

From Seven Years to 360 Degrees: Primitive Accumulation, Recording Contracts, and the Means of Making a (Musical) Living

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Abstract: *This article examines the apparent paradox of the persistence of long-term employment contracts for cultural industry ‘talent’ in the context of broader trends toward short-term, flexible employment. While aspirants are numberless, bankable talent is in short supply. Long-term talent contracts appear to embody a durable axiom in employment: labor shortage favors employees. The article approaches this axiom through the lens of recent reconsiderations of the concept of primitive accumulation. In the case of employment, this concept highlights employers’ impetus to transcend legal and customary barriers to and limits on their capacity to capture and compel creative labor, and to appropriate the products of contracted creative labor. The article supports this argument through the analysis of contests between Los Angeles-based recording artists and record companies over the California and federal laws that govern their power and property relations. These struggles reveal a pattern of attempts by record companies to overcome or change laws that limit their power to control, compel and dispossess recording artists. The article suggests that as contractual forms change under digitalization, familiar political dynamics continue to characterize the relationships between recording artists and the companies that depend on their labor and output.*

Keywords: Primitive accumulation, social common, recording industry, RIAA, contract, popular music, labor law, injunction, bankruptcy law, copyright, work for hire, Olivia Newton-John.

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1. Introduction

Binding, long-term employment contracts for creative labor (or ‘talent’, in industry jargon) are important to the recording industry and have featured in legislative and courtroom battles between recording artists and record companies for decades. Today, points of contractual friction are shifting as artists and companies explore new contracting conventions in response to challenges stemming from digitalization and the unauthorized distribution of music via the Internet. Where record companies and recording artists often argued before lawmakers and judges over the allowable duration of their contracts, they are increasingly concerned with negotiating the contract’s coverage of formerly off-limits recording artist activities such as touring and merchandising.

Drawing mainly on legislative and judicial documents and trade journal reportage, this article examines ongoing changes in contracting conventions. It traces late 20th century contests over laws that governed recording contracts, and considers the “360 deal,” the main contractual response to the early 21st century destabilization of the recording industry. The article links the political-economic logics of contracting under the old and emergent regimes through the lens of *primitive accumulation*, a Marxian concept that highlights capitalists’ ongoing drive to overcome legal and/or traditional limits to the extension of the capital relation (De Angelis, 2004; 2001; Bonefeld, 2001; Midnight Notes Collective, 1990; Perelman, 2000). It argues that even in the contemporary context of labor’s increasing casualization, the impetus of cultural capitalists toward contractual capture

and control of valuable talent and creative cultural products exemplifies the usefulness of the primitive accumulation perspective in the analysis of work and employment.

1.1. Option Contracts, Rules, and the 360 Deal

Unsure of new artists' potential value, record companies typically require new artists to sign open-ended "option" contracts. Option contracts give companies the exclusive right periodically to renew or end the employment. If an artist under contract becomes (or shows promise to become) profitable, the company may exercise its option(s) to continue the relationship, if not, they can "drop" the artist. Because artists under such contracts typically face severe penalties for breach, option contracts essentially guarantee employer control of the artist's creative labor and products (on an exclusive and assignable basis) for as long as the employer chooses. The benefit to employers of this kind of control is a substantial legal claim on the forms of income that can be generated from the marketing of the artist's work and likeness which obligates the company to very little. Moreover, most new artists sign their first contracts from positions of bargaining weakness, as relative unknowns. While artists may be able to renegotiate for better terms as they become more successful, these contracts prevent them from offering their talents to other bidders on an open market, thus keeping their costs to their initial employer artificially low.¹ A respected industry reference (now in its 7th edition) warns artists "DON'T BE FOOLED! OPTIONS ARE NEVER GOOD FOR YOU!! They only mean you'll get dropped if you're not worth the price, or you'll get too little if you're a smash. So repeat after me: 'OPTIONS ARE NEVER GOOD FOR ME!!!'" (Passman, 2006, p. 99, emphasis in original).

Despite the option contract's general auspiciousness for employers, companies making use of it sometimes encounter obstacles or limits to the full exploitation of the contract's advantages. Among the impediments to the maximization of the option contract are labor and bankruptcy law, which preserve some rights for artists in their status as employees by setting limits on what can be included in the contract. Copyright law, too, insofar as it construes performers as the authors of their sound recordings, appears as an obstacle to maximum exploitation. Employers of valuable talent have long chafed against the limits set by these forms of law; their legislative activities evince a pattern of attempts to change law in order to reduce or remove these impediments.

As a result largely of digitalization and file-sharing, however, recording artist contracting is taking place in a business context that is, for the most part, extremely different from the one in which these longstanding conventions developed. In particular, record sales and royalty income, once the main source of record industry profit, have begun to lose their pride of economic place as the "hole in the universe" rent by file-sharing threatens these revenues (Jay-Z, quoted in Pareles, 2010, January 3, p. AR1).² One way around this problem has been the development of the "360 (degree) deal," so named because it enables the company to 'participate' in virtually all artist activities and revenue streams, including such formerly off-limits areas as merchandise and touring (Leyshon et al., 2005). With the 360 deal comes a shift of attention and emphasis from the public/legislative to the private/contractual arena. The RIAA's member companies are developing a new contractual form in which several of the terms that are governed by law (such as duration) diminish in importance relative to terms that spell out the number and kinds of activities that the contract covers.

However, not all has changed: a primitive accumulation analysis highlights crucial continuities between the fading and emerging regimes. Under the 360 deal, this analysis suggests, "unconscionable" conditions of indentured or even involuntary servitude that some analysts find codified in the recording contract (Anorga, 2002; Gardner, 2006; Brereton, 2009), "in which the victim is forced to work...by use or threat of coercion through law or legal process" (United States v. Kozminski, 1988), appear to become more rather than less of an issue in the record industry. A second persis-

¹ The logic of the long-term option contract is so favourable to entertainment-industrial stability, in fact, that some contemporary Hollywood observers are suggesting the film industry ought to revisit some of the legal labour practices of the system that were tossed out along with the system's many illegal aspects (Moore, 2009).

² File sharing is far from the only culprit in the music industry's crisis of profitability (Leyshon et al., 2005; Peitz & Waelbroeck, 2004).

tent feature linking the old and new contracting regimes is concern with the allocation of intellectual property rights. In 1992, Simon Frith noted already “a move from record sales to rights exploitation as the basic source of music income” (p. 73); accompanying and intensifying the normalization of the 360 deal has been an explosion of activity in the spheres of music publishing and licensing (Ripley, 2010). While one of the examples I discuss in this article has to do with a 1999-2000 contest over intellectual property rights, this contemporary correlative shift has consequences for artists that I do not analyze beyond more general consideration of the recording contract’s expanding scope.

2. Primitive Accumulation

In both the fading and emerging regimes, record companies (increasingly styling themselves as “music companies”) use recording contracts to secure control over the recording artists’ activities and output. They do this by requiring that artists (voluntarily) make themselves contractually vulnerable – legally unable to say “no” without penalty – to certain kinds of demands.³ Many of the earlier era’s demands had to do with *how long* a successful artist could be held to a relatively narrow option contract (or could be enjoined from offering their services to other buyers). Laws that effectively endowed employees with certain meaningful rights offered some protection to artists, under certain conditions, against the full weight of some of these demands. Today’s demands increasingly concern the *breadth* of the range of artist activities in which a company may ‘participate’ (by claiming some portion of revenue related to given activities and/or some rights of decision-making power over them); legal limits appear to play a less-central role in determining the contents of contracts.⁴ Because it smacks of life bondage, a contract that has no fixed endpoint is of greater concern to lawmakers than one that has no fixed limit on the range of activities it governs. Yet in both cases the dynamic at issue is the extension of employer power, whether across greater lengths of time or over a wider range of activities. In each case, this analysis argues, extension requires the transcendence of former (legal or customary) limitations or obstacles to increased employer power, of which the obvious corollary is increased employee vulnerability.

Employer efforts to increase employer power and worker vulnerability are not new; the efforts of record companies under both regimes have an illuminating analogue in a phenomenon first called “primitive accumulation” by Marx’ translators, and recently elaborated in Marxist political theory and economic history. For Marx, capital is not a thing (e.g., Adam Smith’s “stock”) but a relation: the separation of people from direct access to the means of subsistence and production. This separation renders some people – those who have not already accumulated or inherited wealth – dependent on markets in which they must sell their labor and, with their money wages, purchase what they need to survive. Primitive accumulation has conventionally been understood to describe a historical period when nascent or proto capitalists advanced the preconditions for capitalist development through the enclosure of common lands. Enclosures curtailed people’s rights and access, for example, to land on which they could grow food for themselves, increasing the pressure on them to buy rather than grow what they needed, and to undertake paid work to earn the necessary wages.

Recent reinterpretations of Marx’ writing, however, suggests the concept plays a central and ongoing role in economic life. Massimo De Angelis argues for a broadening of primitive accumulation to include all efforts by capital – personified by its owners and their agents – to transcend various limits and barriers to the extension of capital’s relation of separation. As a political-theoretical category, De Angelis writes, primitive accumulation “define[s] a strategic terrain among social forces” that is not locked in the past (2001, p. 68). The persistent, dynamic logic of primitive accumulation is starkly visible, for example, in present-day efforts to privatize public utilities such as water and water services. Public utilities prioritize people’s rights and access to necessary means of life, de-

³ The question of substantive vs. formal voluntariness is beyond the scope of this paper. For an illuminating treatment see Macpherson (1973).

⁴ Of course, recording contracts could not legally require artists to do anything illegal; such a contract would be invalid.

marking areas of life protected from (excessive) commodification; their privatization represents capital's transcendence of prior limits on the penetration of markets into hitherto protected (non- or less-marketized) areas of life.

2.1. A 'Social Common'

The privatization of water is an easily legible example because it so clearly rehearses the spectacular enclosures of the early period at the same time as it exemplifies the continuous nature of primitive accumulation in the modern world. Axiomatically speaking, in a fully marketized society (an impossibility in all but the most extreme contractarian fulminations), you have no right to anything you have not purchased. The maximal proliferation of markets in water depends on the elimination of non-market or traditional or human rights to water. Without a right to clean water, thirsty people are at the mercy of those who hold title. Alongside plainly visible enclosable commons like clean water is a less legible but equally important "social common" which "sets a limit to the extension, the scale" of the capital relation in everyday life (De Angelis, 2001, p. 18). According to De Angelis, "socio-economic rights and entitlements" are bulwarks (often resulting from "past battles") that protect people's standard of life, as do rights to water their ability to live. "State institutions", he writes, "have developed and attempted to accommodate many of these rights and entitlements with the priorities of a capitalist system. The entitlements and rights guaranteed by the post-war welfare state for example, can be understood as the institutionalization in particular forms of social commons" (De Angelis, 2001, p. 19).⁵ "A classic example", De Angelis writes, "is the body of rights, provisions and entitlements universally guaranteed by the welfare state in spheres such as health, unemployment benefits, education, and pensions" (2004, p. 80). These serve as limits to the extension of the capital relation, or marketization, because they underwrite people's capacity to say "no" to degrees of domination and exploitation considered excessive by the social movements and policymakers responsible for them.

A "primitive accumulation" analysis of contests over the contents and boundaries of welfare-state entitlements (such as those highlighted by De Angelis) might seem to be in tension with a more strictly "propertarian" reading such as that sometimes attributed to David Harvey's recasting of contemporary primitive accumulation as "accumulation by dispossession" (e.g. 2007). In this reading, primitive accumulation is primarily perceived in cases that mimic most closely the enclosures of early modern Britain, in which people are separated from access to the means of living, conceived as access to productive property. From this perspective, an analysis of legislative contests over the contents of labor law (or of struggles over the limits to collective bargaining) might seem strained.

To such objections I offer three preliminary, interrelated replies, while putting aside a fuller theoretical engagement for future work. First, Harvey's own rubric is considerably broader than the term "dispossession" might at first suggest. The range of practices he conceives under this heading include not only those immediately recognizable as forms of privatization and commodification, but also

a raft of additional techniques, such as the extraction of rents from patents and intellectual property rights and the diminution or erasure of various forms of communal property rights—such as state pensions, paid vacations, access to education, and health care—won through a generation or more of social democratic struggles (Harvey 2007, p. 35).

Harvey's own refiguring of the concept is quite inclusive, covering not only property rights as conventionally understood but rights to social goods and protections that underpin the autonomy and life chances of individuals who do not own productive property. A closer analysis of the "creative

⁵ De Angelis notes that this dynamic is captured in Polanyi's account of the social-protective "double movement;" "[o]n one side, there is the historical movement of the market, a movement that has no inherent limits and that therefore threatens society's very existence. On the other, there is society's propensity to defend itself, and therefore to create institutions for its own protection. In Polanyi's terms, the continuous element of Marx's primitive accumulation could be identified as those social processes or sets of strategies aimed at dismantling those institutions that protect society from the market" (De Angelis, 2004, p. 69).

destruction” Harvey perceives in neoliberal policies and aspirations (2007) thus reveals an approach sympathetic to that of De Angelis. It is not precisely property that is decisive, but rather the ways in which social institutions such as welfare-state entitlements, statutory and common-law labor protections, and human and civil rights *as well as* more conventionally understood property and access rights provide bulwarks against individual and community vulnerability and uphold a floor of social stability in market society.

Second, even as Harvey’s analysis decenters productive property in conceptions of primitive accumulation (and accumulation by dispossession), property itself is a more complex idea than proprietarian readings of the phenomenon seem to suggest. As political and legal theorists have long pointed out, property itself is not (physical or virtual) “things”; rather, property is “a political relation between persons” (Macpherson 1978, p. 4). It is *political* because it exists in the form of claims enforced by the state, and it is a *relation* because “any given system of property is a system of rights of each person in relation to other persons. This is clearest in the case of modern private property, which is my right to exclude you from something, but it is equally true of any form of common property, which is the right of each individual not to be excluded from something” (Macpherson 1978, p. 4).⁶

To have property in a thing is to have rights to it that are enforced against others by the state. As Harvey (2007, pp. 22-23) argues, one of the most important functions of the state in neoliberal society is the enforcement of property rights. The ephemeral nature of intellectual property in the digital era brings this principle into high relief: no longer is control over master recordings (once necessary to high-quality duplication of the kind practiced by manufacturers of vinyl records) exercised through their sequestration in locked record company vaults. Today, each person whose computer contains a CD-quality digital music file has unimpeded “access” to the vault by virtue of being in possession of a pristine recording that will not degenerate in the course of its reproduction. Yet the copyright holder’s intellectual property rights nevertheless render unauthorized users of that file vulnerable to prosecution, as the fearsome FBI and Interpol warnings included on VHS tapes and DVDs intended for home use make clear. In other words, the computer-using music fan has relatively easy access to the means of production of high-quality copies of valuable recordings; what matters is which party has the rights to reproduce and circulate those files without fear of prosecution.

Finally, over the course of several decades, a handful of labor relations scholars have developed a strand of historically-rooted theoretical argument in favor of a view of “property in work” that proposes the existence of a proprietary relationship between workers and jobs. This strand of argument explicitly links rights of workers to property rights by proposing that workers have rights to continued tenure in a job that should be enforceable against employers seeking to dismiss them without cause. Salient points of this perspective support the legitimacy of a broader reading of primitive accumulation, from an angle not taken up by most theorists of the phenomenon, to include rights to collective bargaining and labor protective legislation as rights against capital. As do the rights and entitlements characteristic of the social common, these rights and laws pose limits to the extension of the capital relation, to employers’ power to compel working people.

The “property in work” perspective emerges in large measure in the context of analyses of dismissals under the governing Anglo-American doctrine of “at-will” employment.⁷ At-will doctrine holds that employment is at the will of both employer and employee, and that the right of the latter to depart without notice or penalty is the exact and reciprocal obverse of the right of the former to terminate without notice or penalty. This doctrine is premised on a radical (but commonplace) view of contract as the voluntary exchange of (rights in) properties by juridical equals; it does not and cannot take into account ‘extra-contractual’ elements of the relationship such as inequalities of

⁶ See the other essays collected in Macpherson’s edited volume for a broad range of perspectives.

⁷ Termination in the UK is held to be mitigated by the ‘notice rule’, but in practice this notice can be so short as to render the two systems indistinguishable (Njoya 2007, p. XX)

wealth or other forms of social power, or the differing degrees of dependence experienced by the two parties.

Yet as Njoya (2007) argues, a longstanding but now forgotten or ignored tradition in the English common law (the taproot of modern Anglo-American employment law) recognizes a range of property (or property-like) rights of employees in their jobs. In short, in the same way that good will or workplace knowledge can become the object of enforceable corporate property claims by virtue of their cultivation, accumulation and reification over time, so also can a worker's investment of time, skills, loyalty, and effort become the object of that worker's claims, such that dismissal without cause (e.g., breach of contract) constitutes a form of dispossession (Meyers 1964, p. 3). Njoya points out that before the late 19th century, both master and servant were perceived to have property rights that conditioned their relationship: masters had rights in the servants' labor (such that "absconding workers were [...] treated as criminals who had misappropriated their master's property" (Njoya 2007, p. 27)); servants had rights in the means of making a living that limited employers' freedom to discharge workers willy-nilly. In Blackstone's famous words, "the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done as where there is not" (quoted in Njoya 2007, p. 29). Emerging out of the law of 'master and servant', which governed employment in England for over five centuries, this tradition of legal thought persisted to the turn of the 20th century in lower court and dissenting judicial opinions that opposed radical interpretations of freedom of contract and managerial prerogative. One such opinion found that a "valuable interest" in an employee's "probable expectation" of continued employment – an expectation reified in legal terms – militated against an employer's right to dismiss an employee without good cause (cited in Njoya 2007, p. 42). Assertions like these see "the right to work" conceived here more as the right to the means of making a living rather than simply the right to exert oneself where one has been lucky enough to be hired, "as an attribute of individual liberty and one which is more important than 'any right of property or capital'" (Njoya 2007, p. 44, citation omitted). Njoya's articulation of the property-in-work perspective invites us to imagine, with David Harvey, Massimo De Angelis, Christopher Hill (1996), and others a more inclusive sense of property and rights relevant to the relations of firms and individuals. Additionally, her view invites us to consider the very broad range of "concrete limit[s]" to the extension of the capital relation posed by the welfare state, protective legislation, and traditions in common law, and to perceive capital's "deployment of strategies for [the] transcendence" of those limits across a number of terrains (De Angelis, 2004, p. 72).

The rights and entitlements embedded in the forms of labor- and debtor-protective legislation attacked by the RIAA in the cases I recount below are not identical with those rights to resources and public wealth named by De Angelis and Njoya above. I nominate them, however, as an intermediary form that ought to be considered as part of the social common because they share with those rights the practical function of limiting the power of employers to compel people in and to work. The barriers to market influence created by the "rights and entitlements" De Angelis names and by the "property in work" perspective propounded by Njoya are not impermeable; these rights and entitlements can be more or less influenced by markets and yet still have incrementally egalitarian(izing) effects. In the U.S., for example, the quality of "public" primary and secondary education your children can expect is determined to an enormous degree by the property taxes collected in your neighborhood; market values of homes thus play a role in determining how much public money is directed to schools in different neighborhoods (Barry, 2005, pp. 67-68). No progressive would deny, however, that full marketization of education would pose a disastrous extension of market influence. However imperfectly, publicly-funded education mitigates the influence of markets on the distribution and quality of education. Similarly, protective legislation and property rights in a job attenuate the power of capital to set the terms of employment, without creating totally de-marketized social spaces.

Ironically, as Njoya points out, the basic lack of job security characterizing the contemporary experiences of working people is a perverse result of Anglo-American workers' 19th century liberation from the law of master and servant. Collective bargaining and workers' political capacity to contest

the powers of employers – who could enforce criminal sanctions against workers while only ever being vulnerable to civil penalties themselves (and even then only in theory) – would have been impossible under the law of master and servant. But along with the yoke of that legislation, so also did working people unintentionally throw off property rights in work and other extra-contractual forms of employer obligation.

Today, few workers require rights to exit contracts of excessive duration. The rules of contract duration, minimum compensation, and bankruptcy protection attacked by the RIAA help(ed) protect some of the small number of working people who remain vulnerable to being held under contract by a single employer, guaranteeing them the limited but real right periodically to take advantage of competition between employers for their services or to leave the employment altogether. These rules put limits on employers' market power without rendering affected working people invulnerable to market power. In each case, where the record company-recording artist relationship met certain conditions, the rule could intervene and open an exit for the artist, even when the artist had voluntarily agreed to unfavorable terms. In each case, the RIAA sought to place obstacles in front of these exits, in order to make it easier to keep valuable artists under contract for as long as could be desirable. The rule of copyright license termination attacked by the RIAA protects creators of intellectual property from interminable "unremunerative transfers" (Nimmer & Menkel, 2002, p. 411) assuring them of a "second bite at the remunerative apple" (Nimmer & Menkel, 2002, p. 405) – a chance to recover control of potentially valuable rights after their initial license. This rule serves to limit the effect of employers' or commissioners' market power on the long-term fortunes of cultural creators. All four of these efforts are better understood in the context of the significant autonomy enjoyed by successful, late 20th century recording artists.

3. Recording Artist Autonomy

Part of the reason why record companies work so hard to establish control over the labor and output of recording artists is the unusually high degree of autonomy typically enjoyed by many recording artists. The extraordinary position of recording artists relative to other forms of talent in film, television, publishing and other popular media has at least two medium-specific explanations.⁸ First, and most significantly for the present discussion, recording artists' unusual autonomy is rooted in their historically-developed ability to derive significant incomes from activities not covered by their recording contracts. This pattern emerged in an exemplary form among mid-20th century U.S. swing bands. As Jason Toynbee writes, these touring ensembles, like the rock'n'roll and rock groups that followed them, "were able to sell their services" – stage as well as recording studio performances – "directly to several buyers and so avoid dependence on any single one" (Toynbee, 2003, p. 44). This self-sufficiency has shaped the terms of record deals for many popular music performers. It has become institutionalized and can limit record companies' capacity to control the labor of their artists. (As I show below, this theme appears in record companies' arguments for laws that would increase their leverage in contractual relationships with performers.) Second, the market value of a popular musician can rest to an unusual degree in the public's perception of the artist as autonomous. This principle has long been understood to operate primarily in jazz, folk, blues, and rock cultures, where evidence of an act's authenticity is important to fans' monetizable investments (Frith, 1981; Keightley, 2001), although recent scholarship has shown that this principle is also important in other genre cultures (Leach, 2001; Stahl, 2002; Tregoning, 2004).

The combination of these factors positions many recording artists at what might be called a *frontier* of employee control and autonomy in market society. Recording contracts are contracts for employment, but these artist-workers' autonomy seems to call that status into question, making them appear more like independent contractors. Employment presumes dependence, but recording artists are already quite independent. Employment law limits employees' vulnerability to employer fiat; the unusual independence of recording artists is (or rather was – see section 4, below) further

⁸ Depending on the outcome of anticipated court battles, recording artists' asserted ownership of copyright in their sound recordings may constitute an additional explanation of their autonomy (see section 4.4 below).

consolidated, supported and protected by such law. The recording artist's significant degrees of independence often (but not always) translate into significant degrees of autonomy in their contractual employment,⁹ and are often perceived by their employing record company firms as a threat to the stability and profitability of their business. If the profitability of the recording industry depends in large part on the power of record companies to capture, elicit, and control the "recording services" (as well as the resulting "phonorecords") named in recording contracts, then recording artists' capacity to avoid, thwart, or mitigate record companies' power of capture and control constitutes the degree to which (companies fear) artists can hold companies at ransom over various contractual issues.

In the latter decades of the 20th century, in response to real and perceived threats to their power to capture and control recording artist labor, the major record companies (to whom many of the most successful artists were under contract) sought to set limits on the autonomy of their artists. Through the RIAA, the major record companies pursued, resisted, and sometimes obtained significant changes to law that could or would alter the bargaining "playing field." Artists, with less success, have struggled against and also pursued legislation. The lion's share of these changes has benefited record companies by expanding their power to command recording artists' labor.

4. Legislative Contests

4.1. 1979-87: The "Olivia Newton-John Problem" and California's "Seven Year Rule"

The late 20th century era of record label-recording artist legislative battles was initiated by the RIAA following the resolution of a 1979 court contest between the singer Olivia Newton-John and her record label, MCA Records. The singer had given notice of her intention to stop recording under their 1975 contract, and MCA, who had been reaping significant profits from the deal, sought to induce her to keep recording for them (or at least inhibit her from competing with them) by preventing her from recording for any other record company. Superficially, the decision in the case favored MCA: the appellate court approved and enforced an injunction to prevent the artist working for any other record label for the two-year remainder of the term of her contract with MCA. However, when the dust settled it was clear that the interests of Olivia Newton-John (and of recording artists as a group) had been better served by the decision than those of MCA (and of the other major record labels): the decisions reinforced a hard limit to the ability of companies to extend the duration of a profitable contract. The courts' revelation of this newly strengthened limit prompted the RIAA's successful effort to change California labor law to its advantage.

At both the lower court and appellate court levels, the Olivia Newton-John case involved the interpretation of a century-old California law that limited the duration of employment contracts to seven years; this law had been interpreted in 1944 "to protect employees from the consequences of their improvident contracts" (*De Haviland v. Warner Bros.* 1944, p. 237) by means of an inalienable right to terminate at the seventh anniversary of the contract's signing. Both lower and upper courts held that no injunction could extend past that law's seven year limit. This finding alerted artists to an interesting fact: the only penalty to which an artist in breach of contract could be subject was a period of recording studio idleness that would end at the seven year point. For artists who could earn income by touring or appearing in films, for example, such idleness might not pose a compelling hardship. Moreover, this interpretation seemed to promise an immediate way out for artists under contracts that had already exceeded seven years.¹⁰ "The effect of the Newton-John decision upon the recording industry", Robert Steinberg noted already in 1981, "has been tremendous" (1981, p. 104). It demonstrated to the industry that a contract with a fixed duration weakens the

⁹ The case of George Michael (*Panayiotou v. Sony Music Entertainment (UK) Ltd.*, 1994) illustrates the nonidentity of independence and autonomy. When blockbuster artist Michael began to change musical directions, Sony, he charged, refused to promote a new album reflecting his emerging (autonomous) musical vision, believing that fans would not accept it. Michael lost a subsequent suit to be released from his contract (Soocher, 1999, pp. 43- 63).

¹⁰ See *Melissa Manchester v. Arista Records* (1981).

employer's bargaining position, and spurred executives, attorneys and lobbyists to create a way around this newly discovered hazard.¹¹

In order to transcend this limit to the extension of the capital relation, the RIAA set out to eliminate "seven year rule" protection for recording artists. In 1985, acting explicitly on the association's behalf, California state senator Ralph Dills (D-Montebello) introduced a bill to achieve that end. The bill foundered in various forms until, two years on, Dills finally introduced a version that appeared less coercive than earlier versions. Rather than extending the duration limit for all California workers for an additional number of years, this version specified that a person hired to produce phonorecords could still leave the employment at the old seven year mark, but only if she had produced all the albums that could contractually have been required under the contract. If the departing artist had not fulfilled all possible album options set out in the contract she would be vulnerable for damages on "lost profits" associated with those uncompleted albums. Thus, while the power of injunction expired at the seventh anniversary, the new law created a right for the company to demand damages of sufficient magnitude to keep the artist under contract. This version passed in 1987.

The arguments over the various versions of the bill are fascinating and I treat them in detail elsewhere (Stahl, 2010; forthcoming). Here, I want only to highlight some of the main themes in the RIAA's 1985 arguments for the change that substantiate the primitive accumulation analysis. "[C]urrent law in California," the association claimed, "has been used as a weapon by prominent, highly successful recording artists." By invoking the seven year rule, recording artists could "force their record company employer/financiers into renegotiating contracts under circumstances in which the record company is not even sure it will get the benefit of the new bargain." If the record companies did not submit, they argued, "the alternative to renegotiation is that the artist will sit out the balance of his contract term with impunity." The RIAA argued that the artist's bargaining power, moreover, is unfairly enhanced "because he can and does earn substantial sums from 'live' entertainment tours and personal concert appearances", reducing the artist's dependence on the recording agreement for income. These "inequities," they argued, would be corrected by Dills' bill (Gang et al., 1985, p. 4). The bill passed, the "Olivia Newton-John problem" (Passman, 2006, p. 101) was solved, and through the instrument of damages for records that could contractually be required (whether or not the options are ever exercised by the company), the RIAA transcended the seven year limit on recording contracts. The amended law removed a barrier to the extension of the capital relation, a barrier to companies' ability to separate artists from the means of making a living. Recording artists' vulnerability to damages beyond the seven year point effectively overcomes any real ability of the seven year rule to preserve artists from the consequences of improvident contracts.

4.2. 1992-3: Minimum Compensation and Negative Injunctions

The seven year rule provides the employer with the remedy of an injunction against the employee within the seven year limit. The 1987 damages provisions, opponents to the carve-out argued, effectively extend the injunctive power beyond that limit.¹² However, in order to be able successfully to petition a California court for an injunction against a non-performing employee, the employer must pass a test. The employer must have guaranteed and paid compensation at or above a minimum dollar amount set by a 1919 law. If they have not done this, they cannot obtain an injunction, no matter the behavior of the artist. In 1992, recording artist advocates sought to update that figure to an amount reflecting seven decades' worth of inflation. In other words, they sought expand and bolster this by now virtually ineffectual impediment to record company fiat. Their efforts, though partially successful, actually ended up weakening a central aspect of the law's public policy.

¹¹ Following the 1979 Newton-John case were those Donna Summer (1980), Melissa Manchester (1981), Sammy Hagar (1981), and Tom Scholz of Boston (1984) all sought relief with varying degrees of success. See McLane and Wong (1999).

¹² Artist attorney Jay Cooper argued before a March, 19, 2002 hearing of the California State Senate Committee on the Judiciary that artist lawsuits "cost millions of dollars today, and very few artists in this world can afford those things, and they have to settle, they eventually have to cave, because...the threat of a lawsuit is almost the same as an injunction" (audio recording on file at the California State Archive, Sacramento).

Injunctions against employees were prohibited in California until 1919, when the legislature sought to grant employers more power to induce employee performance and found a precedent in the 19th century case of a concert promoter stymied by a recalcitrant singing star (*Lumley v. Wagner*, 1852). However, in recognition of the extreme nature of injunction's power of compulsion, the legislature set a strict condition on their issuance: the worker had to have been guaranteed and paid no less than \$6000 per year under the contract (California Civil Code Section 3423). At the time, that sum – about five times the average annual wage for a working American – was thought to evidence the extraordinary value of the performer to the employer and to demonstrate the good faith of the employer, thereby establishing the case for the injunction. The value of this sum has evaporated through inflation; the passage of time has eroded the efficacy of this limit to capital's freedom to pursue this harsh measure. The law has since been interpreted as an assignment of a "counterweight" to the employer's ability to (otherwise costlessly) restrain a performer from performing for any other employer (Lucas, 1985, p. 1073), but it is not a very hefty one. In the 1960s, 70s and 80s, a handful of cases (including *MCA v. Newton-John*) interpreted the law. In cases involving the comedian Redd Foxx (1966) and the singer Teena Marie (1984), the performers were released from their contracts because their record companies had neither guaranteed nor paid the statutory (and paltry) minimum of \$6000.

In 1992 California State Senator Henry Mello put forward a bill that would update the minimum compensation law in line with 70 years of inflation. Mello's bill replaced the \$6000 figure with \$50,000¹³ and passed in both houses without a single "no" vote. Almost immediately an alarmed RIAA contacted the legislature, arguing that the new minimum would have a "severe", potentially "destructive" effect on the industry (Lopez, 1993). Mello then convened a working group that came up with new legislation that was passed in 1993. The new legislation raised the 1919 figure to \$9000 in the first year of the contract, \$12,000 in the second, progressing to \$45,000 in the seventh year (about \$5,000 above the median income that year, far below 1919's multiple of six). The reduction in the revised 1993 bill of 1992's \$50,000 minimum – particularly pronounced in the first years of a contract – was very well received by smaller firms. "This is the greatest thing for a small record company," an independent music executive told *Billboard*, "because it protects us against being outbid," as can happen once a small record company's artists become successful enough to attract bigger firms (Fitzpatrick, 1993, p. 23).

However, the new law contravened a public policy rationale expressed by the courts in the earlier cases. The law's original rationale is explicitly protective, it denies employers access to an injunction unless the employee has been well paid (in terms meaningful to the law's early 20th century framers) up to the moment of disagreement. This law too poses a limitation to the freedom of record companies to set the terms on which artists work. In the 1960s record companies began inserting a new kind of option clause in their contracts which gave them the option to make (or make up) the minimum payment in response to an artist's announcement of his or her intention to stop performing under the contract. Such measures appear as attempts at primitive accumulation in the broader sense outlined above: capital's discovery and transcendence of a limit to the extension of the capital relation. In this case, the companies sought contractually to convert the employee's inalienable *right* to minimum annual payments (as the basis for a legitimate injunction) into an alienable *property* that would necessarily be alienated by way of contract boilerplate.

The Teena Marie court's opinion oozes with disdain for this practice and finds that it violates the law: this right cannot be bargained away. If this new form of option is found to be legal, that court wrote, then

the company may wait until the last possible moment to exercise its option. Motown and Jobete filed suit against Teena Marie in August 1982 but waited until September 1982 to exercise the option clauses. The request for a preliminary injunction was filed two months later.

¹³ While five times the average annual wage of a working American in 1992 was \$100,000, the rationale of the BHBA was that 1919's \$6000 were worth \$47,000 in 1992, and that \$50,000 would sufficiently increase the 'counterweight' against the power to enjoin an employee to restore the teeth to the 1919 law.

Thus, the companies purchased an insurance policy worth a considerable sum [Motown's profits on Teena Marie's recordings were quite high] for a minimal premium just prior to the time they could be fairly certain a loss would occur. If the option clause [could be found to] meet[] the statutory requirement of minimum compensation, [then] the company can buy its insurance policy on the courthouse steps on its way to seek an injunction. (Motown Record Corporation v. Teena Marie Brockert, 1984, p. 580)

"Indeed", the court continued, "the company may be able to buy its insurance policy after the 'accident' has occurred; that is, after the artist has already signed and recorded with another company" (Motown Record Corporation v. Teena Marie Brockert, 1984, p. 580). However, the 1993 law, while increasing minutely the amounts of money involved, nevertheless eliminates the obligation of the company to have paid the minimums prior to the request for an injunction, allowing precisely this "courthouse steps" insurance policy as a legal business strategy. As *Billboard* reported,

the new bill allows a company to retain an artist even if the company does not meet the minimum compensation rate – as long as it agrees to pay 10 times the difference of the original compensation. For example, if an artist is paid only \$7,000 on a one-year contract, which is \$2,000 below the minimum, the company may keep the artist by paying \$20,000. (Fitzpatrick, 1993, p. 23)

In other words, if the artist attracts attention from another company, the company to which the artist is under contract may buy the right to enjoin the artist, even if they've paid the artist nothing up until that time. I nominate this change too as exemplifying this broader conception of primitive accumulation. If we can view hard-won welfare-state entitlements as bulwarks reducing working peoples' vulnerability to capital's demands and assertions, then we can view labor-protective law as similar bulwarks. Redd Foxx and Teena Marie were able to invoke these protections and resist their contracting companies' attempts to compel them.

The very strategy scorned and invalidated by the Teena Marie court as contravening the minimum compensation law's founding logic became fundamental to the operation of the law, which underwrites the (albeit now more expensive) "courthouse steps" insurance policy. Capital succeeded not only in their resistance to the recording artists' efforts to reinvigorate the law, it prevailed by eliminating the law's core restraint. Guaranteed and paid minimum compensation is no longer a necessary precondition for an injunction, as long as the original company is willing to cough up a larger amount of money to obtain the injunction and thereby prevent the artist from accepting other bids.

4.3. 1998: Bankruptcy and the Rejection of Contracts

In the mid- to late 1990s, a handful of recording artists – notably including African-American performers Run-DMC (1993), TLC (1995), and Toni Braxton (1998) – sought bankruptcy protection. Braxton's filing was particularly big news because at the time her hit song "Unbreak My Heart" "was still generating countless radio royalties" (De Lisle, 2000, April 30, p. 72). One feature of a successful bankruptcy petition is the release of the petitioner from obligations known as "executory contracts" – contracts, that is, that require the performance (execution) of some specified action in the future. Debt is one such contract but there are many others, including the recording contract (Brewer, 2003, p. 588). Shortly after Braxton's bankruptcy filing, the RIAA attempted to change pending federal legislation (then being pushed by credit card companies) in order to make it more difficult for recording artists to declare bankruptcy and void their recording contracts. This effort was rebuffed, and the 1998 legislation failed. However, the recording industry's position – along with those of the consumer credit industries – was strengthened when sweeping bankruptcy reform legislation was passed several years later.

The important place of bankruptcy provisions in US law was first recognized in Article 1, Section 8 of the U.S. Constitution. Despite this recognition, it was not until 1898 that bankruptcy law became a permanent feature of US law (Landry & Mardis, 2006, p. 94). The first major reform of the law took place in 1978, which, according to Robert Landry and Nancy Mardis "did not alter the fun-

damental policy [that had long been] in favor of debtors” (2006, p. 94). For most of its history US bankruptcy law placed a significant burden on creditors to demonstrate that individuals seeking bankruptcy protection were doing so “for reasons other than financial distress” (Pritchard, 1998, August 19, p. 8). The same burden to show “bad faith” and/or “substantive abuse” applied to record companies trying to enforce their contracts by contesting artist bankruptcy claims. Only a very small percentage of recording artists turn to bankruptcy; trying to escape a contract through the declaration of bankruptcy “is risky,” write MacLane and Wong, “because there is no guarantee that the bankruptcy court will reject the contract in question” (1999, p. 27). In the wake of the successful bankruptcy gambles of Braxton, TLC, and Run-DMC, the credit card companies’ legislative push offered the RIAA an opportunity to put obstacles in the way of artist bankruptcy.

In May of 1998, just a few months after Braxton’s January bankruptcy filing, the RIAA pushed Representative Bill McCollum, a Republican from Florida’s entertainment industry-dominated city of Orlando, to insert a provision into the pending bankruptcy reform legislation that would demand a higher standard of court scrutiny for recording artist filings than for those of any other kind of person.¹⁴ A favorable Chapter 7 bankruptcy judgment empowers a court-appointed trustee to “reject” executory contracts if it appears that doing so will facilitate a person’s economic rehabilitation (Brewer, 2003, p. 589). In asking McCollum and other representatives to support the provision, the RIAA argued that artists were increasingly using the bankruptcy code’s Chapter 7 language to escape from their recording contracts. “Unscrupulous lawyers”, acting on behalf of recording artists, argued RIAA president and CEO Hilary Rosen, “are extorting record labels into rewriting existing record contracts – ones they freely entered for their clients – by threatening bankruptcy” (Stern, 1998, May 14, p. 6).

The RIAA advanced legislation that would alter the playing field in their favor. They induced McCollum to insert their proposed language into the pending bankruptcy reform legislation after the bill had been discussed, “without benefit of debate at the subcommittee and committee level” (Holland, 1998, October 7). Union officials discovered the new language prior to its coming up for a vote. When made public, the legislation led to an outcry from artists and their professional and legislative allies. The RIAA (and, in this case, the sponsoring lawmaker) then contended the legislation was technical rather than substantive. The association insisted “that the legislation is not seeking a ‘special interest’ exemption as its opponents are claiming, but instead is trying to close a loophole in current law” (Seelye, 1998, May 15, p. A18). The RIAA provided no evidence that any of the recent bankruptcies had been pursued in bad faith, and little evidence that any more than the handful of cases mentioned above had actually been threatened or taken place. In declining to document the scope of the problem, an RIAA lobbyist said “I simply can tell you based on personal conversations that there’s a problem that should be addressed” (Pritchard, 1998, August 19, p. 8). McCollum acknowledged “I don’t recall the number precisely, but it strikes me that there’s three or four cases they cited to me” (Pritchard, 1998, August 19, p. 8). While observers acknowledged the likelihood that recording artists’ bankruptcies were driven by artists’ desires for substantive renegotiations, they also looked skeptically on the RIAA’s unwillingness or inability to substantiate its own claims.

Finally, concerned senators sent the RIAA to recording artist representatives to hammer out a compromise and “craft substitute language that does not specifically mention recording artists” (Holland, 1998, October 7, p. 12). The two groups agreed on language suggesting somewhat toothlessly that bankruptcy judges may consider “whether an individual debtor seeks to reject a personal services contract and the financial need for such rejection as sought by the debtor” (Holland, 1998, October 7, p. 12).

The bankruptcy reform legislation that ultimately passed (the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005) made it more difficult for most Americans to pursue bankruptcy protection, though it contained no language pertaining solely to recording artists. By introducing

¹⁴ Justin Pritchard noted that “[s]ince 1995, McCollum has received \$3,000 from the RIAA political action committee, campaign records show. House Judiciary Committee members overall received \$8,700 from the RIAA’s PAC during the 1997-98 election cycle, including \$1,000 contributed to McCollum” (1998, p. 8).

means-testing and by shifting more of the burden of proof away from creditors and onto individuals seeking bankruptcy protection, the new legislation made it much more difficult for bankruptcy courts to excuse individuals from their financial obligations (Landry & Mardis, 2006). This legislation – which goes a great distance toward satisfying the recording industry's demand for a more torturous route to artist bankruptcy filings – fits squarely into the perspective on primitive accumulation recently proposed by Vincent Manzarolle. In Manzarolle's account, "[t]he mass production, and resulting commodification of consumer debt" that was facilitated, rationalized, and made more profitable in the US through the 2005 bankruptcy reform legislation, functions as "an important lever in the reconstitution of the labor force" as increasingly vulnerable to the demands of those who hold title to the means of making a living and of consumption (2010, p. 231). Efforts characteristic of primitive accumulation, Manzarolle observes, can be perceived in "the manipulation of financial structures and institutions" (2010, p. 233); the law regulating individuals' access to bankruptcy relief are critical structural elements which set limits on the kinds of pressure capitalist institutions can bring to bear on working people.

4.4. 1999-2000: Work for Hire and Termination of Transfers

The final confrontation I treat here began to unfold in the fall of 1999, in a sequence of events which was strikingly similar to that which followed the revelations of the RIAA's bankruptcy reform efforts. The 1999-2000 struggle over the "work for hire" status of sound recordings has been analyzed by media studies scholars elsewhere (Fairchild, 2005, pp. 64-65; Stahl, 2008; forthcoming) and so will be dealt with only briefly here.¹⁵ This contest diverges slightly from the previous three in that its initial term is control of property rather than of labor; in terms of the primitive accumulation perspective it is closely enough related to the other cases that it merits inclusion in this analysis. In this case, the limit to record company fiat appeared in the realm of copyright: shall the artist or the company control the copyright to the sound recordings produced under contract?¹⁶ The 1976 Copyright Act ended the former system of periodic copyright renewal in favor of one built around terminable licenses. In place of a right to renew a copyright, this Act codifies a right of "termination of transfer." A recording artist (or any author) wishing to reclaim control the rights to a work that she transferred (licensed, in other words, to a record company or publisher, for example) may do so on the 35th anniversary of the original transfer, as long as she has given written notice of her intent according to a process laid out in the Act (Hull, 2005). Though it has not yet been tested in court, the termination right appears to be inalienable (Nimmer & Menkel, 2002, p. 387). The 1976 Act became law on Jan. 1, 1978; sound recordings licensed in that year will be eligible for termination in 2013. In the mid-1990s, a law review article alerted the RIAA to the existence of a potential "leak record company vaults": the termination provision in the 1976 Act threatened companies with the possible loss of control of (still very lucrative) recordings from the late 1970s (Frisch & Fortnow, 1993-94). Before too long, this potential leak was recoded as a "time bomb" as concern spread among industry participants (Gould, 2007, p. 91, n. 1). In October of 1999, acting on behalf the RIAA, Congressional staff member Mitch Glazier caused a few lines to be added to the 1,400+ page "Satellite Home Viewer Act" which appeared to transfer the authorship and ownership of copyrights in sound recordings from recording artists to their record companies at a blow. Glazier was later hired by the RIAA as a lobbyist (Love, 2000; Hall, 2002, p. 215).

The mechanism through which this transfer was effected was copyright law's doctrine of "work for hire," which governs intellectual property created in the workplace. Under US copyright law, employer-created intellectual property is considered to be the product of "corporate authorship" whose first owner is the employer (absent an agreement between employer and employee to the contrary). But nine categories of works produced by non-employee "independent contractors" un-

¹⁵ There is a substantial body of legal scholarship on this topic which, though sometimes critical of the status quo, largely eschews social-theoretical analysis (e.g. Field, 2000).

¹⁶ It is important to note that there are two distinct copyrights associated with popular music, the right in the composition and the right in the recording. Termination rights apply to both, but this account concerns only the latter.

der special commission are also susceptible to corporate authorship and appropriation, including translations, tests, and “contributions to collective works” such as film scripts, magazine articles or editorial illustrations (Hamilton, 1987). Corporate authorship of these works is achieved through contracts assigning authorship and ownership to the commissioning party. Given the patterns of distribution of market power between commissioning institutions and creators, however, such assignments are so routine as to render independent contractors as impotent to resist work for hire as are most employees (Stewart, 1984).

Recording contracts are viewed at the federal level as independent contractor agreements, even though at the state level they are clearly understood as employment contracts (as demonstrated by the importance of the seven year and minimum compensation rules).¹⁷ Much of the contemporary recording contract is standard in form; the clauses specifying that sound recordings are “works made for hire” and therefore the property of the company are no exception (Hall, 2002, pp. 210-211). Nevertheless, artist attorneys reassure their clients that those clauses are meaningless because “sound recording” is not on the list of commissioned works eligible for work for hire status (Krasilovsky & Shemel, 2003, pp. 24, 178). At least, “sound recording” was not on that list until that last-minute addition by Glazier to the Satellite Home Viewer Act.

As was the case with the 1998 bankruptcy reform language, the addition of “sound recording” to the list of commissioned works eligible for work for hire status was undertaken with some apparent stealth, it was discovered by a union official, and its revelation created a sensation. This time, however, the legislation was discovered too late for any change to be made to the bill, which was signed into law by president Bill Clinton in October of 1999. While the RIAA sought to assure interested parties that the change was merely technical and that it would have no substantive effect on existing artist-label relations, recording artists and their allies saw the bill as a naked act of appropriation. The change to law validated boilerplate language in virtually all major label recording agreements, precluding the formerly assumed right of recording artists to terminate their transfers and reclaim their copyrights or renegotiate their licenses. Another version of the “bomb” metaphor used by supporters of record companies could easily have been invoked by artists: standard work-for-hire language could be seen to lurk in their contracts the way that landmines feature in a DMZ.

Clamor in the trade and popular press generated support for a post-facto hearing on the law; the recording artists succeeded in convincing legislators to revisit and possibly repeal the law. As was the case in the bankruptcy imbroglio, lawmakers sent representatives of both parties back to the drawing board to create a repeal bill that would restore the status quo “without prejudice,” that is, without establishing a precedent one way or the other. As of 2011, the status of sound recordings remains ambiguous; observers anticipate renewed activity on this front as 2013 and the termination horizon approaches (Strohm, 2003-04, p. 131).

5. Atavism at the Threshold of Digitalization?

5.1. Primitive Accumulation and Protective Legislation

California’s seven year rule and its requirement of minimum compensation as a precondition of injunction, federal bankruptcy law’s low pre-2005 threshold for voiding executory contracts, and copyright law’s guaranteed termination of transfers established and enforced limits on record companies’ power over recording artists’ labor and products. In order for record companies to maintain and advance their stability and profitability during turbulent times, the RIAA argued, recording artists had to be constrained in their capacity to invoke these legal limitations of employer power. I have suggested that the efforts of this group of employers to extend their control over their artists bears an obverse, corollary dimension: the ratcheting up of employer control requires and produces increased employee vulnerability. This is the salience of the primitive accumulation analysis: when

¹⁷ This contradiction in the status of the recording artist poses an enigma that has not satisfactorily been solved by this writer. It may involve another “legal fiction” of the kind that often appear like the proverbial bumblebee to non-lawyers: it shouldn’t fly, but it does.

capital encounters an obstacle or a limit it often works aggressively to overcome it; the limit's transcendence often requires and results in the erosion of the employee's political position.

The record industry's continued dependence on the long-term option contract might seem to contradict the 21st century's prevailing logics of digitalization and employment casualization. In digitalization's brave new world of "convergent media" and "liquid life" (Deuze, 2007) contractual labor subordination seems as obsolete as the mortal coils of magnetic tape and vinyl grooves recently shuffled off by the record industry. It is tempting to understand record companies' legal paroxysms over capture and control, after Ernst Bloch and Frederic Jameson, as an ironic example of the "simultaneity of the non-simultaneous", the "the coexistence of realities from radically different moments of history[, of] peasant fields with the Krupp factories or the Ford plant in the distance" (Jameson, 1991, p. 307 (drawing on Ernst Bloch)). Yet the rigid enforcement powers on which companies still depend for their control of labor are not only not inimical to corporate flexibility, they are central to it. "Casual" is an attribute of the job and not the worker. As Guy Standing writes, prison labor is "the most casual form of all, in that the worker has no rights, cannot bargain, and can be made to do as much labor as somebody sees fit" (2010, p. 71). The option contract is a one-way arrangement of obligation: employees are locked in, employers are free to exit at any time. Employer efforts at extending the capacity to capture, elicit, and control creative labor through primitive accumulation are consistent with casualization in that they push past prior public policy or traditional limits on marketization, on capital's freedom and expansion. When successful, such efforts diminish impediments that might otherwise constrain employer fiat.

When the RIAA pushes state and federal legislators to tilt the record industry playing field in their favor, they are engaging the state in a project of primitive accumulation through the latter's power to impose what Marx called "[d]irect extra-economic force" (De Angelis, 2004, p. 67). The argument here is not about contrasting abstract or idealized states of "freedom" and "unfreedom" but about showing, with Michael Perelman, how employers and politicians incrementally adjust the rights of working people in different ways, at different times, in response to different constellations of forces and priorities. The constraining of recording artists' liberty by the restriction of their access to a market for their labor (the seven year rule case) and by making it more difficult for them to pursue bankruptcy relief, and the attempt to dispossess artists through the redefinition of sound recordings as works made for hire, began "with the identification [by capital] of a concrete limit and the deployment of strategies for its transcendence" (De Angelis, 2004, p. 72). Such "strategies also target any given balance of power among classes that constitutes...a resistance against the further process of capitalist accumulation" (De Angelis, 2004, p. 70). The legalization of the "courthouse steps" option to justify an injunction in the absence of actual minimum compensation was a response to the resistant assertion of a new limit, in the form of a required \$50,000 annual payment to artists to justify injunction.

5.2. The 360 Deal and the Extension of the Scope of the Contract

Jay-Z's "hole in the universe" invokes a problem on a different scale than that suggested by Frisch and Fortnow's "leak." As the record industry scrambles to reproduce itself around file-sharing, how are these relations changing? Music industry players and observers have proposed numerous strategies following the disruption of the CD-sales-based business model. Among the main innovations along these lines is the 360 deal. "360" describes a situation in which the artist is contractually surrounded by corporate toll gates through which pass most or all artist revenues – not just record royalties – now subject to record company "participation." In fact, in many such agreements, companies not only gain significant percentages of formerly inaccessible streams of revenue, but also decision-making power over those activities.¹⁸ "By expanding the scope of their relationships with artists," notes Sara Karubian, "labels are shifting their focus from trying to reverse the trend of declining CD sales to compensating for the decreased sales by participating in more profitable arenas" (2009, p. 422). This language of an expanded scope immediately suggests the identification

¹⁸ As is the case with Nickelback's deal with Live Nation (Gallo, 2008, July 9, p. 1).

by record industry capital “of a concrete limit and the deployment of strategies for its transcendence” (De Angelis, 2004, p. 72). However, with the 360 deal, it is strategies of class power more than state power that are involved, reshaping the content rather than the legal conditions or frameworks of the long-term talent option contract. The main target of this force is the longstanding barrier between artists’ record royalty income (customarily claimed by the record company) and artists’ traditionally independence-sustaining revenues from live performance, licensing of music (including to television and film producers, video game companies, advertisers), and merchandise (from tour t-shirts to deals with retailers like Hot Topic).

There are numerous practical advantages to both record companies and artists to engaging on these terms: not only are record companies – increasingly recreating themselves as what Edgar Bronfman Jr. calls “music based content companies” (quoted in Schultz, 2009, p. 700) or what James McQuivey calls “music talent managers” (quoted in Basch, 2008, June 22, p. E1) – invested in music marketing in a range of new and profitable venues, able to replace revenue lost to declining sales and reposition themselves better to take advantage of unforeseen licensing or marketing opportunities. New recording artists themselves may enjoy lowered pressure to produce hits and thus more time to develop their act and fan base, as well as a larger relative royalty percentage (Leeds, 2007, November 11); established artists can trade some relatively calculable profit for “a measure of financial certainty” (Pearlstein, 2008, June 25, p. D1) as they shift some risk onto a big company like concert promoter Live Nation.

It appears increasingly that 360 deals are becoming the new normal.¹⁹ According to Karubian, “the bargaining power dynamic remains relatively consistent in the shift from traditional to 360 deals” (2009, p. 442). In fact, her analysis indicates incremental gains in employer leverage as “labels have used their publicized crisis to their advantage in negotiating terms with artists,” appearing “justified in their claims that they need to dip into non-recording revenues when they insist that their full reliance on the recorded music business will lead them to extinction” (2009, p. 443). Against this, Karubian notes that “many artists and their advocates worry that companies are invading and planting their flags in territories traditionally belonging to artists” (2009, p. 443). Again, Karubian’s language points to the usefulness of a primitive accumulation analysis for understanding struggles over the boundaries to maximal marketization of terrains of employment set by labor and finance law.

Michael Perelman’s account of the “secret history of primitive accumulation” illuminates the strategic regulation by early liberal political economists and policymakers of “self provisioning,” the capacity of people to meet their own subsistence needs outside of, or without dependence on, the employment relationship (Perelman, 2000). Alongside the enclosures of common lands, 18th and 19th century policy makers and their political economist allies learned carefully to manage a mix of self-provisioning and wage labor in order to control labor and its cost. “They wanted,” Perelman writes, “to make sure that workers would be able to be self-sufficient enough to raise the rate of surplus value” – self-provisioning as a wage subsidy – “without making them so independent that they would or could resist wage labor” (2000, p. 107).²⁰ The continuous form of primitive accumulation through the regulation of self-provisioning was “a matter of degree. [...] capital would manipulate the extent to which workers relied on self-provisioning”, and hence the degree to which they depended on employers, “in order to maximize its advantage” (2000, p. 32).

¹⁹ Some observers suggest the form is “used by all the major record labels” (Leeds, 2007), that “it’s everywhere” (producer Josh Abraham, quoted in Leeds, 2007). One record company president said that he didn’t “think there’s a deal being made today where the 360 model doesn’t come up” (Morrissey, 2007, October 28). Warner Music Group CEO Edgar Bronfman, Jr. told CNET News that “[e]very new artist we sign, we sign now with rights in all their revenue streams: ticketing, touring, merchandising, sponsorship. ... We’re only signing artists that way and we now have over a third of our current roster signed to 360 rights” (McCarthy, 2008).

²⁰ An exemplary target for this kind of policy was the English kitchen garden, the size of which was carefully regulated in the early 19th century. Perelman quotes Robert Gourlay, who in 1822 declared that “[i]t is not the intention to make labourers professional gardeners or farmers! It is intended to confine them to bare convenience” (2000, p. 108).

As Toynbee (quoted above) argues, popular music performers' ability to sell their services to a number of buyers enabled many of them to avoid dependence on any single one.²¹ Although the recording contract is an employment contract, and state law treats recording artists as employees, their relative independence along these lines renders them more like independent contractors, market participants with little or no capital who "are able to protect themselves, to some extent, from work-related risks...because they self-insure themselves, to some extent, by spreading their risks" among a number of clients or buyers (Davidov, 2002, p. 394). Michael Perelman argues that "the struggle against self-provisioning is not confined to the distant past. It continues to this day" (2000, p. 11). I'm suggesting that popular music performers' incomes from live appearances, licensing and merchandising function(ed) as a form of self-provisioning (within the market, yes, but not subject to record company claims), relieving recording artists from total dependence on record companies. This is precisely what the RIAA was complaining about in its 1985 arguments for the (1987) legislative carve out of recording artists from protection by California's seven year rule (quoted above).²²

This principle is at the heart of recent legal analyses of the 360 deal. According to Ian Brereton, in addition to their income participation,

[t]he major labels' retention of final-decision making rights on all recording, touring, merchandising, and publishing activities forces artists, and ultimately their creative endeavors, to be subject to the complete control of their record label (2009, pp. 195-196).

Casting this new relationship as a partnership, he writes, would be false; "under this new type of agreement, the complete sacrifice of control to one party violates an important principle of partnership law", which requires mutual rights of control (2009, p. 196). Before the advent of the 360 deal, argues Tracy Gardner, an artist attempting to avoid involuntary servitude ("in which the victim is forced to work...by use or threat of coercion through law or legal process") by breaching her contract would be faced only with the loss of recording revenues. Under the new deal, where companies participate administratively and economically in non-recording activities like touring, licensing, merchandising, and so on, today's 360-contracted artist "is faced with a lack of alternate revenue streams upon which artists before her could rely" (2006, p. 755). 360 deals "only add to the unconscionability of the artists' situation because artists have lost control over the ability to convert their musical fame into other financial opportunities" (Gardner, 2006, p. 750). The 360 deal represents capital's identification as a limit of what before had been simply a conventional separation between spheres of economic activity under its control and those under the control of the artist.

Despite radical challenges to the industry's business model, the major labels offer opportunities for which (aspiring) recording artists compete vigorously; pressure on aspirants to sign anything in order to enter what Steve Greenfield and Guy Osborn call the record deal's "holy of holies" (1998, p. 177) means that if the 360 deal is what's on offer, few without significant bargaining power or attractive alternatives will be able to resist it. Abandoned by increasing numbers of file-sharing (non-) consumers, record company capital pushes in another direction, transcending former barriers, colonizing new regions of musical economic activity, and consolidating new dimensions of political control, particularly over legions of new artists in weak bargaining positions.

6. Conclusion

Throughout the 80s and 90s the RIAA engaged in a series of public, political contests with recording artists over several of the elements of state and federal legislation that set the terms of their contractual engagement. The two sides experienced differing degrees of success and failure in these contests, but the largely or apparently stable nature of the playing field itself assured the incremental nature of most of the resulting changes. In the early 2000s, in the face of digitalization

²¹ At the same time, of course, artists' non-recording income subsidizes record companies. See producer Steve Albin's grim (1997) calculations.

²² MCA also made this argument in their complaint against Newton-John.

and file-sharing's apparently tectonic destabilization of the record industry, the emerging 360 deal promised a way in which record companies and recording artists could continue to profit in the face of declining sales through the record companies' investment and participation in formerly off-limits forms of economic activity such as touring, licensing, and merchandising. "Given their command of the entire recorded music industry", writes Tracy Gardner, "it is hardly surprising that the record labels are quickly gaining control over new revenue streams as well as traditional revenue channels that once belonged solely to the artist" (2006, p. 751). Yet while this "new deal" is still nascent, it appears to herald intensified relations of control and appropriation between record companies and recording artists.

This article has argued that both incremental changes in legislated authority relations and in private contractual conventions can be understood through the theoretical lens of primitive accumulation, a model for comprehending the exercise of political and class power by capital to overcome limits to its expansion. Recording artists can be understood as an illuminating case of continuity and change in the social relations of cultural production under conditions of digitalization and the widespread unauthorized distribution of cultural commodities enabled by internet technologies. Seen from the primitive accumulation perspective, the persistence of binding, long-term option contracts is not anomalous in the context of digitizing, flexibilizing, 21st century terrains of employment. Rather, these new contracts are suited to the maintenance of low-obligation cultural industry "options" where the principal difference is found in the types of boundaries, limits, and obstacles encountered by record company capital in its pursuit of greater freedom favorably to arrange its artist employment relations. In this light, the impetus of cultural industry enterprise toward the intensification of long term capture and control of "golden-egg" laying talent appears not to subside but to change form and venue.

When applied to the work of recording artists, categories like "primitive accumulation" sound strange. The use of such categories in this context depends on a degree of abstraction that itself requires the putting aside of popular images and narratives of expressive individuals enjoying unalienated lives and sometimes great fame and wealth. But it is precisely recording artists' extraordinary autonomy that constitutes certain aspects of their value, that makes their legal protections the targets of repeated employer attacks, and that makes their struggles so dramatic, so capable of bringing obscure logics into high relief. This examination of some of the legal dynamics of their unusually autonomous careers, of the laws that enable and constrain their capacity to say "no" to the various historically-conditioned demands of their employers, argues that problems of autonomy and control have been and remain central to the relationships of recording artists and their record companies. Laws and conventions that preserve and protect this capacity pose impediments to the ability of record companies to extend their advantage, provoking reactions that, until recently, often took place in public, before legislators, and that now appear increasingly to be taking place in private negotiations over new contractual territories.

References

- Albini, S. (1997). The Problem With Music. In T. Frank & M. Weiland (Eds.), *Commodify your dissent: Salvos from the Baffler* (pp. 164-176). New York: W.W.Norton.
- Anorga, O. (2002). Music contracts have musicians playing in the key of unconscionability. *Whittier Law Review*, 24, 739-773.
- Barry, B. (2005). *Why social justice matters*. Cambridge: Polity.
- Basch, M. (2008, June 22). Bands try different paths to make cash. *Florida Times-Union*, p. E1.
- Bonefeld, W. (2001). The permanence of primitive accumulation: Commodity fetishism and social constitution. *The Commoner*, 2. Retrieved from <http://www.commoner.org.uk/index.php?p=5>
- Brereton, I. (2009). The beginning of a new age? The unconscionability of the '360-degree' deal. *Cardozo Arts & Entertainment Law Journal*, 27(1), 167-197.
- Brewer, J. (2003). Bankruptcy & Entertainment Law: The Controversial rejection of recording contracts. *American Bankruptcy Institute Law Review*, 11(2), 581-606.

- Cooper, J. (2002). Testimony offered in hearing before California State Senate Committee on the Judiciary, March 19. Audio recording on file at the California State Archive, Sacramento.
- Davidov, G. (2002). The three axes of employment relationships: A characterization of workers in need of protection. *University of Toronto Law Journal*, 52(4), 357-418.
- De Angelis, M. (2001). Marx and primitive accumulation: The continuous character of capital's 'enclosures'. *The Commoner*, 2. Retrieved from <http://www.commoner.org.uk/index.php?p=5>
- De Angelis, M. (2004). Separating the doing and the deed: Capital and the continuous character of enclosures. *Historical Materialism*, 12(2): 57-87.
- De Lisle, T. (2000, April 30). A heated battle that took away Toni's fire. *Mail on Sunday*, p. 72.
- Deuze, M. (2007). *Media work*. Cambridge: Polity.
- Fairchild, C. (2008) *Pop idols and pirates: Mechanisms of consumption and the global circulation of popular music*. Aldershot, UK: Ashgate.
- Field, C. (2000). Their master's voice? Recording artists, bright lines, and Bowie Bonds: The debate over sound recordings as works made for hire. *Journal of the Copyright Society of the U.S.A.*, 48, 145-189.
- Fitzpatrick, E. (1993). Calif.'s new Contract Law: A boon for smaller firms. *Billboard*, 105(43), 23.
- Frisch, R. & Fortnow, M. (1993-94). Termination of copyrights in sound recordings: Is there a leak in the record company vaults? *Columbia-VLA Journal of Law & the Arts* 17(2), 211-236
- Frith, S. (1981). *Sound effects: Youth, leisure, and the politics of Rock'n'Roll*. New York: Pantheon.
- Frith, S. (1992). The Industrialization of Popular Music. In J. Lull (Ed.), *Popular Music and Communication* (pp. 49-74). London: Sage.
- Gallo, P. (2008, July 9). More dwellers in Live Nation. *Variety*, p. 1.
- Gang, Tyre, Brown, Inc., & JLA Advocates, Inc. (1985). Background paper in support of Senate Bill 469 (Dills) on file at the California State Archive, Sacramento.
- Gardner, T.C. (2006). Expanding the rights of recording artists: An argument to repeal section 2855 (b) of the California Labor Code. *Brooklyn Law Review*, 72(2), 721-758.
- Gould, D. (2007). Time's up: Copyright termination, Work-for-hire and the recording industry. *Columbia Journal of Law & the Arts* 31(1), 91-137.
- Greenfield, S., & Osborn, G. (1998). *Contract and control in the entertainment industry: Dancing on the edge of heaven*. Brookfield, VT: Ashgate.
- Hall, P. (2002). Smells like slavery: Unconscionability in recording contracts. *Hastings Communication and Entertainment Law Journal*, 25, 189-229.
- Hamilton, M. (1987). Commissioned works as works made for hire under the 1976 Copyright Act: Misinterpretation and injustice. *University of Pennsylvania Law Review*, 135, 1281-1329.
- Harvey, D. (2007) Neoliberalism as creative destruction. *Annals of the American Academy of Political and Social Science*, 610, 22-44.
- Hill, C. (1996). *Liberty against the law: Some seventeenth century controversies*. London: Allen Lane/ The Penguin Press.
- Holland, B. (1998, October 7). Senate favors artists in bankruptcy bill. *Billboard*, p. 12.
- Hull, G. (2005). Termination rights and the real songwriters. *Vanderbilt Journal of Entertainment and Technology Law*, 7(2), 301-322.
- Jameson, F. (1991). *Postmodernism, or, the cultural logic of Late Capitalism*. Durham, NC: Duke University Press.
- Karubian, S. (2009). 360 deals: An industry reaction to the devaluation of recorded music. *Southern California Interdisciplinary Law Journal*, 18(1), 395-462.
- Keightley, K. (2001). Reconsidering Rock. In S. Frith, W. Straw, & J. Street (Eds.), *The Cambridge companion to Pop and Rock*. New York: Cambridge University Press.
- Krasilovsky, M., & Shemel, S. (2003). *This business of music*. New York: Billboard.
- Landry III, R., & Mardis, N. (2006). Consumer bankruptcy reform: Debtors' prison without bars or 'Just Desserts' for Dead-beats? *Golden Gate University Law Review*, 36(2), 91-120.
- Leach, E. (2001). Vicars of 'Wannabe': Authenticity and the Spice Girls. *Popular Music*, 20(2), 143-167.
- Leeds, J. (2007, November 11). The New Deal: Band as Brand. *New York Times*, p. 1.
- Leyshon, A., Webb, P., French, S., Thrift, N., & Crewe, L. (2005). On the reproduction of the musical economy after the Internet. *Media, Culture & Society*, 27(2), 177-209.
- Lopez, R. (1993). Legislative Analysis of SB 487 (Mello), as amended, August 16, 1993, on file at the California State Archive, Sacramento.
- Love, C. (2000). Courtney Love does the math. Retrieved from <http://archive.salon.com/tech/feature/2000/06/14/love/index.html>
- Lucas, K. (1985). Injunctive relief in the record industry. *Whittier Law Review*, 7(4), 1059-1083.
- Lumley v. Wagner (1852). 42 Eng. Rep. 687 England (1852).

- Macpherson, C.B. (1973). *Democratic theory: Essays in retrieval*. London: Oxford University Press.
- Macpherson, C.B. (1978). *Property: Mainstream and critical views*. Toronto: University of Toronto Press.
- Manzarolle, V. (2010). The virtual debt factory: Towards an analysis of debt and abstraction in the American credit crisis. *tripleC* 8(2), 221-236.
- McCarthy, C. (2008). Warner's Bronfman, MySpace's DeWolfe talk music. Retrieved from http://news.cnet.com/8301-13577_3-10084715-36.html
- McLane, B., & Wong, V. (1999). Practice tips: How recording artists have broken their contracts. *Los Angeles Lawyer*, 22(2), 27-55.
- Melissa Manchester v. Arista Records, Inc. (1981). No. CV 81-2134-RJK-Kx (C.D. Cal. Sept. 17, 1981).
- Midnight Notes Collective (1990). New Enclosures. *The Commoner*, 2. Retrieved from <http://www.commoner.org.uk/index.php?p=5>
- Moore, S. (2009). With biz at a crossroads, sharp turns from the current path are imperative. *Hollywood Reporter* 408(31), 9.
- Morrissey, J. (2007, October 28). If it's retail, is it still Rock? *New York Times*, p. BU1.
- Motown Record Corporation v. Teena Marie Brockert (1984). 160 Cal. App. 3d 123, 207 Cal. Rptr. 574.
- Nimmer, D., & Menell, P. (2002). Sound recordings, works for hire, and the termination-of-transfers time bomb. *Journal of the Copyright Society of the USA*, 49(2), 387-416.
- Njoya, W. (2007). *Property in work: The employment relationship in the Anglo-American firm*. Aldershot, UK: Ashgate.
- Panayiotou v. Sony Music Entertainment (UK) Ltd. (1994). 13 Ch. 532 (England).
- Pareles, J. (2010, January 3). A world of megabeats and megabytes. *New York Times*, p. 1.
- Passman, D.S. (2006). *All you need to know about the music business*. New York: Free Press.
- Pearlstein, S. (2008, June 25). Lessons from the most pit. *Washington Post*, p. D1.
- Peitz, M., & Waelbroeck, P. (2004). The effect of internet piracy on CD sales: Cross-section evidence. Retrieved from http://www.cesifo-group.de/portal/page/portal/ifoHome/b-publ/b3publwp/_wp_abstract?p_file_id=14559610
- Perelman, M. (2000). *The Invention of capitalism: Classical political economy and the secret history of primitive accumulation*. Durham, NC: Duke University Press.
- Pritchard, J. (1998, August 19). Striking a chord with congress. *Los Angeles Times*, p. 8.
- Ripley, K. (2010). Moving to the beat: Digital media and changing tastes force publishers to fine-tune strategies. *IBISWorld Industry Report 51223: Music Publishing in the US*. Retrieved from <http://www.ibisworld.com/industry/default.aspx?indid=1253>
- Schultz, M. (2009). Live performance, copyright, and the future of the music business. *University of Richmond Law Review*, 43(2), 685-764.
- Seelye, K. (1998, May 15). Bankruptcies by musicians inspire a bill. *New York Times*, p. 18.
- Soocher, S. (1999). *They fought the law: Rock music goes to court*. New York: Schirmer Books.
- Stahl, M. (2002). Authentic boy bands on TV? Performers and impresarios. *The Monkees and Making the band. Popular Music*, 21(3), 327-349.
- Stahl, M. (2008). Recording artists, work for hire, employment, and appropriation. Retrieved from <http://ssrn.com/abstract=1288831>
- Stahl, M. (2010). Flexibility in one place presumes rigidity elsewhere: Record industry turbulence and the 1985-87 legislative lock down of recording artists. Paper presented at 2010 meeting of the International Communication Association, Singapore.
- Stahl, M (forthcoming). *Unfree masters: Popular music and the politics of work*. Durham, NC: Duke University Press.
- Standing, G. (2010). *Work after globalisation: Building occupational citizenship*. Northampton, MA: Edward Elgar Publishing.
- Steinberg, R. (1981). Injunctions: Unjust restraint on entertainers in California. *Loyola Los Angeles Entertainment Law Review*, 1(1), 91-111.
- Stern, C. (1998, May 14). RIAA Seeks to Curb Abuse of Bankruptcy by Artists. *Daily Variety*, p. 6.
- Stewart, J. (1984). The freelancer's trap: Work for hire under the Copyright Act of 1976. *West Virginia Law Review*, 86, 1305-1316.
- Strohm, J. (2003-04). Writings in the margin (of error): The authorship status of sound recordings under United States Copyright Law. *Cumberland Law Review*, 34, 127-156.
- Toynbee, J. (2003). Fingers to the bone or spaced out on creativity? Labor process and ideology in the production of pop. In A. Beck (Ed.), *Cultural work: Understanding the cultural industries*, New York: Routledge.
- Tregoning, W. (2004). 'Very Solo': Anecdotes of authentic identity. *M/C Journal of Media and Culture*, 7(5). Retrieved from <http://journal.media-culture.org.au/0411/04-tregoning.php>
- United States v. Kozminski (1988). 487 U.S. 931.

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