. For a discussion of *Nordenfelt*, see Angelo & Ellinger, *supra* note 16, at 464. For a discussion of the *Nordenfelt* test, see *infra* note 177.

<sup>160</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*101 Enggen Library, Cases File). Michael argued that the 1988 agreement's restrictive nature should "outrage the Court." *Id.* at 120. The court held that it "is impossible to be outraged at the prospect of Mr. Michael being denied the opportunity, once he has achieved success under the provisions of his existing recording agreement, to capitalize on that success in the open market by commanding even greater financial returns than he has so far enjoyed." *Id.*

<sup>161</sup> *Id.* at 114.

Sony's twelve legitimate interests for the purpose of the *Nordenfelt* test were:

- i) The desire to sell as many records as possible.
- ii) The desire to ensure that there is an even and adequate flow of product.
- iii) The desire to be able to plan ahead.
- iv) The desire to have available proven successful product for as long as possible.
- v) The desire and need to be able to compete on equal terms in an international environment against other record companies which have long term signing.
- vi) The desire to be known for continued high calibre releases by long term successful artists in order to maintain a reputation with consumers, dealers and new unsigned artists.
- vii) The desire to maintain morale and enthusiasm amongst employees.
- viii) The desire and need to recover the investment made in a particular artist.
- ix) The desire to make a profit on that investment.
- x) The need to have available sufficient product to finance (a) losses on unsuccessful product, and (b) the fixed costs of the infrastructure (including overheads).
- xi) The desire to accumulate property rights as an



In attempting to legitimize their business practices, Sony argued that long-term contracts are justified because when an artist is successful, the profits of the artist's success should be available to cover the cost of artists who are not as successful.<sup>162</sup> The court concluded that the terms of the 1988 agreement were justified.<sup>163</sup> The Chancery Court held that the restrictions in the 1988 agreement were reasonably necessary for the protection of the legitimate interest of Sony and commensurate with the benefits Michael received.<sup>164</sup> In supporting this conclusion, the court noted that the 1988 agreement was a renegotiation of an earlier agreement.<sup>165</sup>

The court noted that by January of 1988, Michael was an established artist who had achieved commercial success as a solo artist with his album "Faith," and that Michael's aim in renegotiation was to achieve parity with other superstars.<sup>166</sup> Additionally, the court stated that the essence of the renegotiation, as defined in the 1988 agreement, was a substantial improvement in Michael's financial terms in exchange for additional albums.<sup>167</sup> As such, the 1988 agreement was reasonable in meeting the requirements of the *Nordenfelt* test and, therefore, was not in restraint of trade.

### B. *The Article 85 Issue*

First, the Chancery Court held that Michael's service companies and Sony were "undertakings" for purposes of article 85(1).<sup>168</sup> As applied to the 1988 agreement, the court held that the issue, relating to the effect of trade for article 85 purposes, was whether this agreement had any actual or potential reper-

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asset. xii) The desire to have a supply of successful product in the future at reasonable and predictable prices.

*Id.*

<sup>162</sup> *Id.* at 120.

<sup>163</sup> *Id.* at 135.

<sup>164</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*135 Enggen Library, Cases File) (quoting *Schroeder*, [1974] 1 W.L.R. 1308, 1315H).

<sup>165</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*136 Enggen Library, Cases File).

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 167.

cussions on competition in the market for pop records.<sup>169</sup> Michael argued that the 1988 agreement had an adverse effect on the "raw material" market because it prevented him from producing recordings for other record companies in other Member States.<sup>170</sup> Additionally, he argued that it had an effect on the "end product" market because it affected the flow of trade for his recordings. Because of these reasons, Michael concluded that the 1988 agreement had an effect on trade between Member States.<sup>171</sup>

However, the Chancery Court viewed the market for the services of U.K. recording artists in the pop field as a purely domestic one, only limited to the U.K.<sup>172</sup> As a result, the court held there was no Community-wide market for the services of U.K. recording artists in the field of popular music for the purposes of article 85(1).<sup>173</sup> Therefore, the 1988 agreement did not affect trade between Member States. Hence, the article 85 preliminary jurisdictional requirement for article 85 purposes was not fulfilled in this case.<sup>174</sup>

#### IV. ANALYSIS

The litigation between Michael and Sony, analogous to the litigation in *Schroeder, O'Sullivan, Davis, Elton John* and *Holly Johnson*, will have an affect on the way contracts are negotiated and drafted in the European Community and the World.

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<sup>169</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*170 Enggen Library, Cases File).

<sup>170</sup> *Id.*

<sup>171</sup> *Id.* Michael then argued that the effect on trade between Member States was not de minimus given:

(a) the size and status of Sony Music and the Sony Group, (b) the fact that Mr. Michael is (and was in January 1988) a highly successful recording artist, whose records have achieved substantial sales, and (c) the fact that the 1988 agreement forms part of a 'network of similar agreements' (i.e. agreements between other recording artists and other 'majors.')

*Id.*

The court noted that there was "no evidence that U.K. artists sign with foreign record companies." *Id.* at 171. The only exceptions the court noted were the Rolling Stones and Rob Halford with Sony U.S. and the Stone Roses with Geffen Records. *Id.*

<sup>172</sup> *Id.* at 171. The market the court viewed as domestic was the market in which Michael engaged his services. *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*175 Enggen Library, Cases File).

### A. *The 1988 Agreement in the Context of a Renegotiation*

The Chancery Court correctly held that the 1988 agreement Michael signed was a renegotiation of a pre-existing 1984 agreement. Since Michael did not contest the enforceability of the 1984 agreement, and negotiated the 1988 agreement based on the 1984 agreement, receiving a financial improvement in the terms of his contract, the contract was properly held to be enforceable. However, the Chancery Court noted that a renegotiation needed to be justified under the doctrine of restraint of trade,<sup>175</sup> yet it still could result in terms which are oppressive to the artist involved.<sup>176</sup>

### B. *The 1988 Agreement under the Nordenfelt test.*

The court correctly analyzed the restraint of trade claim brought against Sony under the test formulated in *Nordenfelt v. Maxim Guns and Ammunition Co.*<sup>177</sup> The concept of "inequality of bargaining power" must be placed in a commercial context.<sup>178</sup> As held in *Alec Lobb Ltd. v. Total Oil (Great Britain) Ltd.*, the "mere existence of an inequality of bargaining power"<sup>179</sup> does not amount to unconscionability.<sup>180</sup> The 1984 agreement Michael signed was binding, hence, while renegotiating the terms of the recording agreement, "he was in the position of any other recording artist renegotiating the terms of his or her recording agreement; he was negotiating against the background of an existing binding contract."<sup>181</sup> As such, there is always an

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<sup>175</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*95 Enggen Library, Cases File) (citing *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*, 1968 App. Cas. 269).

<sup>176</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*95 Enggen Library, Cases File).

<sup>177</sup> 1894 App. Cas. 489. The *Nordenfelt* test states that the contract:

Must be reasonable in the interests of the contracting parties, and secondly it must be reasonable in the interests of the public. In the case of each condition he lays down a test of reasonableness. To be reasonable in the interests of the parties the restraint must afford adequate protection to the party in whose favor it is imposed; to be reasonable in the interests of the public it must be in no way injurious to the interests of the public.

*Id.* at 535.

<sup>178</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*105 Enggen Library, Cases File).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* at 106.

inequality of bargaining positions in situations of renegotiation between a record company and an artist.

Additionally, the Chancery Court correctly distinguished *Schroeder* from the Michael case. Unlike Michael, the songwriter in *Schroeder* entered into a form agreement where the publishing company had a unilateral right to terminate the agreement at any time by giving one month notice.<sup>182</sup> The publisher made no satisfactory positive undertakings to publish the artist's compositions.<sup>183</sup> In contrast to the *Schroeder* agreement, the disputed contract in the Michael litigation was the "renegotiation" of a contract signed in 1984.<sup>184</sup> Because Michael decided not to question the validity of the 1984 as a restraint of trade, he essentially affirmed the 1988 agreement.

It was clear that Sony would have no economic interest in preventing the publication of Michael's music. Michael had achieved superstar status, thus, it was in Sony's best interest to promote his music to the fullest. Applying the *Nordenfelt* test, the Chancery Court correctly held that the 1988 renegotiation signed by Michael, which was renegotiated by competent legal counsel, was not nearly as oppressive as the terms of the *Schroeder* agreement.<sup>185</sup> The Chancery Court stated that renegotiations are common in the music business once an artist becomes successful, and that the agreement completed in 1988 involved concessions by both Michael and Sony.<sup>186</sup> Under the *Nordenfelt* Test, the 1988 agreement was compatible with public interest and reasonable as between Sony and Michael.

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<sup>182</sup> A. Schroeder Music Publishing Co. Ltd. v. Macaulay, [1974] 1 W.L.R. 1308, 1314H.

<sup>183</sup> *Id.* at 1313H-14A.

<sup>184</sup> Panayiotou v. Sony Music Entertainment (U.K.) Ltd., (Chancery Division June 21, 1994) (LEXIS \*16 Enggen Library, Cases File).

<sup>185</sup> The Court in Zang Tumb Tumm Records Ltd. v. Holly Johnson, (C.A. August, 1989) (LEXIS \*14, Enggen Library, Cases File), found a contract similar to the 1984 and 1988 agreements unenforceable as a restraint of trade. Although the Chancery Court held as a matter of public policy Michael could not claim that the 1988 agreement was in restraint of trade, it analyzed the provision of the agreement under the *Nordenfelt* test because of the similarities between the contracts in the two cases. Panayiotou v. Sony Music Entertainment (U.K.) Ltd., (Chancery Division June 21, 1994) (LEXIS \*95 Enggen Library, Cases File).

<sup>186</sup> Panayiotou v. Sony Music Entertainment (U.K.) Ltd., (Chancery Division June 21, 1994) (LEXIS \*99 Enggen Library, Cases File).

### C. *The Effect of Exclusivity*

The *Schroeder* court, discussing whether a contract should be considered unfair, noted that when a person gives his exclusive services to a company, that person's ability to exercise as he or she chooses will be restricted.<sup>187</sup> *Schroeder* held that even though the doctrine of restraint of trade is inapplicable to such restrictions, if the contractual restrictions appear to be unnecessary or oppressive, "they must be justified before they can be enforced."<sup>188</sup> Unlike the contract provisions in *Schroeder*, the 1988 agreement was not oppressive. Michael had competent legal counsel negotiating on behalf of his interests.<sup>189</sup> Additionally, the 1988 agreement was the subject of a renegotiation which improved Michael financially and set him at parity with other world famous pop musicians.<sup>190</sup>

Michael signed his contracts with Sony and CBS in a commercial context. Under *Nordenfelt* reasoning, if a contract is reasonable at the time it is entered into, the court will not "look out for improbable and extravagant contingencies in order to make it void."<sup>191</sup> Similarly, an expert for Sony stated, "if a recording contract is to be expected to contain anything approaching absolute protection for the artist . . . the parties are in danger of stultifying the underlying commercial purpose of the transaction."<sup>192</sup>

It is clear that none of the 1988 agreement's restrictions go further than what is "reasonably required to protect"<sup>193</sup> the interests of Sony. As the Chancery Court in *Petrofina (Great Brit-*

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<sup>187</sup> *A. Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308, 1314G. See *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*106 Enggen Library, Cases File).

<sup>188</sup> *A. Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308, 1314H.

<sup>189</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*136 Enggen Library, Cases File).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 108.

<sup>192</sup> *Id.* at 109. The Chancery Court stated that "[i]n a doctrine based on the wide ground of public policy, the wider aspects of commerce must always be considered as well as the narrower aspects of the contract as between the parties." *Id.* at 110.

<sup>193</sup> *A. Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308, 1310B. See *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*115 Enggen Library, Cases File).

ain) *Ltd. v. Martin* stated, "the interests of the appellants in selling as large a quantity of their petroleum products as they can is one which they have a right to have protected."<sup>194</sup> Similarly, Sony's interest in selling as many records as possible, the "desire and need to be able to compete on equal terms in the international environment against other record companies which have long terms signing,"<sup>195</sup> and other interests under the *Nordenfelt* test are all legitimate.

Exclusive contracts such as Michael's contract with Sony are not objectionable. As the court in *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*<sup>196</sup> stated:

Sole agencies are a normal and necessary incident of commerce and those who desire the benefits of a sole agency must deny themselves the opportunities of other agencies. So, too, in the case of film-star who may tie herself to a company in order to obtain from them the benefits of stardom.<sup>197</sup>

Under the 1988 agreement, Michael sold his entire output of master recordings to Sony, thereby giving up the right to sell Master Recordings to anyone else so long as the 1988 agreement remained effective.<sup>198</sup> Selling an entire catalogue of Master Recordings to a record company as in the Michael case is similar to the sole agency situation described above in *Esso* and, therefore, unobjectionable.

#### D. *The Duration of the 1988 Agreement*

In *Schroeder*, duration was a "factor of great importance."<sup>199</sup> Duration was also the critical factor in the English Court of Appeal's decision in *Holly Johnson*.<sup>200</sup> In *Panayiotou*, the fifteen year contract limitation only operated in the event that the minimum delivery commitment had not been complied

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<sup>194</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*115 Enggen Library, Cases File).

<sup>195</sup> *Id.* at 114.

<sup>196</sup> 1968 App. Cas. 269.

<sup>197</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*115 Enggen Library, Cases File). *See also* *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*, 1968 App. Cas. 269, 328.

<sup>198</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*116 Enggen Library, Cases File).

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 117.

with.<sup>201</sup> Michael argued that there was a lack of reciprocity, in the sense that Sony could have terminated the 1988 agreement by declining to exercise its next option, while Michael had no corresponding right.<sup>202</sup> As the court correctly noted, Sony would have only terminated its contract with Michael if it was commercially reasonable. Because of the commercial success of Michael at the time of the 1988 signing, it would have been unlikely that Sony would have terminated its contract with Michael.<sup>203</sup> Under the 1988 agreement, Sony was interested in commercially exploiting Michael to the fullest.<sup>204</sup>

#### E. *Royalty Rates and Equitable Apportionment*

The royalty rates that Michael received were not objectionable, and were in accord with rates received by other artists in the music business. The Chancery Court, responding to Michael's argument that his Sony royalty rates were much less than those he could have achieved in the open market, noted:

a comparison with open market rates presupposes that Mr. Michael was not on the open market - i.e. that he was already

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<sup>201</sup> *Id.*

The Chancery Court stated:

[I]n the case of a new artist a record company will normally only commit itself to taking one album - no doubt a prudent step, where the market is unpredictable and the artist unproven - with options over at least five more. At the other end of the scale, the deal available to an established artist who is free of contract will depend on the negotiation strength of that particular artist. Four-album deals are common for established artists, but such an artist may nevertheless choose to sign up for more than the minimum number of albums he could have achieved given his negotiating strength.

*Id.* at 118.

<sup>202</sup> *Id.* at 119.

<sup>203</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*119 Enggen Library, Cases File). Sony stated: "The duration is the function of success. If the artist is unsuccessful, it is likely that the record company will decline to exercise an option, and the relationship will terminate. It is only if an artist is actually successful that the contract will continue for its full length." *Id.*

<sup>204</sup> *Id.* at 123.

As Judge Parker stated:

The notion that, as matters stood on 4 January 1988, there was a real risk that Sony Music might in effect 'put [Michael's recordings] in a drawer and leave them there' is in my judgment far-fetched: or, to use the language of Lord Macnaghten in *Nordenfelt* 'improbable and extravagant.' *Id.*

bound by the 1984 Agreement. But if he was already bound by the 1984 Agreement, it is no surprise that in a renegotiation he could not achieve terms as favorable as those which he could have achieved on the open market.<sup>205</sup>

In the Chancery Court's terms, "fairness" did not require the financial return of the recording artist to represent an "equitable apportionment of the proceeds of exploitation."<sup>206</sup> The Chancery Court stated that "[i]f Mr. Michael is to be entitled to a share of Sony's return from exploiting his services, why should not the same apply to Sony's own employees?"<sup>207</sup> Because Michael was already bound by the 1984 agreement, it was

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<sup>205</sup> *Id.* at 124.

In *Holly Johnson* the court stated:

There was no contention for the plaintiffs at that time that the point about the unenforceability of the agreements on grounds of restraint of trade had been waived or abandoned despite what Mr. Eaton wrote. On the contrary the picture as I see it is that there had been desultory renegotiation of the terms of the two agreements from July 1985 and during that process both sides realised that each side was reserving its position on all points in the event that, as happened, agreement was not reached. On the facts there was nothing at any time which could be described as an unequivocal representation by or on behalf of the defendant that he had decided not to proceed with his claim of unreasonable restraint of trade . . . . In my judgment there is nothing in these facts to render it unjust to the plaintiffs or unconscionable for the defendant to assert the unenforceability of the two agreements on grounds of restraint of trade. Accordingly in my judgment the plaintiffs fail on the question of waiver, laches or estoppel or however else it may termed.

*Zang Tumb Tumm Records Ltd. v. Holly Johnson*, (C.A. August, 1989) (LEXIS \*14-15, Enggen Library, Cases File).

<sup>206</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*125 Enggen Library, Cases File).

<sup>207</sup> *Id.* The Chancery Court stated that the music publishing contract in *Schroeder* contained an unrestricted power for the publisher to assign. *Id.* at 128.

The 1988 agreement between Sony Music and Michael contains a clause stating that "such rights may be assigned by any assignee thereof . . . ." *Id.* This clause, unlike the clause in *Schroeder*, only meant that "an assignee from Sony Music will stand in Sony Music's shoes so far as assignment is concerned, and will have no wider power to assign than Sony Music itself had." *Id.* at 129. Michael argued against Sony Music's right of rejection, multiple sets or 'live albums,' joint recordings, audio-visual performances, audit restrictions, alienation of copyrights, delayed royalty accounting and artistic control, all of which Judge Parker ruled against him. *Id.* at 131.

In *Schroeder*, Lord Reid held:

There may sometimes be room for an argument that although on a strict literal construction restrictions could be enforced oppressively one is entitled to have regard to the fact that a large organization could not afford to act oppressively without damaging the goodwill of its business.



no surprise that his royalty rates were considerably less than those he could have received as an artist on the open market.

#### F. *Differences between Panayiotou and Schroeder*

There are substantial differences between the contractual positions of Michael in *Panayiotou* and the artist in *Schroeder* in relation to their publishers and record companies. The artist in *A. Schroeder Music Publishing Co. Ltd. v Macaulay*<sup>208</sup> was not well known and was bound to assign to the publisher "during a long period, the fruits of his musical talent."<sup>209</sup> Under the *Schroeder* contract, the publisher did not have to do anything.<sup>210</sup> If the publisher used the songs which Schroeder composed, the publisher had to pay Schroeder pursuant to the terms of the contract.<sup>211</sup> As the House of Lords in *Schroeder* stated, the publisher may put the recordings "in a drawer and leave them there."<sup>212</sup>

On the other hand, Sony would never have simply left Michael's songs in a drawer, especially when the 1988 agreement was signed at the peak of Michael's career. On the contrary, Sony would be interested in exploiting Michael's talents to the fullest extent possible.

#### G. *The Effect of Competent and Independent Legal Advice*

The Chancery Court, citing two cases which dealt with the restraint of trade issue, *Binder v. Alachouzos*<sup>213</sup> and *Colchester Borough Council v. Smith*,<sup>214</sup> correctly found that the 1988 agreement was not in restraint of trade. In *Binder*, the compromise agreement between the two contesting parties was the re-

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But the power to assign leaves no room for that argument. We cannot assume that an assignee would always act reasonably.

A. *Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308, 1310B-C.

<sup>208</sup> [1974] 1 W.L.R. 1308.

<sup>209</sup> *Id.* at 1313D.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> [1972] 2 Q.B. 151 (C.A.).

<sup>214</sup> [1992] Ch. 421 (C.A.).

sult of a bargain involving solicitors and counsel on both sides.<sup>215</sup>

Similarly, the parties in *Colchester* entered into a bona fide compromise, which the contesting party had signed with the advice of a solicitor.<sup>216</sup> Like the parties in *Binder* and *Colchester*, the compromise of the Inner Vision Action in the Michael case resulted from bona fide negotiations. Both Michael's attorneys and CBS's attorneys pursued their respective positions "with vigor, if not rancor."<sup>217</sup> As such, it is clear that the 1988 agreement, which was negotiated by competent legal counsel, did not offend public policy.

Additionally, *Panayiotou* can be distinguished from *Clifford Davis Management Ltd. v. WEA Records Ltd.*,<sup>218</sup> based on the existence of competent and independent legal representation. In *Clifford Davis*, there was an inequality of bargaining power since the plaintiff was the manager of the group.<sup>219</sup> The composer received no legal advice before signing the agreements, and the terms of the assignment were unfair.<sup>220</sup> Unlike *Clifford Davis*, Michael had independent legal advice well versed in the workings of the music industry when he negotiated the 1984 agreement and the 1988 renegotiation. In addition, the terms of Michael's agreement were not unfair as those in *Clifford Davis*. Unlike the contract in *Clifford*, the disputed 1988 agreement was signed at the height of Michael's popularity. Therefore, it would be unlikely for Sony not to publish Michael's recordings.

#### H. *The article 85 Claim*

The Chancery Court was also correct in holding that "the market for the services of U.K. recording artists in the pop field is a purely national and domestic market."<sup>221</sup> Jurisdictionally,

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<sup>215</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*96 Enggen Library, Cases File).

<sup>216</sup> *Id.* at 97.

<sup>217</sup> *Id.* at 98.

<sup>218</sup> [1975] 1 W.L.R. 61 (C.A.).

<sup>219</sup> *Id.* at 62H.

<sup>220</sup> *Id.* at 65G.

<sup>221</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*171 Enggen Library, Cases File). Michael's counsel said: "there is no evidence that U.K. artists sign with foreign record companies (except

article 85 was inapplicable to Michael. For purposes of article 85(1), there was "no Community-wide market for the services of U.K. recording artists in the field of popular music."<sup>222</sup> At trial no evidence was presented to support the premise that English artists sign with foreign record companies.<sup>223</sup> As such, "the 1988 agreement does not affect trade between Member States at the 'raw material' end of the chain of supply, that is to say in the market for Mr. Michael's recording services."<sup>224</sup>

Pursuant to his contract, Michael's entire output of master recordings during the 1988 agreement, could have lasted as long as 15 years. This provision, in and of itself, was not sufficient to demonstrate an affect on trade between Member States under article 85.<sup>225</sup> Since Michael treated the 1984 agreement as an enforceable agreement under English law, and one which did not contravene article 85(1), the 1988 agreement did not have an effect on competition in the relevant market.<sup>226</sup> Based on the evidence presented by Michael, he did not meet the jurisdictional requirements of article 85.<sup>227</sup>

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for Rolling Stones and Rob Halford with Sony US, and the Stone Roses with Gefen)." *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.* The burden was on Michael to establish that it was "possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or fact that the 1988 agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States." *Id.* This test was formulated in *Societe Technique Miniere v. Maschinenbau Ulm GmbH*, 1966 E.C.R. 235.

<sup>226</sup> *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*174 Enggen Library, Cases File).

<sup>227</sup> If an artist or record company were found to be "undertakings" for purposes of article 85, a court would then have to analyze whether the agreement made between the artist and the record company has an impact on trade between Member States or whether such an agreement distorts competition. EEC TREATY, art. 85, sec. 1. For this purpose, the agreement must be evaluated with respect to the economic and legal context in which the agreement was made. *Brasserie de Haecht v. Vilkins*, 1967 E.C.R. 407.

Courts, therefore, consider the changing consumer preferences with regard to music purchases and record company strategies in ensuring profitability under such conditions. *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*120 Enggen Library, Cases File). As such, exclusivity is a necessary component to artist agreements in the music industry because record companies can only recoup their investment in the artist if the companies bind their artists once they becomes successful. The profits the record company receives from the successful artist can then be used to offset the losses incurred by

### I. *Impact of the George Michael Decision*

Although *Schroeder Music Publishing Co. Ltd v. Macaulay*<sup>228</sup> was an English case, with no precedential value on other countries, it nevertheless stunned the music industry and caused record companies to analyze their business practices more closely for restraint of trade issues.<sup>229</sup> As a result of this holding, record companies were more inclined to seek legal advice with regard to the contracts they sign with their artists.<sup>230</sup> Like *Schroeder Music Publishing*, the *Panayiotou* decision in its own right will have an international impact on artists as well as record companies. Michael is the first pop recording artist to use article 85 of the Treaty of Rome to rescind a recording contract. A likely consequence of the Michael action will be that other artists, with more exigent circumstances, will follow Michael's lead in the use of article 85 as a viable method for rescinding their recording contracts.<sup>231</sup>

Established artists, however, will not be able to rescind their recording contracts unless they can prove the elements of restraint of trade and not mere "dissatisfaction" with their recording agreements. In *Panayiotou*, the court distinguished an artist dissatisfied with the marketing methods of his or her recording company from one who is exploited. Based on the facts before it, the Chancery Court found that Michael was simply dissatisfied.<sup>232</sup>

In terms of European Community impact, although artists might have a new weapon for rescinding contracts in article 85,

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the record company in the marketing and distribution of less successful artists. Such exclusivity is critical to companies competing in a market characterized by an ephemeral quality in consumer taste. *Id.*

As a result, the context in which such an agreement is signed weighs in favor of the recording company that signs an artist to a contract for a number of years.

<sup>228</sup> [1974] 1 W.L.R. 1308.

<sup>229</sup> Jane Tatt, *Music Publishing and Recording Contracts in Perspective*, 5 EUR. INTELL. PROP. REP. 132 (1987).

<sup>230</sup> *Id.*

<sup>231</sup> The dismissal of Michael's article 85 claim might have been different had Michael pleaded that the 1984 agreement was also in violation of competition rules and provided the court with more substantial evidence with regards to the exclusivity of the 1988 agreement. See generally *Panayiotou v. Sony Music Entertainment (U.K.) Ltd.*, (Chancery Division June 21, 1994) (LEXIS \*173 Enggen Library, Cases File).

<sup>232</sup> *Id.* at 155.

they will not be able to overturn agreements on the grounds of restraint of trade, unless the agreement is intrinsically unfair.<sup>233</sup> Additionally, the artist's counsel must note the jurisdictional hurdles imposed by English courts in terms of proving a recording agreement's affect on trade within the European Community.<sup>234</sup>

The most important effect of the *Panayiotou* decision will be to truncate the contract periods artists sign with record companies to avoid litigation.<sup>235</sup> Gone are the days of fifteen year contracts that require the production of eight albums. As such, contracts must be shortened in order for companies to avoid restraint of trade claims and costly litigation.

## VI. CONCLUSION

Based on English case law, European Community case law and treaty law, the Chancery Court in *Panayiotou* was correct in holding that the contract between Michael and Sony was neither in restraint of trade, nor in violation of article 85 of the Treaty of Rome. In the commercial context of the recording industry, the contract Michael signed with Sony was clearly not unconscionable. Michael had industry attorneys representing his interests through each successive contract negotiation. Additionally, there was no Community-wide market for Michael's services as a recording artist and consequently, his 1988 agree-

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<sup>233</sup> Such unfairness was clearly delineated in *Clifford, O'Sullivan, and Schroeder* where English courts found it unreasonable to tie artists to companies that had no intention of promoting their artist's work. In each of these cases artists signed contracts with record companies at the beginning of their careers, unlike Michael. See generally *O'Sullivan v. Management Agency and Music Ltd.*, [1984] 3 W.L.R. 448; *Clifford Davis Management Ltd. v. W.E.A. Records Ltd.*, [1975] 1 W.L.R. 61 (C.A.); *A Schroeder Music Publishing Co. Ltd. v. Macaulay*, [1974] 1 W.L.R. 1308.

<sup>234</sup> *O'Sullivan v. Management Agency and Music Ltd.*, [1984] 3 W.L.R. 448; *Clifford Davis Management Ltd. v. W.E.A. Records Ltd.*, [1975] 1 W.L.R. 61 (C.A.); *A. Schroeder Music Publishing Co., Ltd v. Macaulay* [1974] 1 W.L.R. 1308.

<sup>235</sup> Clearly, Michael's settlement with Sony in July of 1995 will have an effect on the contracts other internationally successful pop musicians enter into with their record companies. The Virgin-Dreamworks contract, with a two album commitment and a royalty rate conservatively estimated at over 20%, was essentially the contractual terms Michael hoped to negotiate with Sony Music before he filed suit against the company. Although Michael lost his suit against Sony Music, he did shift the leverage between artists of his stature and their record companies. Adam White and Dominic Pride, *George Michael Arrives at Dreamworks/Virgin Sony Suit Settled*, BILLBOARD, July 22, 1995.

ment could not affect trade between Member States. Although Michael lost his case against Sony, record companies have been put on notice and will certainly have to think twice before signing an artist to a long term contract similar to the one litigated in *Panayiotou*.

Karl Zucconi