Discovering the Full Potential of the 360 Deal: An Analysis of the Korean Pop Industry, Seven-Year Statute, and Talent Agencies Act of California

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The 360 deal has been an attractive option for music labels in the United States to gain traction in the faltering music industry, but potential legal obstacles may hinder the incentive to enter into the deals—both for the label and for the artist. Labels entering into 360 deals may find themselves liable for violating the Seven-Year Statute or the Talent Agencies Act (TAA). With 360 agreements becoming more popular, labels should turn to an existing music industry that has dealt with the potential legal problems of 360 deals for years.

The Korean pop industry, commonly called "K-pop," has taken advantage of a 360-deal-like model for many years, and as a consequence, many Korean labels have experienced the potential legal problems that American labels may face. Particularly, the legal problems faced by S.M. Entertainment, a talent agency and music label giant in South Korea, as a result of their contract with TVXQ, a popular and hugely successful boy band, reveal exactly the type of potential liability faced by American music labels. By analyzing and reviewing the current legal landscape facing Korean labels that almost exclusively negotiate 360 agreements with their artists, music labels in the United States can become more successful.

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I. INTRODUCTION

CD sales in the United States have substantially plummeted since the late 1990s and early 2000s.[1] With the trend of decreasing record sales, music labels are turning to alternative income sources. One major alternative income source that has been the center of debate lately is the 360 deal.[2] The 360 deal is a recent innovation in the music industry that has increasingly become a center of discussion between music artists and record labels.

The 360 deal comes in two flavors: an active deal and a passive deal.[3] The active deal transfers full or partial ownership of the ancillary rights, such as merchandising, websites, retailing, touring, spon-

[1] David Goldman, *Music's lost decade: Sales cut in half*, CNNMONEY (Feb. 3, 2010, 9:52 AM), http://money.cnn.com/2010/02/02/news/companies/napster_music_industry/.

[2] Daniel J. Gervais et al., *The Rise of 360 Deals in the Music Industry*, 3 LANDSLIDE 40, at 41 (2011), *available at* http://www.americanbar.org/content/dam/aba/publications/landslide/landslide_april_2011/landslidev3_n4.authcheckdam.pdf.

[3] Erin M. Jacobson, *360 Deals and the California Talent Agencies Act: Are Record Labels Procuring Employment?*, 29 ENT. & SPORTS LAW. 9, 10 (2011) (discussing how 360 deals might procure employment under the California Talent Agencies Act).

sorships, and fan sites,[4] to the label, whereas the passive deal does not and the label merely takes a percentage of the artist's income from exploitation of ancillary rights.[5]

Essentially, in a 360 deal, the label receives a percentage of the artist's revenue from ancillary sources.[6] The record labels argue that since they help develop and build the artist's career, the label should get a cut of everything the artist earns.[7] On the other hand, artists argue that the labels in a passive deal merely take a cut of everything the artist makes, even though the labels have not directly contributed to the success of every revenue stream from which the artist profits, such as television roles or merchandising.

Numerous industry advocates have argued the pros and cons of 360 deals, which have been experimented with in the U.S., and whether they actually work, but a look into the world of "K-pop," a slang term for Korean popular music from South Korea, reveals the legal problems that labels may face as a result of 360 deals.[8] For years, the Korean pop music industry has utilized a system where talent agencies—major companies involved with distribution and manufacturing of records, management, and discovery of talent—sign contracts with artists in deals very similar to the 360 deal structure, where these talent agencies, which are also labels in the industry, take an active role in developing the artists.[9] The Korean pop scene is dominated by the "Big Three"— S.M. Entertainment, YG Entertainment, and JYP Entertain-

[4] Gervais, *supra* note 2, at 41.

[5] Jacobson, *supra* note 3, at 10. Note that the distinguishing feature between active deals and passive deals is merely the role the label plays in helping the artist obtain other entertainment activities – in both the active and passive deals, the label obtains a percentage of ancillary income. *See id.*

[6] Tom Cole, *You Ask, We Answer: What Exactly is a 360 Deal?*, NPR (Nov. 24, 2010, 5:30 PM), http://www.npr.org/blogs/therecord/2010/11/24/131574836/you-ask-we-answer-what-exactly-is-a-360-deal.

[7] Jeff Leeds, *The New Deal: Band as Brand*, N.Y. TIMES (Nov. 11, 2007), http://www.nytimes.com/2007/11/11/arts/music/11leed.html?pagewanted=all&_r=0.

[8] *See* Gyant, *Lyor Cohen Weighs the Positives of 360 Deals*, BET, (June 6, 2011, 6:12 PM), http://www.bet.com/news/opinion/sound-off/lyor-cohen-weighs-the-positives-of-360-deals.html.

[9] Park Sun-young, *An Idol's Life: Sweat and Sleepless Nights*, KOREA JOONGANG DAILY (Feb. 18, 2010), http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2916729.

ment. These three talent agencies typically take in trainees[10] as young as eight years old and put the trainees through intensive training until they are ready to debut as a music "idol."[11] In Korea, an "idol" is a performer or celebrity trained under the training programs at various talent agencies.[12] Some of the biggest idols in recent years include Super Junior and Girls' Generation from S.M. Entertainment, Big Bang from YG Entertainment, and the Wonder Girls from JYP Entertainment. The Korean music industry is one of the few that experienced an increase in physical music sales since the general industry plunge in the 2000s,[13] partly as a result of these talent agencies' successes.[14] In recent years, however, the labels have found several legal consequences involving term length, conscionability, and fairness, initiating investigations by the Korean Fair Trade Commission[15] and several major lawsuits.

The music industry in the U.S., particularly in California, may be able to learn from the successes of the K-pop model. In light of the recent litigation arising in Korea, however, as well as California's Seven-Year Statute[16] and California's Talent Agencies Act (TAA), one can predict that labels in the U.S. might encounter corresponding legal issues.[17] The Seven-Year Statute requires generally that for all contracts

[10] Trainees are individuals that pass the audition stage and enter the company in hopes of debuting as a "K-pop idol." *See* Melody Or, *K-POP's Idol Factory – Act Two: The Trainee*, YOUTHRADIO (April 21, 2010, 4:45 PM), http://www.youthradio.org/news/k-pops-idol-factory-act-two-the-trainee.

[11] Leesa86, *Big Bang's G-Dragon was an SM Entertainment Trainee for Five Years*, ALLKPOP (May 8, 2012, 10:48 AM), http://www.allkpop.com/2012/05/big-bangs-g-dragon-was-an-sm-entertainment-trainee-for-5-years.

[12] *Korean pop idol*, WIKIPEDIA, http://en.wikipedia.org/wiki/Korean_pop_idol (last visited June 26, 2013); *see also* Jon Caramanica, *Korean Pop Machine, Running on Innocence and Hair Gel*, NY TIMES (Oct. 24, 2011), http://www.nytimes.com/2011/10/25/arts/music/shinee-and-south-korean-k-pop-groups-at-madison-square-garden-review.html.

[13] 2013 Digital Music Report at 12 (South Korea "soar[ed] from the 23rd largest recorded music market worldwide in 2007 to the 11th largest in 2012.").

[14] *Id.* ("[I]n South Korea sales are expected to have increased for the third consecutive year, underpinned by K-pop acts whose fans predominantly want high-quality physical formats.")

[15] *See SM Entertainment Officially Investigated for Unfair Contract Terms!*, DBSKNIGHTS (Mar. 4, 2010), http://www.dbsknights.net/2010/03/news-sm-entertainment-officially.html (*citing* Sweetrevenge, *SM Entertainment Officially Investigated for Unfair Contract Terms!*, ALLKPOP (Mar. 4, 2010, 1:42 AM), http://www.allkpop.com/2010/03/sm-entertainment-officially-investigated-for-unfair-contract-terms).

[16] *See* CAL. LABOR CODE § 2855 (West 2006).

[17] *See id.* § 1700.5 (West 1986).

that involve personal services, the contracted duration of such services cannot exceed seven consecutive calendar years. This raises issues about the applicability of this statute to 360 deals, because these deals may contract for personal services for durations longer than seven years.[18] Contracts involving both the record deal and the 360 deal together are subject to scrutiny under the doctrine of severability in determining the enforceability of the contract and its application to the Seven-Year Statute.[19] This is because if a contract includes both a record deal and a 360 deal, if the contract is severable, then the 360 deal may extend past the seven-year requirement if the record deal is found invalid.[20] The TAA requires that agents must be licensed in order to procure employment for talent in California.[21] There are several potential legal consequences the K-pop model would have under these two statutes for 360 deals applicable in the U.S.

Part II discusses the types of 360 deals in detail, including why 360 deals came to be and what arguments have been made in support of or in rejection of 360 deals.

Part III discusses 360 deals in the K-pop industry. This section provides an overview of how the K-pop industry works, including the apprenticeship training system. It also analyzes some of the reasons that the Korean music industry has been one of the most successful models in Asia, as well as some of the recent litigation that has occurred. Specifically, it analyzes the litigation and exclusive contract between three members of TVXQ, a five-member boy band, and their label, S.M. Entertainment. This part addresses what labels in the U.S. can learn from the successes and failures of the K-pop model.

Part IV analyzes two California statutes—California Labor Code § 2855, the Seven-Year Rule; and California Labor Code § 1700, the TAA, in the context of 360 deals. First, this section analyzes whether 360 deals are subject to the Seven-Year Statute. It next analyzes

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[18] *Id.* § 2855 (West 2006).

[19] The doctrine of severability states that if a court finds a clause of a contract unconscionable, the court "may enforce the remainder of the contract without the unconscionable clause." 14A CAL. JUR. 3D CONTRACTS § 214 (2013).

[20] See *infra* Part IV.A. and B.

[21] CAL. LABOR CODE § 1700.5 (West 1986). There is an exception, however, that managers who procure record contracts for talent are not required to be licensed talent agents. *See* Marathon Entm't, Inc. v. Blasi, 174 P.3d 741 (Cal. 2008).

whether a 360 deal that is in the same document as a record deal would be severable under severability law and how the answer to that question affects the way the Seven-Year Statute would be interpreted for 360 deals. This Part further identifies the potential legal issues labels face if 360 deals are subject to the TAA. Part V includes concluding remarks on further questions to be answered and where U.S. record labels should go from here.

II. INDUSTRY RESPONSE TO DECREASED RECORD SALES—THE 360 DEAL

A. *The Origin and Goals of the 360 Deal*

The 360 deal was created as a result of the decrease in sales of recorded music in the late 1990s and early 2000s.[22] For example, in 1999, record sales in the U.S. dropped 53% from $14.6 billion to $7.0 billion in 2001.[23] Unfortunately, the music industry trailed behind the innovations of technology, and digital sales were not high enough to make up for the drop in CD sales.[24] Global revenue record sales dropped as well.[25] By imposing 360 deals, record labels would be able to make additional money from ancillary sources by taking about 10% to 35% of an artist's net income and reporting it as ancillary income.[26] Based on the Warner Music Group (WMG) Fiscal Report for the Second Quarter ending on March 31, 2013, $50 million of the total revenue of $675 million was based on ancillary income.[27] According to Glenn Peoples, Senior Editorial Analyst for *Billboard* magazine, "[n]on-traditional revenue is the kind of stuff in multi-rights deals. 10% [the fraction of the total revenue in 2011 that was from ancillary income]

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[22] Leeds, *supra* note 7.

[23] *Scope of the Problem*, RECORDING INDUSTRY ASSOCIATION OF AMERICA, http://www.riaa.com/physicalpiracy.php?content_selector=piracy-online-scope-of-the-problem (last visited May 12, 2012).

[24] Katie Reilly, *360/All Rights Deals: An Infographic*, INTERN LIKE A ROCK STAR (Mar. 7, 2012, 3:56 PM), http://www.internlikearockstar.com/2012/03/360all-rights-deals-infographic.html .

[25] *Id.*

[26] DONALD P. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 96 (7th ed. 2009).

[27] *Warner Music Group Corp. Reports Results for the Fiscal Second Quarter Ended March 31, 2013*, WARNER MUSIC GROUP NEWS (May 14, 2013), http://www.wmg.com/newsdetails/id/8a0af8123e836135013e9fc377ab0148.

isn't much, but it's a big improvement from nothing—which is where non-trad[itional] revenue was just a few years ago."[28]

It can make sense to get income from other revenue streams if record sales are low and the artist is making more from the alternate streams. For instance, for Jay-Z and Kanye West's "Watch the Throne," album sales came out to about $15 million in revenue, while the "Watch the Throne" tour garnered $48 million in revenue.[29] In this instance, being able to take a portion of the tour revenue would seem to make sense, at least financially, to labels to make up for lost record sales from traditional streams.

B. *Types of 360 Deals*

There are two types of 360 deals. The first type is called an "active deal." In this kind of deal, the label obtains some of the rights involved, like merchandising rights, and publishing rights, which may involve sharing rights with the artist or helping the artist to obtain ancillary income.[30]

The second type is called a "passive deal." In this kind of deal, the label has no control over the rights and merely takes a cut of the artist's income, and the label largely does not help the artist in obtaining the ancillary income.[31] This is a situation where the label "could just take the money even though they're not helping the artist obtain that revenue stream."[32]

C. *Industry Arguments for 360 Deals*

What have the proponents been arguing in support of both active and passive 360 deals? One of the major arguments is that 360 deals are good for new emerging music artists. One of the first 360 deals was between Paramore and Atlantic Records. The 360 deal Paramore struck with Atlantic Records was a positive one because there was less pressure to make the label's money back immediately since there were

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[28] Cole, *supra* note 6.
[29] Reilly, *supra* note 24.
[30] PASSMAN, *supra* note 26, at 98; Jacobson, *supra* note 3, at 10.
[31] PASSMAN, *supra* note 26, at 98; Jacobson, *supra* note 3, at 10.
[32] Cole, *supra* note 6.

ancillary sources of income available, such as from concert and merchandise sales.[33] The deal was good for the developing artist as it let the artist slowly work its way up by doing shows.[34] As the artist did more shows, the label would earn ancillary income from the shows to supplement the income from selling albums.

Another example is Care Bears on Fire,[35] which signed a 360 deal with S-Curve Records; since the band was brand new, it was risky for the label to invest in the band without an existing fan base.[36] Signing a 360 deal was a good idea for the label because having access to ancillary income could, in the meantime, offset the investment the label initially made with the artist.

So how are labels justifying 360 deals? Music labels have justified 360 deals by arguing that since they are investing in the risky and expensive process of developing talent, they deserve a larger cut of the artist's success.[37] Labels further say that under 360 deals they will "commit to promoting the artist for a longer period of time and will actively try and develop new opportunities for them."[38] According to Lyor Cohen, head of Warner Music Group, 360 deals are required to get the "quality of the individual" and are positive for both the artist and for the label.[39] Proponents have also argued that 360 deals are good if the artist is very involved with touring.[40] If the artist is making a lot of money through touring as an alternative revenue stream, the label can earn money even if the artist's record is not selling well.

360 deals are also a good idea because they give the record labels the incentive to establish a long-term relationship with the artist.[41] Since consumers can now often buy single songs from an album in-

[33] Leeds, *supra* note 7.
[34] *Id.*
[35] Cole, *supra* note 6.
[36] *Id.*
[37] Leeds, *supra* note 7.
[38] Tiffany Simmons-Rufus, Esq., *"Double Edged Sword": An Overview of the 360 Deal*, AMERICAN BAR ASSOCIATION, http://www.americanbar.org/groups/young_lawyers/publications/the_101_201_practice_series/an_overview_of_the_360_deal.html (last visited May 12, 2012).
[39] Gyant, *supra* note 8 (quoting Lyor Cohen saying, ". . . [360 deals are] really important for us because we are, you know, these labels are about people. And to get the very finest, the most seasoned, the most creative, thoughtful, transformative people you have to pay them.").
[40] Reilly, *supra* note 24.
[41] Jonathan Ostrow, *The Musician's Guide to the 360 Record Deal*, MUSIC THINK TANK, Jun. 8, 2010, http://www.musicthinktank.com/blog/the-musicians-guide-to-the-360-record-deal.html.

stead of the entire album or CD, it is increasingly more difficult for record labels to make money based solely on records, and a 360 deal will incentivize labels to have a long-term relationship with the artist to develop a library of albums because labels will be interested in receiving ancillary income.[42] This kind of relationship works well if the label is helping the artist develop its brand.

D. *Industry Arguments Against 360 Deals*

There has been a lot of discussion about how 360 deals are "slave" deals[43] and how they are unfair.[44] Some talent managers think that 360 deals are a "thinly veiled money grab" and are skeptical that labels will "deliver on their promises of patience."[45]

Artist lawyer Bob Donnelly argued that artists should think twice about signing a 360 deal because labels will most likely keep 100% of the money to which they are entitled, "without applying . . . any of it to reduce the artist's debt to the record company."[46] This would be a problem if the record is not selling well but the label is continually obtaining its portion from the 360 deal, because the artist would still have an unrecouped balance with the label on the record deal, and the artist would therefore only be making a reduced amount of money from the alternative revenue streams after the label takes its percentage. It is even possible that if the artist has not yet recouped the balance from the record contract, artists would be concerned that the ancillary in-

[42] *Id.*

[43] Michael Arrington, *"360" Music Deals Become Mandatory as Labels Prepare for Free Music*, TECHCRUNCH (Nov. 8, 2008), http://techcrunch.com/2008/11/08/360-music-deals-become-mandatory-as-labels-prepare-for-free-music/.

[44] People in the music industry, from executives to labels to attorneys, have voiced opinions on 360 deals. *See id.* (quoting Warner Music Group CEO Edgar Bronfman that the label requires all new artists to sign 360 deals); *see also* Bob Donnelly, *Buyer Beware: Why Artists Should "Do a 180" on "360 Deals,"* BILLBOARDBIZ (Mar. 22, 2010, 12:00 AM), http://www.billboard.com/biz/articles/news/1209534/buyer-beware-why-artists-should-do-a-180-on-360-deals; *cf. Music Business News, September 17, 2011*, MUSICIANCOACHING.COM (Sept. 17, 2011), http://musiciancoaching.com/music-news-2011/music-business-september-17/ (Martin Mills, the Chairman and Founder of Beggars Group voices concern over 360 deals.).

[45] Leeds, *supra* note 7.

[46] Donnelly, *supra* note 44.

come could be used to offset unrecouped balances on the record contract or even from a previous album.

360 deals also may not be desirable to the artist unless the label is developing the artist. Wendy Day, the founder and CEO of Rap Coalition, argues that labels are not developing artists, and artists often have to "fight with their bosses and the status quo to succeed on a project."[47] It is rapper and record label executive Jay-Z's approach not to enter into 360 deals unless his label is actively developing the artist. In an interview with *Billboard*, Jay-Z stated, "You can't take someone's rights, profess to be an expert in that field and then not do anything for it."[48] Lawyer Bob Donnelly takes the same position, stating that he would be "receptive to a 360 deal where the record company is obligated to make an investment in a band's career."[49] This suggests that passive 360 deals are probably not advantageous to the artist, and it would be most fair to have 360 deals where the label is taking an active position in helping develop the artist's career.

III. 360 DEALS IN THE KOREAN POP INDUSTRY

For years, the K-pop industry has adopted a model similarly structured to the model by label Johnny & Associates[50] in the Japanese pop industry that is all-inclusive and also similar to the 360 deal that record labels are using in the United States. Analyzing how the K-pop model works and what legal consequences labels have had to face in Korea can help U.S. labels identify strategies to be successful and avoid the legal pitfalls of 360 deals.

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[47] Wendy Day, *The Day Report: 360 Deals are Today's Record Deals*, ALLHIPHOP.COM (Feb. 4, 2010, 6:46 PM), http://allhiphop.com/2010/02/04/the-day-report-360-deals-are-today%C2%92s-%C2%93record-deals%C2%94/. The author of the article notes, however, that there are people in major labels that do great artist development, but these people are usually the exception. *Id.*

[48] Gail Mitchell, *Jay-Z Talks Exit Rumors, Grammys, 360 Deals*, BILLBOARD (Dec. 14, 2010, 12:00 AM), http://www.billboard.com/news/jay-z-talks-exit-rumors-grammys-360-deals-1003685726.story#/news/jay-z-talks-exit-rumors-grammys-360-deals-1003685726.story.

[49] Donnelly, *supra* note 44.

[50] *Johnny & Associates*, WIKIPEDIA, http://en.wikipedia.org/wiki/Johnny_%26_Associates (last visited May 12, 2012); *see also* MARK JAMES RUSSELL, POP GOES KOREA: BEHIND THE REVOLUTION OF MOVIES, MUSIC, AND INTERNET CULTURE 150-56 (2008).

A. *The Apprenticeship Model and the "Big Three" of K-pop*

S.M. Entertainment, one of the leading talent agencies and labels in Korea specializing in K-pop, is headed by Lee Soo-man, and represents artists including Super Junior, TVXQ, and Girls' Generation.[51] JYP Entertainment, led by Park Jin-young, represents acts like 2PM and the Wonder Girls.[52] YG Entertainment, founded by Yang Hyun-suk, represents acts like Big Bang and 2NE1.[53] These are just a few of the current biggest acts in K-pop. There are also several smaller labels, such as CUBE Entertainment, a sister company to JYP Entertainment, that represents increasingly popular acts such as BEAST and G.NA.[54] These labels also act as talent agencies and producers.[55] Sometimes the label also chooses the manager for the artist.[56] The label often takes an overarching role in deciding and managing all entertainment activities, including contracts for television appearances, performances, events, films, endorsements, use of lyrics, compositions and arrangements, and all other entertainment activities.[57]

Although these labels operate somewhat differently, they nearly all follow an apprenticeship model, much like the model used in the late '90s to create U.S. stars like The Backstreet Boys and 'N SYNC.[58] K-pop artists typically go through the apprenticeship (called "training") at

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[51] *"Big 3" in K-pop See Highest Profits for 2010, JYPE, ONEDAY*, DAILY K POP NEWS (Apr. 12, 2011), http://www.dkpopnews.net/2011/04/news-110412-big-3-in-k-pop-see-highest.html.

[52] *Id.*

[53] *Id.*

[54] Sun-young, *supra* note 9.

[55] *S.M. Entertainment*, WIKIPEDIA, http://en.wikipedia.org/wiki/S.M._Entertainment (last visited May 12, 2012).

[56] *See* Incheon District Court [Dist. Ct.], 2009Ga-Hap2869, Jan. 12, 2010 (art. 3 ¶ 8) (S. Kor.), *translated at* Precious, *Complete translation of the contract (English)*, THE TRUTH ABOUT TVXQ (Jan. 5, 2011, 10:46 PM) (Seung-ah Lee ed. 2011), http://truetvxq.blogspot.com/2011/01/complete-translation-of-contract.html, (hereinafter "Translation of TVXQ Exclusive Contract") (requiring that the manager of TVXQ must be chosen by S.M. Entertainment and that all schedules be managed by the manager that S.M. Entertainment chose).

[57] *See* Translation of TVXQ Exclusive Contract. Although not all contracts are similar, typically for contracts with the Big 3, the label handles all entertainment activities. *Id.* at art. 3, ¶ 1.

[58] Mary-Jayne McKay, *The Idol Maker*, CBS NEWS (Feb. 11, 2009 10:06 PM), http://www.cbsnews.com/2100-500164_162-63871.html.

the beginning of their long-term contract signed with the label and become "trainees."[59] Trainees are chosen by several methods. Some companies have casting agents who scout potential trainees.[60] For example, in S.M. Entertainment, a member of their newest band EXO, named Luhan, was scouted in Seoul while he was there for his studies.[61] After being scouted, he was offered an audition, which he passed, and he became a trainee.[62]

Some trainees are chosen through just an audition process. For example, labels like S.M. and CUBE have global auditions, where the judges tour places like Korea or even the U.S., and people that meet certain criteria can audition in various categories, such as modeling, singing, acting, or dancing.[63] Sometimes preliminary rounds are also conducted online, where participants submit videos of them singing for the audition.[64] Those who qualify move on to a second round of auditions, and also to a final round.[65]

There are also regular auditions. For example, S.M. Entertainment has monthly auditions at their office in Koreatown in Los Angeles, and any person that meets eligibility requirements can walk in and audition.[66] The trainee undergoes a hectic schedule including dance lessons, singing lessons, language lessons,[67] and rehearsals.[68] The label frequently invests a lot of money[69] in a trainee before the trainee de-

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[59] Simon Dyson, *South Korean continues to develop as model for future recorded-music markets*, INFORMA: TELECOMS & MEDIA, Mar. 10, 2011, http://blogs.informatandm.com/937/south-korea-continues-to-develop-as-a-model-for-future-recorded-music-markets.

[60] maldita, *Comment on The Road to K-pop Stardom: Auditioning*, SEOULBEATS (Jan. 31, 2012, 7:57 AM), http://seoulbeats.com/2012/01/the-road-to-k-pop-stardom-auditioning/#comment-425489223.

[61] *EXO's Profile*, DAILY K-POP NEWS, http://www.dkpopnews.net/2012/05/exos-profile.html.

[62] *Id.*

[63] Guest, *The Road to K-pop Stardom: Auditioning*, SEOULBEATS (Jan. 31, 2012), http://seoulbeats.com/2012/01/the-road-to-k-pop-stardom-auditioning/#comment-425489223 ("Auditioning").

[64] *Id.*

[65] *Id.*

[66] SMTOWN > Audition > USA Monthly Audition, http://www.smtown.com/Audition/Usa (last visited June 26, 2013).

[67] *KPop's Frontiers: How Does the Big 3 Teach Foreign Languages to Their Trainees?*, KPOPSTARZ, Feb. 7, 2012, http://www.kpopstarz.com/articles/4143/20120207/yg-jyp-sm.htm.

[68] Sun-young, *supra* note 9.

[69] leesa86, *SM Entertainment invested $2.6 million dollars to debut singer BoA*, ALLKPOP, Jan. 31, 2012, http://www.allkpop.com/2012/01/sm-entertainment-invested-2-6-million-

buts, but trainees enter into the apprenticeship without knowing if they will ever debut or not.[70] Often even after their debut, the artist is still under an intense schedule, including TV shows, music shows,[71] commercials, rehearsals, and performances.[72] Through the apprenticeship program, and during the course of the contract, the label's active role in the artist's career significantly contributes to the artist's development, including the artist's singing ability, performance presence, or image.

Many of these K-pop acts have become hugely successful in Korea, Japan, China, Taiwan, and even countries in non-Asian regions. For instance, S.M. Entertainment's TVXQ has experienced huge success in the Japanese market in promoting several albums[73] and putting on numerous successful concerts.[74] JYP Entertainment's Wonder Girls recently entered the U.S. market by opening for the Jonas Brothers,[75] releasing English albums,[76] and appearing in a Nickelodeon original movie, "The Wonder Girls."[77] YG Entertainment's Psy's popular music video, "Gangnam Style," became the first video to hit 1 billion views on YouTube.[78] It is most likely that the labels' active role in de-

dollars-to-debut-singer-boa. Whether a trainee debuts could depend on a variety of factors, and labels do not publicly announce the determination process, but these entertainment companies primarily focus on marketability and potential success of the trainee before selecting them for debut. Auditioning, *supra* note 59.

[70] Sun-young, *supra* note 9.

[71] There are several music shows in Korea that feature live performances of popular music artists in a competition, much like "Battle of the Bands," for instance, SBS Live K-Pop Countdown (Inkigayo). *See* Official Site of Korea Tourism: How to Apply for K-pop Music Shows, http://visitkorea.or.kr/ena/HA/HA_EN_7_7_2_1.jsp (last visited May 13, 2012).

[72] Sun-young, *supra* note 9.

[73] KBS Global: TVXQ Tops Asian Groups on Oricon Chart, http://english.kbs.co.kr/entertainment/news/1411857_11858.html (last visited May 13, 2012).

[74] KBS Global: TVXQ Attracts 390,000 Fans During Asia Tour, http://english.kbs.co.kr/mcontents/entertainment/1529555_11692.html (last visited May 13, 2012).

[75] David Yi, *Jonas Brothers' tour openers the Wonder Girls: Will they conquer America?*, ENTERTAINMENT WEEKLY, Jun. 17, 2009, http://music-mix.ew.com/2009/06/17/jonas-brothers-tour-nobody-but-wondergirls/.

[76] coolsmurf, *Preorders for Wonder Girls Official CD begins*, ALLKPOP, Sep. 1, 2009, http://www.allkpop.com/2009/09/preorders_for_wonder_girls_official_cd_begins.

[77] Wonder Girls Movie Coming Soon!, http://www.nickcannon.com/post/wonder-girls-movie-february-2-groundhogs-day (last visited May 13, 2012).

[78] Deborah Netburn, *'Gangnam Style' Sets World Record: Gallops to 1 Billion Video Views*, L.A. TIMES (Dec. 21, 2012), http://www.latimes.com/business/technology/la-fi-tn-gangnam-style-one-billion-20121221,0,6632883.story.

veloping its artists have contributed to the successes of these K-pop groups.

B. *Successes of the Korean Music Industry*

South Korea is one of the few countries to experience an increase in recorded music sales since the downward turn in the music industry in the early 2000s,[79] and up until recently, South Korea was one of the few countries where digital sales outnumber physical sales of records.[80] Between 2001 and 2005, CD sales dropped more than two-thirds the trade value in South Korea.[81] Since 2005, however, the trade value of record sales has increased,[82] resulting in a shift from being the 33rd ranked music market in the world to the 11th in 2011.[83] In the first half of 2011, South Korea reported a growth in the recorded music market of 6%, following a 12% increase in 2010. Although the actual origin of the industry's success is unclear, some posit that the increasing popularity of K-pop in Korea and abroad has played a significant role.[84]

Based on the success of the Korean music market, one could argue that labels in the U.S. should take an active role in developing their artists. The labels in the K-pop business help their artists through the apprenticeship program, which allows them to go into entertainment activities beyond the recording of music, such as film,[85] television shows,[86] variety shows,[87] and touring.[88] By taking an active role in-

[79] Dyson, *supra* note 59.

[80] Helienne Lindvall, *How K-Pop & J-Pop are Saving Physical Music Sales*, DIGITAL MUSIC NEWS (Apr. 10, 2013), http://www.digitalmusicnews.com/permalink/2013/20130410kpopjpop. Digital sales dropped 25%, which was "largely blamed on the collapse of one of the country's biggest digital services, the social networking platform Cyworld." *Id.* Consequently, the physical market grew by 11% and now represents 74% of all music revenue. *Id.*

[81] *Id.*

[82] *Id.*

[83] INT'L FED'N OF THE PHONOGRAPHIC INDUSTRY, DIGITAL MUSIC REPORT 2012 22 (2012), *available at* http://www.ifpi.org/content/library/DMR2012.pdf.

[84] Dyson, *supra* note 59.

[85] *See, e.g.*, *Attack on the Pin-Up Boys*, ASIANWIKI, http://asianwiki.com/Attack_on_the_Pin-Up_Boys (last visited May 13, 2012) (featuring the members of Super Junior, one of the popular groups created by S.M. Entertainment).

[86] *See, e.g.*, Min Ho, DRAMAWIKI, http://wiki.d-addicts.com/Min_Ho (last visited Dec. 31, 2012) (noting that Min Ho of SHINee, a popular boy group under S.M. Entertainment, has worked in several TV series, including the latest one, *To the Beautiful You*, as the starring male role).

stead of a passive role in the artist's career, the label may use its resources to help further the artist's career by helping obtain opportunities like film roles and television shows, which in turn can help boost record sales through exposure and increased popularity.

C. *Contract Litigation against K-pop Record Labels*

Many people, however, have criticized the intensity of the K-pop model by referring to the long-term contracts signed with talent agencies as "slave contracts."[89] Several artists have initiated lawsuits in Korea against their record labels for unfair or unconscionably long contracts. KARA, a girl K-pop group, filed a lawsuit against their label DSP Media in 2011, claiming that the contract was unfair because they received little income in return for high success in Japan and Korea.[90] Eventually, KARA and DSP Media came to a settlement.[91]

In 2009, Hangeng, a member of the boy band Super Junior, filed a lawsuit against his label, S.M. Entertainment, arguing that the 13-year length of his contract was excessive.[92] He also argued that there was unfair profit distribution and that since there was no sick leave provision, he was required to attend events even if he was ill because the contract term would be extended for every day that he could not attend an event for which his presence was required.[93] Hangeng won the case, and the court ruled that he no longer needed to continue his contract

[87] *See, e.g.*, kimchisteve, *SHINee's Onew to Host New Variety Show*, ALLKPOP (May 5, 2010, 11:18 PM), http://www.allkpop.com/2010/05/shinees-onew-to-host-new-variety-show (explaining that leader Onew, of S.M. Entertainment's SHINee, a five-member boy band, became an MC on a variety show).

[88] *See, e.g.*, leesa86, *Upcoming YG Family Japanese Concert Tour Estimated to Bring in Over $26 Million USD*, ALLKPOP (Jan. 3, 2012, 3:05 PM), http://www.allkpop.com/2012/01/upcoming-yg-family-concert-japanese-concert-tour-estimated-to-bring-in-over-26-million-usd.

[89] Dyson, *supra* note 59.

[90] Sun-young, *supra* note 9; Dyson, *supra* note 59.

[91] *KARA Dispute is Finally Resolved*, SEOULBEATS (Apr. 30, 2011), http://seoulbeats.com/2011/04/kara-dispute-is-finally-resolved/.

[92] Dyson, *supra* note 59.

[93] *Han Geng's Reasons for Filing a Lawsuit Against SM Entertainment?*, ASIANBITE (Dec. 22, 2009), http://www.asianbite.com/default.asp?Display=3109.

and that there was no binding connection between Hangeng and S.M. Entertainment.[94]

One major case filed in the Seoul Central District Court in Korea involving three members of the boy band TVXQ against their label S.M. Entertainment spurred enormous coverage in the news and among K-pop fans.[95] Kim Jaejoong, Park Yoochun, and Kim Junsu of TVXQ filed suit in 2010, claiming that the contract was unfair because of its length (thirteen years), and because it contained unconscionable provisions such as a damages provision requiring the artists to pay a high penalty for terminating the contract, while permitting the label to demand damages if the artists did not comply with the entertainment activities and to terminate the contract without paying damages.[96] TVXQ's contract was released publicly as a court filing. The contract contained provisions where the label actively obtained entertainment activities for the band and also took an income participation on each deal.[97]

On the issue of contract duration, the court held that since the bargaining position of the artist who wished to debut was so low, the 13-year duration of the contract was too long, and observed that "at the very least the time period during which the [artists] can enjoy the top-level popularity . . . can only be very limited."[98] Even the Korean Fair Trade Commission (KFTC) investigated the talent contracts and found

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[94] VITALSIGN, *Hangeng Wins Lawsuit Over SM Entertainment*, ALLKPOP (Dec. 20, 2010, 8:51 PM), http://www.allkpop.com/2010/12/hangeng-wins-lawsuit-over-sm-entertainment.

[95] The lawsuit was covered by numerous news outlets in Korea. *See JYJ Win Legal Battle with Former Management*, CHOSUN MEDIA (Feb 18, 2011, 12:13 PM), http://english.chosun.com/site/data/html_dir/2011/02/18/2011021801086.html; *JYJ and SM finally reach agreement*, KOREA JOONGANG DAILY (Nov. 29, 2012) http://koreajoongangdaily.joinsmsn.com/news/article/article.aspx?aid=2963083; *and SM and JYJ Put An End to Their Long, Winding Legal Suit*, MWAVE (Nov. 28, 2012), http://mwave.interest.me/enewsworld/article/22343?enewsLang=EN. The lawsuit was also discussed by numerous K-pop and TVXQ fans. *See* The Truth About TVXQ, http://truetvxq.blogspot.com/ (last visited June 26, 2013); JYJ Fan Talk, http://jyjfantalk.com/?tag=lawsuit (last visited June 26, 2013); *TVXQ Lawsuit*, http://tvxqlawsuit.wordpress.com/ (last visited June 26, 2013); and *TVXQ Legal Log: always keep the faith*, http://tvxq-legal-log.livejournal.com/ (last visited June 26, 2013).

[96] 전속계약 효력정지 가처분 신청 결정문 - 한국어, English, 日本語, 中國語 Ver., DNBN JYJ FANSITE (Nov. 2, 2009), http://dnbn.pe.kr/bbs/zboard.php?id=db01&no=24480 (translating court judgment, citing Seoul Central District Court [Dist. Ct.], 2009-Ga-Hap2869, Oct. 27, 2009 (S. Kor.) [hereinafter "Translation of November 2009 Court Judgment"]).

[97] Translation of TVXQ Exclusive Contract, art. 4, 9, and 10.

[98] Translation of November 2009 Court Judgment.

that a term of 13 years for this type of contract is too long and that after seven years, the artist should have the option to terminate the contract.[99] It is interesting to note the correlation between the standard created by the KFTC and California's Seven-Year Statute.

On the issue of termination, the court stated that the contract did not have any options for the artists to terminate the contract and the damages to be paid to the label as a result were unconscionable.[100] The court further emphasized that the contract provisions did not mention what damages would be paid to the artists if the *labels* terminated the contract, which resulted in a contract that highly favored the labels.[101]

Overall, the court noted that since the contract gave the label too much control and the artist too little leverage to terminate or to discuss career options, the contract was unconscionable.[102] Ultimately, the court declared the contract invalid and granted an injunction to the artist such that the label would be unable to obtain contracts for the artist and unable to prevent the artists from participating in other entertainment activities.[103]

Learning from the recent litigation in the K-pop industry, record labels in the U.S. should recognize not only ensure a proper length of time for 360 deals and avoid unconscionability but also take an active role in developing the artist's career. Although S.M. Entertainment was able to make TVXQ a huge success because the label actively sought touring opportunities for them and even expanded their market to Japan, the label faced serious legal ramifications because the contract did not allow the artists to have creative control over their careers

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[99] writer_girl, *Korean Fair Trade Commission Finds SM Entertainment Guilty of Interfering With JYJ's Korean Activities*, SOOMPI (Dec. 22, 2011), http://www.soompi.com/news/korean-fair-trade-commission-finds-sm-entertainment-guilty-of-interfering-with-jyjs-korean-activities; *Korean Fair Trade Commission and the Contract*; *The Truth About TVXQ* (Jan 6, 2011), http://truetvxq.blogspot.com/2011/01/korean-fair-trade-commission-and.html) (last visited June 23, 2013) (translating 보도/해명 | 공정위소식 | 공정위뉴스 | 공정거래위원회, Korean Fair Trade Commission, Dec. 23, 2010, http://www.ftc.go.kr/news/ftc/reportView.jsp?report_data_no=4141).

[100] Translation of November 2009 Court Judgment; Translation of TVXQ Exclusive Contract, art. 11, § 3.

[101] Translation of November 2009 Court Judgment; Translation of TVXQ Exclusive Contract, art. 11, § 2-3.

[102] Translation of November 2009 Court Judgment.

[103] *Id.*

and locked the artists into a long, unconscionable contract where they had to obey the label at all costs.[104] Although the case was litigated in Korea, the same potential issues could arise in the U.S.—contracts for a long period of time with little creative input from the artists could harm labels and artists alike. To avoid such pitfalls, the labels in the U.S. should make sure the term of the contract is a reasonable amount of time.[105] The label should also work closely *with* the artist to develop his or her career and discuss other entertainment activities.

Record labels interested in 360 deals should also be aware of legal issues on profit distribution, even in cases where the label takes an active role in the artist's development. Providing the artist with creative control and discussing with the artist opportunities available to them will alleviate the potential legal issues on fairness of the contract. Overall, the K-pop litigation and industry history teaches the U.S. music industry to focus on artist development, while remaining cautious about the length and terms of the 360 deals.

IV. LABOR AND AGENCY ISSUES WITH 360 DEALS

A. *California Seven-Year Statute*

The California Seven-Year Statute was first enacted in 1937 to address the terms of personal service contracts.[106] In the most recent version of the Seven-Year Statute, entertainers in California cannot be contractually bound to any company for more than seven years in a row.[107]

In the 1944 case *De Haviland v. Warner Bros. Pictures*, which involved a motion picture actress suing the producer to end her contract subject to the Seven-Year Statute, the Ninth Circuit held that for acting contracts, seven years means seven *calendar* years.[108] The original

[104] Translation of TVXQ Exclusive Contract, art. 3, § 2, 8 ("During the contract period, 'B' [TVXQ] must diligently perform all activities decided upon by 'A' . . . The manager of 'B' must be chosen by 'A' [S.M. Entertainment], and all schedules should be managed by the managers that 'A' chose. And 'B' must diligently work to maintain the schedule.")

[105] *See infra* Part IV.A.

[106] CAL. LAB. CODE § 2855 (2006).

[107] Chuck Philips, *Metallica Sues Label, Challenging '7-Year' Contract Statute*, LA TIMES, Sept. 28 1994, http://articles.latimes.com/1994-09-28/business/fi-43984_1_warner-music-group.

[108] De Haviland v. Warner Bros. Pictures, 153 P.2d 983, 986 (Cal. 1944).

contract had allowed the producer to extend the term of the contract for periods when the actress did not work.[109] The *De Haviland* holding essentially freed actors from the traditional Hollywood studio system that required them to hold long-term contracts as a matter of industry custom.[110]

In 1985, the Recording Industry Association of America (RIAA) unsuccessfully lobbied to extend the ceiling to ten years, offering two new arguments: (1) the Seven-Year Statute was unfair because artists could walk away from the record contract after seven years before their album delivery obligation is met, and (2) the Statute would harm labels since many labels do not make money until after the fourth album is delivered, which often occurs after seven years.[111] Following several revisions, § 2855(b) was enacted in 1987.[112]

Further legislative history shows that the original bill to enact the Seven-Year Statute intended to specify damages for certain breaches of contract for personal services and require the employee to notify the employer that the employee would no longer be rendering services under the personal services contract.[113]

The current California Labor Code § 2855 (2006) states that "a contract to render personal service . . . may not be enforced against the employee beyond seven years from the commencement of service under it."[114] Personal services contracts are defined as contracts to "perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which cannot be reasonably or adequately compensated in damages in an action at law."[115]

Following an artists' rights campaign to repeal § 2855(b), Senator Kevin Murray introduced a bill in January 2002 to repeal the Sec-

[109] *Id.* at 984. It is interesting to note that the clause found in the Translation of the TVXQ Exclusive Contract also had a clause that extended the term for days that the artist did not work. *See* Translation of TVXQ Exclusive Contract, art. 2, ¶ 2.

[110] *See California Labor Code Section 2855 and Recording Artists' Contracts*, 116 HARVARD L. REV. 2632, 2635 (2003).

[111] *Id.* at 2636.

[112] *Id.*

[113] S. 1987-1988 Session, ch. 591 (Ca. 1987).

[114] CAL. LAB. CODE § 2855(a) (2006).

[115] *Id.*

tion.[116] Since there was not enough support, however, Senator Murray withdrew the bill in August of 2002.[117] On February 24, 2003, Senator Murray reintroduced legislation, but no significant changes were made because only a technical change was proposed, not a substantive one.[118]

The major issue in relation to this statute is whether the 360 deal is a contract for the artist to render personal services to the label. In an active deal, the artist is most likely rendering personal services if the professional opportunities that the label obtains for the artist are with the label or the label's subsidiary companies. In such a case, 360 deals in California are subject to the Seven-Year Statute, and could present issues about what remedies might apply after the seven years. Labels may then be hesitant to take an active role in the artist's development and may just opt to do a passive deal instead.

This is a problem because the successes of the music artists in the K-pop industry have most likely turned primarily on the labels taking an *active* role in obtaining employment for the artist, including booking performance appearances, getting TV show deals, and working on commercial ads. Labels should, arguably, take an active role in order to help develop the artist, because it can potentially revive the current music industry.

One option is that the label could avoid the Seven-Year Statute in California and still take an active role in the artist's development by other means, such that the artist would not render services to the label at all, which may be the case if the company the artist works with for other entertainment activities is not the label or its subsidiaries. If the artist is not rendering services to the label, then the contract is no longer subject to the Seven-Year Statute. This provides great incentive for the labels to take an active role, and would therefore make labels less reluctant to do so.

The record labels originally lobbied to get remedies listed in the Seven-Year Statute, and it is unclear whether record labels were *also*

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[116] *California Labor Code Section 2855 and Recording Artists' Contracts*, *supra* note 110, at 2636-37.

[117] *Id.* at 2637.

[118] *Id. See generally* S. Journal, 2003-2004 Reg. Sess., at 215 (Ca. 2003), *available at* http://www.leginfo.ca.gov/pdf/SenateJournal-03-04v1.pdf; S.B. 1035, 2003-2004 Reg. Sess. (Ca. 2003) ftp://leginfo.ca.gov/pub/03-04/bill/sen/sb_1001-1050/sb_1035_bill_20030221_introduced.html.

lobbying for these remedies in the 360 deal context. It is very likely that given the opportunity, however, a label would also lobby for these remedies by arguing that since the label worked to help develop the artist, a portion of the future profits of the artist, including tours and merchandise revenue, should also be given to the label if the contract is terminated.

Perhaps the solution is to amend the legislation for the Seven-Year Statute to include an exemption for active 360 deals or to specify that 360 deals are not personal services contracts. The uncertainty in the current legislation hinders labels' incentive to develop their artists because the statute provides little guidance on the potential liability a label might face by making a 360 deal. With the current legislative status, the best option would most likely be for labels to take an active role where the artist is not providing personal services to the label to avoid the Seven-Year Statute.

If the 360 deal and the record deal are in the *same document*, however, and the record deal is no doubt subject to the Seven-Year Statute, then labels should consider issues relating to the severability of provisions within the contract.

B. *Severability and Conscionability of Contracts*

Severability is a doctrine in contract law generally established by case law and occasionally by legislative statutes,[119] which determines whether the invalid parts of a contract can be severed from the otherwise valid parts without destroying the legal efficacy of the other provisions.[120] Under California Civil Code § 1599 (1979), "[w]here a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest." Under California Civil Code § 1670.5 (1979), "If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made[,] the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it

[119] RESTATEMENT (SECOND) OF CONTRACTS § 184 (2011).

[120] *See generally* Bd. of Osteopathic Exam'rs v. Bd. of Med. Exam'rs, 125 Cal. Rptr. 619 (Cal. Ct. App. 1975).

may so limit the application of any unconscionable clause as to avoid any unconscionable result."[121]

The legislative intent of this statute was to allow courts to identify which contracts or clauses were unconscionable.[122] The basic test used is "whether, in the light of the general background and the needs of the case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract."[123] The court, as a result of § 1670.5, can eliminate clauses that are unconscionable. Subsequent case law also recognized that a contract is grammatically severable where the language of the statute is mechanically severable.[124]

It should also be noted that in *Marathon v. Blasi*, the California Supreme Court held that courts have the power to sever illegal portions of a partially illegal contract in order to avoid inequity or preserve a contractual relationship.[125] The court, however, explained that the Labor Commissioner supports the principle that severance is not available to permit partial recovery of commissions for managerial services that require no agency license.[126]

Therefore, suppose a 360 deal and record deal are in the same contract governed under California law. If the 360 deal is found invalid, then the contract is most likely severable since the artist would likely have signed the record deal without the 360 deal and the clauses in the contract are most likely grammatically severable (in different provisions). If the *record deal* is found invalid, however, then the inquiry is much different. The issue then is whether the artist would have signed a 360 deal and whether the parties would have intended to have a 360 deal without a record contract. This is highly unlikely, since the income participation for other revenue streams is an alternative stream to the label, and the primary work of the label was to manufacture and distribute records under the record contract. Thus, in most cases, the 360 deal will be severable from the record deal if the 360 deal is found invalid.

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[121] CAL. CIV. CODE § 1670.5 (1979).
[122] CAL. CIV. CODE § 1599 (1979).
[123] CAL. CIV. CODE § 1670.5 (1979).
[124] MHC Fin. Ltd. P'ship Two v. City of Santee, 23 Cal. Rptr. 3d 622 (Cal. Ct. App. 2005).
[125] Marathon Entm't, Inc. v. Blasi, 174 P.3d 741 (Cal. 2008).
[126] *Id.* at 995-96.

In a deal where both the 360 deal and record deal are in the same contract, the record deal is subject to the Seven-Year Statute, but where the labels take an active role and the artist does not render personal services, the 360 deal part of the contract can be severed from the contract. The only further concern is whether, if the labels do take this type of active role, the label's conduct would be subject to the TAA.

C. *California Talent Agencies Act*

Are labels procuring employment for the artist when they take an active role? What is the best solution to help the music industry, but incentivize labels to actively develop their artists? If the label's activity renders it as acting as an unlicensed talent agent, provisions of the 360 deal that provided income to the labels from the other entertainment activities of the artist could potentially be void, meaning the labels would lose some ancillary income despite their efforts to help the artist.[127] The TAA is codified in California Labor Code § 1700 (1986). The definition of a talent agency in the context of the TAA is:

> (a) "Talent agency" means a person or corporation who engages in the occupation of procuring, offering, promising, or attempting to procure employment or engagements for an artist or artists, except that the activities of procuring, offering, or promising to procure recording contracts for an artist or artists shall not of itself subject a person or corporation to regulation and licensing under this chapter. Talent agencies may, in addition, counsel or direct artists in the development of their professional careers.[128]

Moreover, Labor Code § 1700.5 states that "[n]o person shall engage in or carry on the occupation of a talent agency without first procuring a license . . . from the Labor Commissioner."[129]

It is not disputed that artists signing with record labels constitute "artists" under the definition in the TAA.[130] The issue is whether or

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[127] *See id.* at 750-51.

[128] CAL. LAB. CODE § 1700.4 (West 1986).

[129] CAL. LAB. CODE § 1700.5 (West 1989).

[130] CAL. LAB. CODE § 1700.4 (West 1986). Section 1700.4 of the California Labor Code states:

> "Artists" means actors and actresses rendering services on the legitimate stage and in the production of motion pictures, radio artists, musical artists, musical organizations, directors of legitimate stage, motion picture and radio productions, musical directors, writers, cinematographers, composers,

not a label taking an active participation in a 360 deal would be procuring employment under the TAA. If the label's active role constitutes "procurement" under the TAA, then the label is an unlicensed agent subject to the TAA, and the artist might sue the label in the Labor Commissioner's court, which can result in voiding provisions that require the artist to pay the label a percentage of the ancillary income.

What is procurement? According to one scholar, procurement is "[a]ny attempt, regardless of success or profit, by a talent seller to bring about, solicit, cause, further, or negotiate employment for or on behalf of any artist with a third party talent buyer."[131] For example, booking performances,[132] arranging meetings with TV executives,[133] negotiating contracts,[134] and possibility soliciting opportunities would constitute procurement.[135]

The Labor Commissioner[136] in *Chinn v. Tobin* held that "a person or entity who employs an artist does not 'procure employment' for that artist . . . by directly engaging the services of that artist" and that "the 'activity of procuring employment' . . . refers to the role an agent plays when acting as an intermediary between the artist whom the agent represents and the third-party employer who seeks to engage the artist's services."[137] Under this holding then, if labels do not want to be liable under the TAA as unlicensed agents, then the only procurement of employment or active role the label can take in obtaining alternative revenue streams is procuring opportunities where the label directly engages

> lyricists, arrangers, models, and other artists and persons rendering professional services in motion picture, theatrical, radio, television and other entertainment enterprises. *Id.*

[131] Jacobson, *supra* note 3.

[132] *See* Park v. Deftones, 84 Cal. Rptr. 2d 616, 618-19 (Cal. Ct. App. 1999).

[133] *See* Styne v. Stevens, 26 P.3d 343, 348 (Cal. 2001).

[134] *See* Yoo v. Robi, 24 Cal. Rptr. 3d 740, 748-49 (Cal. Ct. App. 2005).

[135] Jacobson, *supra* note 3, at 10-11 (suggesting opportunities in music publishing, merchandising, live touring, and sponsorships). *See* Determination of Controversy at 6, Blasi v. Marathon Entm't Inc., Cal. Lab. Comm'r Case No. 15-03 (2006).

[136] The Labor Commissioner is the head of the Division of Labor Standards Enforcement within the California Department of Industrial Relations responsible for enforcing labor standards in the state of California. DIR – About DLSE, http://www.dir.ca.gov/dlse/aboutDlse.html (last visited June 29, 2013). Since the TAA and Seven-Year Statute are California labor laws, the Labor Commissioner enforces labor laws through adjudication. *Id.*

[137] Determination of Controversy at 6-7, Chinn v. Tobin, Cal. Lab. Comm'r Case No. 17-96 (1997).

the artist's services. This is problematic because then the artist would be rendering personal services to the label, subjecting the 360 deal to the Seven-Year Statute.

If the label is engaging the artist for recording services for a recording contract, the label is likely obtaining complete recording rights, and thus, the label is "directly engaging" the artist, and the holding under *Chinn* suggests that the label would not be procuring employment for the artist. If the label is only helping the artist obtain another opportunity, such as a role in a TV show, the label would not be obtaining any rights to his voice or likeness as used in the show, and therefore the artist is not being "directly engaged" by the label, and it would constitute procuring employment. Therefore, it is most likely that the label may not be subject to the TAA if the label obtains rights for the artist's work. This makes sense because the label would most likely have included a clause in the 360 deal whereby all rights from such opportunities (TV shows, movies, etc.) would be transferred to the label as a work for hire.[138]

If the label is not obtaining rights, however, there is still the issue of whether procuring contracts that are *not* recording contracts constitute procurement under the TAA. In a recent case, *Yoakam v. The Fitzgerald Hartley Co.*, the Labor Commissioner determined that musical publishing contracts and songwriting services do not fall within the recording contract exemption.[139] The Commissioner in *Yoakam* identified that during the legislative session for the bill that eventually became the TAA, the Conference of Personal Managers proposed several amendments such that the law would read, "[a]ny person may procure for an artist an agreement for 'recording, producing, manufacturing, distributing or selling records or tapes or any agreement for the composing or publishing of musical compositions.'"[140] This proposed

[138] *See generally* 17 U.S.C. § 101 (1976) (defining work for hire). It is noted here that work for hire is not necessarily work for hire just because the contract has a clause stating it. If the label is viewed as an employer and the artist as the employee (which raises additional labor law concerns), however, the work produced by the artist on behalf of the employer automatically constitutes a work for hire. *See id.*

[139] Determination of Controversy at 13, Yoakam v. Fitzgerald Hartley Co., Cal. Lab. Comm'r Case No. 8774 (2009).

[140] Testimony Before the Assembly Standing Committee for Labor, Employment and Consumer Affairs, Assembly 1978-1979 Session, ch. 1382, AB 2535 at 180 (April 25, 1978).

amendment does not appear in the final version of the TAA, however. Rejection of this expanded scope suggests that the legislature did not intend to expand the scope of contracts to include contracts beyond recording contracts.

Whether or not the label's activity constitutes procurement of employment under the TAA depends on the actual activity involved.[141] Nonetheless, in a litigation situation, where the artist attempts to get out of a 360 deal, based on the results from *Blasi* and *Yoakam*, it is most likely that the court will sever the contract if there are procurement issues rather than allow the entire contract to be void. It may be possible to relieve potential legal issues by having labels hire licensed agents to help procure such employment, thus avoiding violations of the TAA altogether. Perhaps the best option is to make legislative amendments to the current TAA to address issues about 360 deals and labels actively taking a role in artist development. Nonetheless, in the short-term, the best idea is most likely to make sure labels always have an agent obtain opportunities for the artist.

V. CONCLUSION

Ultimately, labels in the U.S. should take an active role in helping develop artists' careers, the 360 deal and record deal should be in different documents, and the labels should always have an agent involved when obtaining opportunities for the artist.

Since the Korean music industry has been successful despite the worldwide music industry downward turn in the 2000s, and the K-pop apprenticeship and active model seem to contribute to its success, the U.S. industry can learn from this by actively helping artists in developing their careers. This includes discussing career opportunities with the artist in a managerial role.[142]

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[141] *See generally* Jacobson, *supra* note 3, at 10, 12 (analyzing procurement for types of music deals in detail).

[142] Labels in the K-pop industry work with artists to obtain career opportunities outside of music recording through collaborations with other entertainment companies, e.g., S.M. Entertainment, JYP Entertainment, and KEYEAST Entertainment worked with KBS for a production of a second season of a TV show "Dream High: Season 2" featuring JYP artists JB from boy band JJ Project and Jinwoon from boy band 2AM. thunderstix, *SM Entertainment to Join Production of "Dream High: Season 2"*, soompi (Aug. 24, 2011) http://www.soompi.com/2011/08/24/sm-entertainment-to-join-production-of-dream-high-season-2/; DreamHigh – DramaWiki, http://wiki.d-addicts.com/Dream_High (last visited June 29, 2013). In 2011, six major

As evident in the K-pop litigation cases involving KARA, Hangeng, and TVXQ, however, durations of services rendered should not be so long as to constitute near "slave contracts" and fairness about profit distribution and creative controls should be maintained. Labels should also be wary of the Seven-Year Statute, and can avoid it by working actively with the artist without the artist providing personal services to it. Furthermore, labels should avoid acting as an unlicensed talent agent under the TAA by always having an agent involved in the active development of the artist's career.

One solution that could be effective in the long run is to reform legislation for the Seven-Year Statute by requiring the legislation to address 360 deals, and to amend the TAA to allow labels to take an active role without worrying about liability as an unlicensed agent.

Nonetheless, with the added perspective of how the K-pop industry's successes and failures teach that labels should take an active role in artist development, and the insight that agents should always be involved in obtaining artist opportunities that do not provide personal services for the label, record labels in the United States can discover the full potential of 360 deals.

agencies also collaborated to create the United Asia Management in an attempt to "advance the entertainment industry of Korea" and expand the casting system and provide opportunities for their artists to work in movies, dramas, and other media. UAM – United Asia Management, http://uam.asia/about.htm (last visited June 29, 2013).