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# Proving a Point or Paving the Way: Will Taylor Swift Rerecording Her Masters Bring Needed Change to the Music Industry's Unconscionable Contracting?

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**Proving a Point or Paving the Way: Will Taylor Swift Rerecording Her Masters Bring Needed Change to the Music Industry's Unconscionable Contracting?**

Ellen Ray[1] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn1)



Taylor Swift has been a fierce advocate for artists' rights to own their work in the music industry, but her latest move falls short of the necessary solution to unconscionability in record label contracting. In August, Swift announced she will be rerecording her first five albums in response to the sale of her master recordings by Big Machine Records to Ithaca Holdings in order "to regain artistic and financial control of her material."<sup>[2]</sup> (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn2)

In standard recording contracts, like Swift's contract with Big Machine, the record label profits by offering young artists the means to "finance, produce, and sell their creations,"<sup>[3]</sup> (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn3) in exchange for the label's retention of the master recording, the "physical embodiment of the performance."<sup>[4]</sup> (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn4) Because Swift is the primary songwriter on all her songs, she holds a copyright for the use both the lyrics and music, which is distinct from the label's copyright for production rights.<sup>[5]</sup> (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn5)

However, without ownership of the masters, a song cannot be produced and profited off in any meaningful way.<sup>[6]</sup> (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn6) For this reason, legal scholars argue that the terms of a recording agreement are "unconscionable as a matter of law," but due to a lack of litigation on the topic, courts have yet to arbitrate the matter.<sup>[7]</sup> (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn7)

A contract is classified as unconscionable when the terms are so one-sided that it presents a lack of meaningful choice for one of the bargaining parties.<sup>[8]</sup> (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn8) §208 of the Restatement (Second) of Contracts does not explicitly define

unconscionability, but provides qualifications to assist judicial analysis subject to a sliding scale test.[9] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn9)

When courts analyze a breach of contract under unconscionability, there must a procedural element, meaning the “bargaining terms” were unfair, and a substantive element, meaning the contract itself had “oppressive terms.”[10] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn10) If a court were to find the contract terms unconscionable, it would become voidable.[11] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn11)

Utilizing precedent from similarly-situated music industry cases, like *Graham v. Scissor-Tail Inc.*, would direct the court’s analysis on unconscionability based on the labels retention of the master recording. [12] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn12) In *Graham*, the dispute was between a concert promoter who was a member of a labor union, American Federation of Musicians, and a band, Scissor-Tail.[13] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn13) Under the sliding-scale test, the weight of the substantive unconscionability through violations of fundamental fairness and failure to protect the artist’s best interests was coupled with the finding of an adhesion contract, utilized as evidence of procedural unconscionability in the artists lack of “meaningful choice” or “alternative in contracting.”[14] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn14) In this sense, the requirements of procedural unconscionability have been broadened. This could counteract the viewpoint that the standard recording contract has become an accepted contract of adhesion, “ingrained into the notion of free contracting,” such that a claim of unconscionability would be against the public policy of the industry. [15] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn15)

Swift is well-positioned to fund a breach of contract claim based on unconscionability for a class of artists against their record label and force the issue past settlement proceedings to obtain an adjudication on the issue.[16] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_edn16) This would be a more productive alternative; allowing the courts to decide definitively whether recording contracts are unconscionable. The strength of legal precedent would have a ripple effect in the music industry.

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[2] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref2) Anastasia Tsioulcas, *Look What They Made Her Do: Taylor Swift To Re-Record Her Catalog*, NPR (Aug. 22, 2019), <https://www.npr.org/2019/08/22/753393630/look-what-they-made-her-do-taylor-swift-to-re-record-her-catalog>.

[3] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref3) Abdullahi Abdullahi, *Termination Rights in Music: A Practical Framework for Resolving Ownership Conflicts in Sound Recordings*, 2012 U. Ill. J.L. Tech. & Pol’y 457, 458 (2012).

[4] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref4) *In re Antone’s Records, Inc.*, 445 B.R. 758, 779 (W.D. Tex. 2011).

[5] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref5) *Id.*

[6] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref6) Joe Coscarelli, *Taylor Swift Says She Will Rerecord Her Old Music. Here’s How.*, N.Y. Times (Aug. 22, 2019), <https://www.nytimes.com/2019/08/22/arts/music/taylor-swift-rerecord-albums.html>.

[7] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref7) Ian Brereton, *Beginning of a New Age?: The Unconscionability of the “360-Degree” Deal*, 27 *Cardozo Arts & Ent. LJ* 167, 168 (2009).

[8] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref8) *Id.* at 172.

[9] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref9) *Id.*

[10] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref10) Abdullahi, *supra* note 3, at 471.

[11] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref11) *Id.* at 479.

[12] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref12) *Graham v. Scissor-Tail Inc.*, 623 P.2d 165 (Cal. 1981).

[13] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref13) Omar Anorga, *Music Contracts Have Musicians Playing in the Key of Unconscionability*, 24 *Whittier L. Rev.* 739, 747-48 (2003).

[14] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref14) *Id.* at 747-49.

[15] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref15) Brereton, *supra* note 6, at 173.

[16] (applewebdata://117B88FC-AF77-45C9-AF71-04BA1C6DCA86#\_ednref16) See Anorga, *supra* note 12, at 740.



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