Tension between artists and record companies is at a high point. Many recording artists and their supporters have formed organizations such as the Artist Empowerment Coalition and the Recording Artists Coalition (RAC) to organize extensive industry reform efforts, including campaigns to limit long-term recording and publishing contracts, secure artist ownership of copyrights in master recordings and music publishing, and reform industry accounting practices. The artists' opponent on these and other issues is the Recording Industry Association of America (RIAA) - the influential trade association representing the music industry, including the five global conglomerates: Universal Music Group (Universal), Sony Music Entertainment, Warner Music Group, EMI/Virgin, and Bertelsmann Music Group (BMG).

Central to recording artists' rights is the duration of artists' contracts with record companies. Recent controversy in California, a pivotal jurisdiction for the entertainment industry, illustrates this point. California Labor Code section 2855 has been the focus. Section 2855(a) - also known as the "seven-year statute" - prohibits enforcement of personal services contracts beyond seven years from the beginning of service, allowing California employees to terminate such contracts after that period. However, section 2855(b) - an amendment to section 2855 secured by the record companies in 1987 and applicable only to recording artists - gives record companies the right to sue artists who invoke section 2855(a) for damages for contractually required albums undelivered within the seven-year period. Record companies argue that because recording contracts are based predominantly on a specified quantity of albums, rather than on a particular time period, an artist should not be able to terminate her contract while still owing albums without facing liability.

Record companies have contended, moreover, that section 2855(b) damages - undefined in the statute - should be construed as lost profits, which are calculated based on the speculative profitability of undelivered albums.

Section 2855 has been an important aspect of almost every significant dispute between a recording artist and a major record company during the last decade. The section 2855 regime is problematic because the typical recording contract requires artists to deliver up to seven albums, a task that is virtually impossible to complete within seven years and could in fact take up to fourteen years. The seven-album requirement, combined with potential section 2855(b) damages, effectively deters artists' invocation of section 2855(a). This Note examines section 2855 and its effects on the
recording industry. Part I provides some background to section 2855, including the history of the statute and a description of the recording industry practices governing the standard duration of artists' contracts. Part II discusses section 2855(b) and argues that damages should not be defined as speculative lost profits, but instead should be based on a record company's investment in an individual artist, specifically on artist advances and other recoupable expenses. n18 Part III discusses the two most prominent models for recording artist contract duration: the free agency model advocated by artists and the long-term model advocated by the major record companies. The Part concludes that neither model fulfills the policy objectives of section 2855 and argues that these objectives can be met only by reducing the number of albums required under typical recording contracts.

I. Background of Section 2855

A. The History of Section 2855

De Haviland v. Warner Bros. Pictures, Inc. n19 set forth the prevailing interpretation of section 2855. In that case, Olivia de Haviland signed a contract with Warner Brothers for her services as a motion picture actress. The contract was for a one-year term and gave Warner Brothers, through option clauses, the right to extend the term for up to six successive one-year terms. n20 Under the contract, Warner Brothers had the right to suspend de Haviland "for any period or periods [*2635] when she should fail, refuse or neglect to perform her services to the full limit of her ability ... and for any additional period or periods required to complete the portrayal of a role [refused by de Haviland] and assigned to another artist." n21 The contract also provided that Warner Brothers held the right to extend the contract for a time equal to the suspension periods. n22 De Haviland was suspended several times for a total of twenty-five weeks, and Warner Brothers exercised its option to extend the term of the contract. n23 At issue was the meaning of section 2855: Warner Brothers contended that the language of the statute should be interpreted to establish that "a contract for "exceptional services' could be enforced against an employee for seven years of actual service," even though an employee would thereby be required to perform services for a period beyond seven calendar years. n24 The court rejected this argument and held that the language of section 2855 limited personal services contracts to seven calendar years. n25 The court articulated strong public policy reasons for limiting personal services contracts to seven years, including age-and health-related considerations, time allowances for employees to rear and provide schooling for their children, and changed economic or social conditions. n26 Further, the court noted the significance of economic mobility: "as one grows more experienced and skillful there should be a reasonable opportunity to move upward and to employ his abilities to the best advantage and for the highest obtainable compensation." n27 It is commonly accepted that De Haviland and its interpretation of section 2855 (sometimes referred to as the "de Haviland law") freed actors from the old Hollywood studio system, which hampered or ruined many actors' careers by holding them to long-term contracts" n28 and initiated an era of "free agency" for actors. n29 As a result, actors gained the ability to negotiate new contracts based on their fair market value.

[*2636] Section 2855 has had a different effect in the recording industry context - a context in which the provision has not been tested in court. Record companies, wary of the possibility that a section 2855 holding favorable to artists could grant them free agency, have renegotiated dissatisfied artists' contracts, often providing more generous terms and large advances. n30 Seeking greater protection for record companies, the RIAA lobbied in 1985 to extend section 2855's contract ceiling to ten years. n31 Failing in this effort, the RIAA offered a new proposal, presenting two main arguments. First, because record companies necessarily make "large investments in an artist's career based primarily on the promise that the act [will] deliver" the contractually stipulated number of albums, section 2855 "was unfair because [it] allowed an artist to walk away from a seven-album recording contract after seven years, regardless of whether the [artist] had fulfilled its contractual albums." n32 Second, industry
lobbyists argued that record companies did not "earn money on successful artists until after the fourth album and would be severely injured if the remaining three albums were not delivered." n33 In 1987, after several revisions, the RIAA's proposal became section 2855(b). n34 Subsection (b)(3), which has since ignited controversy, provided record companies the protection they sought by giving them the right to sue artists who invoked their rights under section 2855(a). n35

Recently, section 2855 has again drawn scrutiny. In 1999, Courtney Love, frontwoman for the band Hole, invoked section 2855(a) and terminated Hole's contract with Geffen Records, a subsidiary of Universal. n36 The contract required Hole to deliver two albums to Geffen and gave Geffen three options for delivery of an additional five albums. n37 In response, Geffen and Universal sued Love under section 2855(b), contending that Hole owed the companies damages for the five undelivered option albums. n38 Love cross-complained, challenging [2637] the constitutionality and applicability of section 2855(b). n39 Love's suit enlivened a burgeoning artists' rights campaign, which quickly focused on section 2855(b). The furor surrounding section 2855(b) led to a hearing before the California State Senate's Select Committee on the Entertainment Industry in September 2001, at which artists, record company representatives, and trade groups testified regarding whether the provision should remain law. n40 In January 2002, California State Senator Kevin Murray, chair of the Select Committee, introduced a bill to repeal section 2855(b). n41 Subsequently, however, the campaign against section 2855(b) waned. Lacking sufficient support, Senator Murray withdrew the bill in August 2002. n42 Meanwhile, Love, facing mounting legal costs and legal setbacks, settled with Universal in September. n43 However, Senator Murray reintroduced his legislation in February 2003. n44 Section 2855 will thus be reviewed anew. n45

B. The Structure of Recording Industry Contracts

The recording industry generates $ 40 billion annually, ninety percent of which the five major music conglomerates control. n46 The industry [*2638] is one of high risk; record companies "sink enormous amounts of capital into developing and marketing new artists, few of whom ever make money." n47 Fewer than ten percent of the albums released in a given year turn a profit. n48 According to Hilary Rosen, President and CEO of the RIAA:

The music business is the epitome of risk - investing million of dollars in artists in the hope that [their] music will appeal to the public. And the challenge of our business on a daily basis is managing that risk, managing it in a way that gives new artists their fair shake and gives established artists their fair shake. n49

The risks and low profitability are products of unique market conditions: the recording industry is "subjected to constant and unpredictable change in consumer preferences and is characterized by the short life cycle of its products." n50 Further, "profitability is based on the impact of individual hit records rather than brand loyalty to individual record labels." n51

Recording artists sign contracts with major record companies because the companies have expertise in marketing and promoting artists and their music to broad audiences. n52 Record companies also have long-established relationships with radio and television networks. n53 Because of the high failure rate of released albums, however, record companies absorb great losses and thus insist that they must earn profits from the few successful acts on their rosters. n54 To sustain a profitability based solely on successful artists, the companies argue that such artists must be bound to "low-paying, long-term" contracts, without which companies "would have no incentive to underwrite the [risk and] enormous costs of developing an unknown artist's career." n55
The standard industry contract, then, is in theory structured around a business model that allows record companies to take risks [\*2639] and invest extensively in unproven artists and also to capitalize on those artists who achieve success. n56 To this end, artist contracts contain a record company's commitment to accept one album from the artist and option clauses that, if exercised by the company, require the artist to record and deliver additional albums. n57 Terms may vary with respect to the number of albums a record company commits to initially and the number of options the company may exercise for additional albums, but a company generally commits to one album "firm" with options for six additional albums - a total of seven. n58 With this structure in place, companies are able to minimize their risks: not only do they have a minimal commitment to unknown artists, n59 but also they have the option to retain artists that become successful.

C. Difficulties Arising from Section 2855

1. Record Company Difficulties Under Former Section 2855. - In California, employment contracts ordinarily "are not subject to specific enforcement, nor may their breach be enjoined." n60 Under former section 2855 n61 (still in operation as the current section 2855(a)), however, personal services contracts - defined as contracts "to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law" n62 - could be "enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement [*2640] of service under it." n63 Thus, within the seven-year period, a contract for the exclusive rendering of an artist's services n64 could be enforced by an injunction prohibiting the artist from performing the services for others. n65 Furthermore, this rule was applicable to options: an employee subject to a personal services contract could be enjoined from rendering services to others during a period for which her employer had extended her employment by exercising an option. n66

The temporal nature of these rules created a quandary for the record companies. If an artist fails to perform, most recording contracts, like the studio contracts of old, allow for a temporary suspension of the contract and a commensurate extension of the period for which the record company has exclusive rights to an artist's recording services. n67 In theory, an artist who failed to deliver albums could have been subject to an interminable contract. However, section 2855, as interpreted in De Haviland, likely would have acted to limit the contract term to seven years, n68 thus enabling artists to exit contracts without delivering the contractual number of albums. Options were also inadequate to protect record companies' interests. Although it was possible that courts would enjoin artists from performing for another company for all of the option periods, n69 section 2855 would have acted to limit the total contract period to seven years. Thus, again, an artist could exit a contract without fulfilling the album delivery requirement.

These issues crystallized in MCA Records, Inc. v. Newton-John, n70 in which MCA brought a breach of contract action against singer Olivia Newton-John, alleging that she had failed to deliver albums to the company after it exercised an option to renew. n71 MCA sought a preliminary [*2641] injunction to prevent Newton-John from recording for another company. n72 The court held that a preliminary injunction was proper, but that Newton-John could not be prevented from recording albums for another company after her temporal contractual commitment to MCA. n73 Thus, because Newton-John had a contract totaling a potential five years - an initial two years and three one-year options - she could be enjoined only until her contract had run five years, rather than the seven-year maximum permitted under section 2855. n74 This decision was problematic for MCA because, like most contracts of the time, Newton-John's required her to deliver a specified number of albums per year - in her case, two. n75 Thus, a key question went unanswered: What would have happened if Newton-John continued to deliver albums, but not at the required rate of two albums per year? Would she have been obligated to
deliver the late albums once the five-year term had lapsed? Because of the Newton-John holding and
the potency of these unanswered questions, record companies began to "define the duration of a
recording contract in terms of delivery of a stipulated number of albums, not in terms of a stated
number of years." n76

2. Artists' Difficulties Under Section 2855(b). - The combination of contract terms based on the number
of albums delivered and the amendment of section 2855 to include 2855(b) in effect shifted the
problems associated with the unanswered questions to the artists. The problems arose from the
dissonance between the temporal requirements of section 2855 and the quantity-based requirements of
the standard recording contract, the duration of which is defined by an album delivery requirement (but
which may still retain some temporal requirements). n77 Under the contracts, and in the scope of
prevailing industry standards, it is virtually impossible for an artist to deliver seven albums in seven
years.

Under the standard recording contract, delivery occurs every nine to eighteen months; n78 this
extended period of time is required because [*2642] artists - in addition to recording albums - are
often contractually obligated to promote their albums, which includes touring and various periods of
promotion. While in theory this schedule makes it possible for artists to deliver seven albums in seven
years (for example, delivery every nine to twelve months), standard recording industry practices
preclude this possibility. The standard schedule is "contrary to industry custom and practice [because]
record companies have preferred and often insisted on a minimum two-year gap between releases for ...
artists. Successful promotion and marketing involves a cycle that includes multiple music videos and
extensive live touring that usually lasts over a year." n79 Bound by the standard delivery schedule and
facing the threat of a damages suit under section 2855(b), recording artists find little protection in
section 2855(a).

II. Section 2855(b) Damages Theories

If an artist invokes section 2855 after seven years but before she delivers all contractually required
albums, she will be subject to the damages provision of section 2855(b)(3), which states:

In the event a party to [a recording contract] is, or could contractually be, required to render personal
service in the production of a specified quantity of the phonorecords and fails to render all of the
required service ... the party damaged by the failure shall have the right to recover damages for each
phonorecord as to which that party has failed to render service in an action. n80

The damages provision of section 2855(b)(3) is unclear. Record companies have asserted that courts
should interpret "damages" in this context as lost profits even though the term is defined neither by the
statute nor by any case law. n81 They believe that they should be able to recover lost profits based on
the "expected profits on the additional albums that artists have neither delivered nor created." n82
Commentators argue that this definition of damages and the corresponding estimation of lost profits
would effectively circumvent section 2855. Because a record company's profit on a single album
always surpasses the royalties that an artist earns, the "lost profit" a company purportedly suffers
[*2643] when the artist invokes section 2855(a) to escape her contract would always exceed the
royalties that artist could earn for a single album recorded for another company under a subsequent
contract. n83 As a result, under the record companies' theory of lost profits, "artists would be free to
sign with a new record label - exactly the purpose of section 2855(a) - but would end up losing money
since they would owe their previous record company more money in alleged lost profits than they
would most likely earn in royalties from their new record contract." n84 This result is particularly
onerous for the artist because she will typically have substantial financial commitments to her new
record company as well; her royalties will be used to recoup the advance and various other expenses
associated with her album. n85 Thus, the artist's royalties - which few artists receive n86 - will go both
to the old record company and to the new record company before the artist receives any of them. Faced
with these prospects, few artists will terminate their contracts under section 2855(a). With the renewed
debate over section 2855(b), a central issue will likely be the nature of the liability artists will face if the
provision is not repealed. The following section discusses the problem of the record companies' lost
profits theory of damages and describes an alternative basis for damages: a record company's actual
investment in an artist.

[*2644]

A. The Actual-Investment Basis for Damages

1. Reasonable Certainty Requirement. - Should a court render a section 2855(b) judgment, a record
company's actual investment in an artist should be the basis for damages. This theory of damages is
superior to the record companies' lost profits rationale not simply because a damages calculation under
the lost profits theory would be speculative. Indeed, California law permits approximations in
determining lost profits; case law establishes that such profits need not be calculated with precision,
only that some reasonable method of calculation be employed. n87 But before even proceeding to a
damages calculation, a court first must address the issue of reasonable certainty. Recovery of damages
for lost profits hinges on three questions: whether the defendant's conduct was the proximate cause of
the damages, whether and to what degree the damages were foreseeable as the natural and probable
result of a breach at the time the contract was made, and whether the damages can be proven with
reasonable certainty. n88 Assuming that the proximate cause and foreseeability prongs can be met, the
reasonable certainty prong, as typically applied in California, may render the record companies' theory
of lost profits inconsequential. California courts have "gone further than a simple statement that
"reasonable certainty' is required" and "recognized that the rule applies only to the fact of damages, not
to the amount of damages." n89 Based on this distinction, "proof of the fact of damages in a lost profits
case means proof that there would have been some profits. If plaintiff's proof leaves uncertain whether
plaintiff would have made any profits at all, there can be no recovery"; n90 courts allow for recovery
based on "uncertain or inexact" proof of the amount of damages only after the fact of some loss of
profits has been demonstrated with certainty. n91

[*2645] In the recording industry context, this threshold showing would be extraordinarily difficult for
record companies to meet because there is a greater than ninety-percent chance that any given artist's
release will be unprofitable. n92 The current direction of the record industry further reduces even this
slim chance of profitability. The industry once focused on career building; indeed, record companies' current argument that they do not achieve artist profitability until an artist's fourth album n93 is based
on the old industry objective of establishing, shaping, and guiding an artist's career. n94 Currently,
however, "such ... scenarios are becoming rare" in an industry "increasingly dependent on
blockbusters ... [and] in which 97 percent of all records released fail to make money." n95 Essentially,
in establishing a "business that focuses on selling records that do 5 million to 10 million sales, at the
expense of almost everything else," n96 and that relies on a "succession of quick-buck one hit
wonders," n97 the record companies have created a market in which few artists become profitable and
in which it is impossible to conjecture which releases will be profitable. One commentator observed
that "almost nobody has more than a three-album shelf life." n98 Were the industry still focused on
gradual career-building, a company that has nurtured an artist's career and has seen sales increase with
each release might be able to show with reasonable certainty that an artist's next release would be
profitable. However, because of record companies' quest to deliver hits to a notoriously fickle market,
and because of the high percentage of artists that flop, such nurturing rarely occurs, especially if an
artist's first and second albums [*2646] fail - record companies ordinarily drop such artists from their 
rosters. n99 With these practices in place, and with the unpredictability of an album's success, it would 
be extraordinarily difficult for a company to demonstrate with reasonable certainty that a release will be 
profitable. n100 It would be even more difficult for a company to show that all of the albums 
undelivered under a contract would have been profitable had the artist delivered, or even created them. 
Therefore, liability should be based on a company's actual investment in an individual artist, rather than 
on speculative lost profits.

2. The Problem of Lost Profits Estimation. - A small number of successful albums fuel the record 
industry, both making it profitable and allowing companies to invest in new artists. n101 However, 
regardless of what position one assumes on the fairness of successful artists' profits driving the record 
industry, subjecting artists to an exceedingly speculative measure of liability - one based on the 
aggregate losses a record company faces - is not justifiable. In addition to requiring a showing of 
reasonable certainty that the record company would have earned some profit, n102 California law also 
requires that the process of computing damages be reasonable. n103 Even if a company could show that 
the undelivered albums would have generated some profit, there is no reasonable method of estimating 
how much profit. The process of estimating lost profits would therefore be unreasonably speculative.

Generally, albums released by major record companies must sell about 400,000 copies to produce 
profits. n104 In 2000, "of the 6,188 albums released ... only 50 sold more than a million copies. Sixty-
five sold 500,000 units and 356 sold 100,000 or more." n105 Excluding the 356 albums that sold 
between 100,000 and 500,000 units, approximately 1.85% of all releases in 2000 were significantly 
above the profitability level. Including the 356 albums, approximately 7.6% of all releases in 2000 did 
not flop, meaning that although they were not necessarily profitable, they may have sold respectably 
well. n106 In light of these figures, the task of showing that an undelivered album would [*2647] have 
generated some profit is extraordinarily difficult for record companies. Should a company somehow 
overcome this hurdle, estimating the extent of that profitability would be even more difficult, and thus 
more speculative and unreasonable. The figures demonstrate there are no reasonable means of 
determining whether that album would be a five-million seller (substantially profitable); a 400,000 
seller (minimally profitable); or a 250,000 seller (unprofitable). n107 The unpredictable nature of the 
music market, the low probability of profitability, and the indeterminacy associated with estimating 
the performance of undelivered albums render the process of estimating lost profits unreasonable.

One may argue, of course, that reasonable means do exist for calculating the profitability of successful 
artists' albums. Section 2855(b) supporters have argued that the provision concerns highly successful 
artists, not those who are average or even moderately successful. n108 Accordingly, one might argue 
that the consistent success of such artists should facilitate reliable estimations of their future albums' 
profits. A court could use various factors, including past record sales, to estimate lost profits. n109 But 
successful, established artists are subject to the same uncertainties that face the average artist. Indeed, 
"the success rate for follow-up albums by blockbuster bands is no better than for debut acts ... . [And 
even] superstars are having a tough time delivering hits." n110

3. The Content of "Actual Artist Investment." - It is important to define what a company's "actual 
investment in an individual artist's career" includes, or, in other words, which record company 
expenditures should be recoverable. Investment in an artist takes the form of [*2648] advances and 
other recoupable expenditures. Advances are sums of money paid to an artist upon signing a record 
contract; this money is recoupable from an artist's royalties. n111 Other recoupable expenditures 
include recording and video production costs. n112 Advances and recoupable expenditures should 
constitute the sole potential liability of an artist under section 2855(b).

Advances represent the basic risk associated with a company's investment in an artist. Because
advances are usually nonreturnable, if an artist does not sell enough records to recoup the full amount of the advance, the record company loses that amount. n113 This Note does not suggest that advances should become returnable if an artist's album fails to recoup the full amount. However, artists who invoke section 2855(a) and have received an advance, but have not recorded the album associated with that advance, should be liable for the advanced amount. Liability on this basis is important because record companies typically "pay advances to artists on a per album basis, meaning that if a ... company does not exercise an option, there is no advance." n114 Therefore, artists should not be liable for advances that have not been paid, and accordingly, should never be liable for undelivered albums for which a record company has not exercised an option. If a record company has exercised an option and issued the corresponding advance, however, an artist should be liable for that amount. Similarly, an artist should be liable for other recoupable costs if she has accepted such funds from her record company, but invokes section 2855(a) without already having used the funds for the specified purposes.

This solution also addresses the dilemma, discussed above, in which an artist who departs from her old company under section 2855(a) could potentially be liable for enormous damages to that company based on speculative lost profits and yet not earn enough in royalties at a new company to cover those damages. n115 Limiting liability to a company's actual investment in an artist, as described here, would allow an artist to feasibly take advantage of her section 2855(a) rights without facing overwhelming damages. At the same time, a company would not face the prospect of artists making off with advances. This development would be significant because companies often sign artists to multimillion dollar deals that include large advances. In some cases these artists fail to produce successful albums, and in others, they fail to deliver the required albums. n116 If an artist who has signed a deal [*2649] invokes section 2855(a), she should be liable only in the latter circumstance. n117 She would be liable for damages for the undelivered albums based on the amount of the advance, which is often considerable. n118

4. Policy Considerations. - Record companies have argued that the high-risk nature of the industry is the very justification for section 2855(b) protection. n119 The purpose of section 2855(b), however, is not to shield companies from the general risks they necessarily take in the speculative music market. Rather, its purpose is to protect a company in its relationship with an individual artist. Liability based on actual investment in the individual artist would be consistent with this goal. Record companies' arguments in 1987, when section 2855(b) was added, and their current arguments, indicate that the risks and investments contemplated under section 2855(b) are associated with the artist who invokes section 2855(a) to terminate her contract. In 1987, companies argued that section 2855 was unfair because it allowed artists to exit their contracts without delivering the promised number of albums, often prior to becoming profitable. n120 Currently, companies argue that repeal of section 2855(b) would be unfair because "it isn't right for an artist or anyone else to make a commitment ... and then walk away without any responsibility or liability." n121 These arguments are perhaps valid; if an artist terminates a contract under which she committed to deliver additional albums, the artist should face some liability.

n122 If, as the industry's arguments indicate, record companies are concerned with the investments they make in specific artists' careers and the possibility that individual artists will walk away from their contracts, liability should be based on the actual obligations of artists to their companies, not on mere conjecture about the profitability of albums that are undelivered or have not even been created. n123

[*2650]

III. Reduction in the Number of Contractually Required Albums

Assuming that section 2855 remains in place, recording artist contracts must undergo a fundamental change. The current section 2855 regime can operate properly only if the number of albums required by recording contracts is reduced. Section 2855(b), which reinforces the long-term recording contract,
impedes the implementation of a free agency model for recording contracts - a goal of many recording artists' rights proponents. n124 While the specific details of this model have not been articulated, it is based loosely on the free agency system enjoyed by television and film actors. n125 Actors, because they are not limited by any provision comparable to section 2855(b), are far less constrained in their employment pursuits. Thus, they are able to pursue and obtain the full market value for their services by acting as free agents in their respective markets and to "enjoy the equitable compensation ... espoused by Section 2855(a) and De Haviland." n126 Recording artists' rights proponents argue that the television and film industries are similar to the recording industry in that they, too, require large investments in projects, the majority of which fail. n127 Thus, recording artists should similarly enjoy free agency, or the "reasonable opportunity to receive fair-market compensation for their services, as have actors, athletes and creative individuals in other industries." n128 Despite the similarities, actors and other artists enjoy the full protection of section 2855(a), while section 2855(b) nullifies such protection for recording artists. This diminished protection undoubtedly destabilizes the public policy rationale of section 2855(a): fair compensation for employees proportionate to the market for their services. n129

Generally, record companies favor long-term contracts as a way of maximizing the profitability of their investment in a particular artist. n130 Recording industry representatives argue that the music industry [*2651] is quite dissimilar from television and film. Recording artists control their own output; "as a practical matter, they ... decide when they're ready to record and when the album is complete." n131 Actors, in contrast, perform on a firm schedule; they must show up "when the director yells "action.'" n132 Long-term contracts, then, assure companies that they will not lose recording artists before the artists fulfill their contractual commitments. Record companies argue that section 2855(b) is necessary, in this respect, to protect their interests. Due to their control over the creative process, recording artists have greater leverage in their contractual commitments than do actors. Because "this situation can be abused," n133 section 2855(b) is required, in part, to ensure that recording artists do not escape their obligations to deliver contractual albums without facing some liability. The policy rationale, under section 2855(a), of enforcing "negative covenants in contracts involving the unique personal services of star performers" n134 is that an employer "has contracted for the exclusive right to display the 'star' for a given period. That no other entrepreneur may display the particular star during the period contracted for is a part of the right for which the employer has bargained and compensated the star." n135 Section 2855(b) extends this rationale, adding to the temporal restrictions of section 2855(a): by exposing to liability an artist who terminates her contract, section 2855(b) deters that artist from recording for another company while she is still contractually committed to her original company - a commitment with no time limitation.

Record companies' insistence "upon an unrealistic quota of records" n136 in the majority of recording contracts thwarts section 2855 entirely. n137 There is little chance for artists to deliver seven albums in seven years, and the threat of damages under section 2855(b) makes the invocation of section 2855(a) prohibitive. n138 Record companies should thus reduce the number of contractually required albums to three or four. This is a wholly reasonable requirement; requiring three or four albums would give artists ample time to create the albums and [*2652] would provide record companies sufficient time for the required marketing and promotion periods. n139 After seven years and the delivery of all required albums, artists would have the opportunity to exploit their market value, either renegotiating with their original record companies or negotiating with other companies. Should an artist fail to deliver the required albums and proceed to invoke section 2855(a), record companies would retain the ability to sue for damages. Reducing the required number of albums would also allow recording artists' contracts to operate better within the bounds of section 2855. This solution would make an artist's delivery of all the contractual albums a reasonable expectation, altering the current state of affairs in which the requirement of seven albums in seven years effectively undermines artists' rights to terminate their contracts under section 2855(a).
IV. Conclusion

This Note has offered two suggestions regarding section 2855: first, damages under section 2855(b) should be measured by actual artist investment rather than by lost profits, and second, the number of albums required under recording artists' contracts should be reduced to allow section 2855 to operate with legitimacy. The suggestions are not necessarily linked; the artist-investment damages calculus under section 2855(b) can be implemented even if the required number of albums does not change. These proposals were formulated under the assumption that section 2855(b) will remain in place. With the movement for its repeal renewed, however, section 2855(b)'s necessity and wisdom should be reevaluated. The recording industry's first justification for the section - that a record company does not profit on an artist until after that artist has delivered four albums - appears to have diminished in importance. In the current music market, it is the rare artist that has the longevity to reach a fourth album. Record companies routinely drop artists who fail to produce a profit after their first or second album. Additionally, the record companies' overwhelming preference for releasing blockbuster albums, almost to the exclusion of anything else, has reduced drastically the number of artists that companies are willing to cultivate slowly while watching sales grow gradually with each new album. n143

This leaves only the record companies' second justification for section 2855(b) - that artists must be held liable if they seek to terminate their contracts before they deliver the required albums. For the section 2855 regime to be practicable, contracts must require a number of albums that feasibly can be completed within seven years. But the combination of the routine seven-album requirement and the fact that only the most successful artists reach their seventh album, or even the seventh year of their contract, reveals a particularly onerous aspect of the current section 2855 regime. That is, if section 2855(b) affects only the most successful artists, as its proponents argue, then the section is problematic. This argument indicates that the effective function of the section has been to support the recording industry's business model, under which a few successful artists finance the entire industry, even though the actual stated purpose of the section is to compel artists to fulfill their contractual commitments to record companies. Section 2855(b), in other words, gives record companies free rein to exploit a few successful artists to support a business model in need of major revamping. Some have argued that potential artist free agency resulting from the repeal of section 2855(b) would force the industry to reevaluate its business model. This argument reveals that section 2855(b) is more than merely a contract enforcement mechanism; rather, it has become an essential part of the industry business model's foundation, holding successful artists in place to support the recording industry. Repeal of section 2855(b) may reveal the tenuous nature of the recording industry's business strategies and force the industry to become "more efficient [and] more judicious in signing new artists," to reduce expenditures on videos and other promotion and marketing costs, and to be more astute when signing multimillion dollar deals with superstars.

FOOTNOTES:


n4. See, e.g., id. RAC represents "the interests of recording artists [regarding] legislative issues in which corporate and artists' interests conflict." Id. The Artist Empowerment Coalition reform platform also includes the development of technological and legal solutions to music piracy as well as industry responsibility and accountability. See Artist Empowerment Coalition, What Is the Artist Empowerment Coalition?, at http://www.artistempowerment.com/mission.htm (last visited May 3, 2003).


n6. See M. William Krasilovsky & Sidney Shemel, This Business of Music: The Definitive Guide to the Music Industry 14 (8th ed. 2000) ("Most recording contracts are signed in or otherwise made subject to the laws of New York State or California.").

n7. The statute states, in relevant part:

(a) Except as otherwise provided in subdivision (b), a contract to render personal service ... may not be enforced against the employee beyond seven years from the commencement of service under it. Any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary, or intellectual character, which gives it peculiar value and the loss of which can not be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render the service, for a term not to exceed seven years from the commencement of service under it. If the employee voluntarily continues to serve under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

(b) Notwithstanding subdivision (a):

(1) Any employee who is a party to a contract to render personal service in the production of phonorecords ... may not invoke the provisions of subdivision (a) without first giving written notice to the employer ... specifying that the employee from and after a future date certain specified in the notice will no longer render service under the contract by reason of subdivision (a).

(2) Any party to such a contract shall have the right to recover damages for a breach of the contract occurring during its term in an action commenced during or after its term, but within the applicable
period prescribed by law.

(3) In the event a party to such a contract is, or could contractually be, required to render personal service in the production of a specified quantity of the phonorecords and fails to render all of the required service prior to the date specified in the notice provided in paragraph (1), the party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service in an action which, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice.


n9. See 2855(a).


n11. See 2855(b)(3) ("The party damaged by the failure shall have the right to recover damages for each phonorecord as to which that party has failed to render service ... .").

n12. See Krasilovsky & Shemel, supra note 6, at 14 ("The standard contract runs for a term based on the delivery of a minimum number of recordings ... plus a period of time thereafter ... . Even when the contract period is stated in years, a contract year is invariably connected with the delivery of a product ... .").


n15. See, e.g., Chuck Philips, "Free Agency" Sought by Pop Singer, L.A. Times, Feb. 8, 1992, at F1 (discussing singer Luther Vandross's invocation of section 2855); Chuck Philips, Metallica Sues Label,

n16. See infra p. 2639.


n18. See infra section II.A.3.


n20. Id. at 984.

n21. Id.

n22. Id.

n23. Id.

n24. Id. at 985.

n25. See id. at 986 ("We cannot believe that the phrase "for a term not beyond a period of seven years' carries a hidden meaning. It cannot be questioned that the limitation of time to which section 1980 related from 1872 to 1931 was one to be measured in calendar years... . The substitution [in section 2855] of years of service for calendar years would work a drastic change of state policy with relation to contracts for personal services.").
n26. See id. at 988.

n27. Id.


n30. See, e.g., Philips, supra note 10 ("To avoid testing the law, record labels often rewrote the contracts of disgruntled stars."); RIAA, Labor Code Section 2855: Frequently Asked Questions (FAQ), at http://www.riaa.org/section2855.cfm (last visited May 3, 2003) ("There has been very little litigation regarding [section 2855] or Subsection (b) in the recording industry ... . Very few disputes wind up in court.").

n31. See Philips, supra note 10.

n32. Id.

n33. Id.

n34. See Bill Holland, Amendment Pushed by RIAA in 1987, Billboard, Sept. 22, 2001, at 95, 95.


n37. See Love Cross Complaint, supra note 36, at 5.

n38. See Cappello & Thielemann, supra note 14, at 15.

n39. See id. at 14; see also Love Cross Complaint, supra note 36, at 20-22.


n41. S. 1246, 2002 Leg., Reg. Sess. (Cal. 2002). The major record companies aligned with smaller interests, including independent record companies, in opposition to the bill. See California Music Coalition, Frequently Asked Questions (FAQ), at http://www.californiamusic.org/facts.html (last visited May 3, 2003) (arguing that repealing section 2855(b) would allow California recording artists to abandon their commitments to record albums, which in turn would harm California's economy: record companies, without section 2855(b) damages, would face increasing risk and thus have an "incentive ... to contract for and produce music in states other than California").


n45. The issue of limiting the duration of recording artists' contracts has arisen outside California. In October 2002, the Artistic Freedom Act was introduced in the New York State Assembly. See A.


n50. Chang, supra note 29, at 15.

n51. Id. (citation omitted).


n53. See id. at 51-52 (statement of Steve Berman, Head of Marketing, Interscope Geffen A&M Records).
n54. See id. at 41-42 (statement of Jeff Ayeroff) ("We invest in artists who are successful. And it's sort of an understanding, which I've always thought everybody understood, that large artists help pull and pay for the young artists. That's how artistic communities work.").

n55. See Philips, Courtney Love Seeks To Rock, supra note 1.

n56. See Hearings II, supra note 49, at 54 (statement of Steve Berman) ("If we succeed, we're entitled to having a long-term relationship [with artists] to be able to recoup [our large] investments.").

n57. See Krasilovsky & Shemel, supra note 6, at 14; Donald S. Passman, All You Need To Know About the Music Business 117 (1994).

n58. See Hearings II, supra note 49, at 66 (statement of Jay Cooper, entertainment attorney) ("The vast majority [of the contracts] are one album plus six one-year options.").

n59. A record company's commitment to an artist may be even more minimal; standard contract terms effectively remove the company's "recording commitment" for the first album. See Lawrence J. Blake, Analysis of a Recording Contract, in The Musician's Business and Legal Guide 234, 239 (Mark Halloran ed., 4th ed. 1991) (noting that a standard "'pay or play' clause ... allows [a record company] to renge on its commitment to allow the artist to record an album by merely paying the artist minimum union scale... . This clause is almost never a "deal point' (i.e., specifically agreed upon by parties in making the deal before a formal contract is submitted), but is generally buried in the "boilerplate' for unsuspecting artists ... "); see also Hearings II, supra note 49, at 59 (statement of Don Henley, recording artist, representing RAC) ("All the albums are at [the companies'] option. They are not obligated to promote, produce, manufacture, or release an album even after an artist has signed a contract."). For a detailed discussion of recording artist contract terms, see Blake, supra.

n60. See 29 Cal. Jur., Employer and Employee 89 (3d ed. 1986); see also E. Allan Farnsworth, Contracts 770-73 (3d. ed. 1999).


n62. Id.
n63. Id.

n64. "Exclusivity" is with respect to recording albums only for the company with which the artist is signed. Recording artist contracts do not establish "exclusive relationships"; artists may pursue simultaneous "careers in film, on tour, with sponsorships, with merchandising, as producers, as songwriters, and more." Hearings II, supra note 49, at 26 (statement of Hilary Rosen).


n67. See Krasilovsky & Shemel, supra note 6, at 14.

n68. See De Haviland, 153 P.2d at 986; see also Krasilovsky & Shemel, supra note 6, at 14 ("Courts have generally tended to grant relief to the artist." (citing Vanguard Recording Society, Inc. v. Kweskin, 276 F. Supp. 563, 566 (S.D.N.Y. 1967), in which the court refused to enjoin an artist from rendering services to a different record company because enforcing a suspension clause would make a contract "harsh and unreasonable").

n69. See Lemat Corp. v. Barry, 80 Cal. Rptr. 240, 245 (Ct. App. 1969) (stating that an injunction for six option years might be possible if a personal service contract contained "six separate renewal options to extend the term of employment for successive periods of a year" (citing Brodel, 192 P.2d at 949)).

n70. 153 Cal. Rptr. 153 (Ct. App. 1979).

n71. Id. at 154.

n72. Id.
n73. Id. at 155.

n74. Id.

n75. Id. at 154.

n76. See Krasilovsky & Shemel, supra note 6, at 15.

n77. See, e.g., id. at 14 ("Even when the contract period is stated in years, a contract year is invariably connected with the delivery of a product, since the passage of time without [delivery] is of no interest to a record company."); Blake, supra note 59, at 238; see also, e.g., sources cited infra note 78.

n78. See, e.g., Love Cross Complaint, supra note 36, at 6 ("For example, the [Hole contract] provided for a standard delivery schedule, i.e., for a master recording no later than every approximately 18 months."); Hearings II, supra note 49, at 67 (statement of Jay Cooper) ("Almost all of these contracts have a provision that says delivery will be between 9 to 18 months.").

n79. Love Cross Complaint, supra note 36, at 6; see also Hearings II, supra note 49, at 66-67 (statement of Jay Cooper) ("The record companies know going in that [an artist] can't deliver, under today's business, seven albums in seven years... Artists used to be able to deliver two albums a year... But the record industry has changed... The record companies decided that this is now an international business and they wanted the artists, when they delivered an album, to go on tour in Europe[, Asia, and Australia]. They wanted them to go all around the world and then come back and do a tour across the United States to promote the album.").


n81. See Cappello & Thielemann, supra note 14, at 17.

n82. Id.
n83. See id.

n84. Id.; see also Hearings, supra note 40, at 8 (Statement of Ann Chaitovitz, Director of Sound Recordings, American Federation of Television and Radio Artists) [hereinafter Chaitovitz Statement] ("Because a damages lawsuit brought after the artist has invoked the seven-year rule will most likely wipe out all earnings the artist might receive under any subsequent recording contract, recording artists simply cannot risk utilizing the protection of 2855(a).”). Royalties are calculated as a percentage of either the wholesale or the retail price of records sold. Krasilovsky & Shemel, supra note 6, at 19. Although new artists typically receive seven to twelve percent of the suggested retail price for domestic sales (and a smaller percent for international sales), various deductions reduce this percentage to as low as three percent. See generally id. at 19-22.

n85. See, e.g., Passman, supra note 57, at 100 ("The record company pays [an advance] to the artist ... and then keeps the artist's royalties ... until it gets its money back .... The process of keeping the money to recover an advance is called recoupment, and we say an advance is recoupable from royalties.") (emphasis removed). Video production costs, money paid on the artist's behalf (for example, to purchase equipment), and recording costs are also recoupable from royalties. See id. at 102. Recording costs include studio time, equipment rental, travel, instrument transportation, and union wages paid to the artist and others performing at recording sessions. Id.

n86. See Greg Kot, You Say You Want a Revolution: A New Artists' Coalition Puts the Record Industry's Billion-Dollar Business Model at the Crossroads: Shrink or Perish, Chi. Trib., Feb. 24, 2002, 7 (Arts & Entertainment), at 1 (noting that "only a small percentage [of artists] ever get paid from their record sales"); see also id. ("Even multimillion-selling pop stars may find themselves in debt to their label under the standard contract. The latest Jennifer Lopez album ... sold 3 million copies ... Yet ... it's unlikely Lopez will receive royalties from the sales any time soon because her label ... spent more than $13 million marketing the disc.").

n87. See, e.g., Kids' Universe v. In2labs, 116 Cal. Rptr. 2d 158, 169 (Ct. App. 2002) ("If the business is a new one or if it is a speculative one ... damages may be established with reasonable certainty with the aid of expert testimony, economic and financial data, market surveys and analyses, business records of similar enterprises, and the like." (quoting Restatement (Second) of Contracts 352 cmt. b (1979)) (internal quotation marks omitted)); GHK Assocs. v. Mayer Group, Inc., 274 Cal. Rptr. 168, 179 (Ct. App. 1990) ("The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation." (citing Allen v. Gardner, 272 P.2d 99, 102 (Cal. Ct. App. 1954))).

n88. See 1 Robert L. Dunn, Recovery of Damages for Lost Profits 1.1, 1.4, 1.8 (5th ed. 1998).
n89. Id. 1.6.

n90. Id.

n91. Id. (emphasis added); see Stott v. Johnston, 229 P.2d 348, 355 (Cal. 1951) ("It appears to be the general rule that while a plaintiff must show with reasonable certainty that he has suffered damages by reason of the wrongful act of defendant, once the cause and existence of damages have been so established, recovery will not be denied because the damages are difficult of ascertainment." (citations omitted)); Kids' Universe, 116 Cal. Rptr. 2d at 168 ("Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking." (quoting S.C. Anderson, Inc. v. Bank of America, 30 Cal. Rptr. 2d 286, 289 (1994) (internal quotation marks omitted)); GHK Associates, 274 Cal. Rptr. at 179 ("Where the fact of damages is certain, the amount of damages need not be calculated with absolute certainty." (citing Channell v. Anthony, 129 Cal. Rptr. 704, 722 (Ct. App. 1976); and Noble v. Tweedy, 203 P.2d 778, 782 (Cal. Dist. Ct. App. 1949))); James v. Herbert, 309 P.2d 91, 96 (Cal. Dist. Ct. App. 1957) ("Damages consisting of the loss of anticipated profits need not be established with certainty. It is sufficient that it be shown as a reasonable probability that the profits would have been earned except for the breach of the contract." (citation omitted)).

n92. See supra p. 2638.

n93. See supra p. 2636.

n94. See, e.g., Anthony DeCurtis, Town to Town, Selling a Brand, N.Y. Times, Mar. 9, 2003, 2 (Arts & Leisure), at 15 (noting that the recording industry "has taken marketing - not developing new talent, not educating new audiences, not addressing a wide variety of tastes - as its most important function"); Kot, supra note 86 (describing a current artist's five-album, six-year tenure with a record company as "a classic case of artist development, an example of how the record industry used to work before the mega-bucks merger era, building artists in increments until they started turning a profit").

n95. Kot, supra note 86.

n96. Id. (quoting Peter Koepke, former president and CEO of London Sire Records) (internal quotation marks omitted).
n97. Id.

n98. Philips, supra note 48 (internal quotation marks omitted).

n99. See Love Cross Complaint, supra note 36, at 18 ("Record companies systematically drop artists who are not profitable after the first or second album."); Philips, supra note 10 ("It's the rare label that holds on to an act that isn't successful by its second album.").

n100. This difficulty exists not only for new artists, but for established artists as well. See, e.g., infra note 110 and accompanying text.

n101. See supra pp. 2638-39; Hearings II, supra note 49, at 27 (statement of Hilary Rosen) ("[The] only reason record companies can risk investment in the new artists and absorb losses from failures is [that], when successful artists make it, money goes back into the system.").

n102. See supra note 91 and accompanying text.

n103. See cases cited supra note 87.

n104. Philips, supra note 48.

n105. Id.

n106. See id.

n107. See, e.g., Philips, supra note 10 ("For example, what if Alanis Morissette left her label after seven years and still owed the company four albums? It's unclear whether the company would be allowed to base the value of damages on her 30-million selling hit [album] ... or her follow-up ... which sold just 2 million copies.").

n109. See Theresa E. Van Beveren, Comment, The Demise of the Long-Term Personal Services Contract in the Music Industry: Artistic Freedom Against Company Profit, 3 UCLA Ent. L. Rev. 377, 412 (1996) (suggesting, in another context, possible measures of future profitability, including "past record sales, increasing rates of sales, critics' record reviews and predictions of popularity, plans for future touring and the revenue gained or lost by touring, testimony about the quality and marketability of partially completed songs and albums, stability and longevity... ").

n110. Philips, supra note 48; see also supra note 107. Recent events further support this point. In 2002, EMI bought out the contract of singer Mariah Carey - one of the biggest selling artists ever - paying her $ 28 million to leave the label after her "Glitter" album sold only two million units worldwide. See Kot, supra note 86. That same year, Michael Jackson saw his "Invincible" album sell only five million units worldwide, despite the benefit of "the most expensive marketing campaign in music history." Chuck Philips, Power, Money Behind Jackson's Attack on Sony, Insiders Say, L.A. Times, July 9, 2002, at C1. These sales figures fell well short of expectations, illustrating that conjecture regarding the profits of even the most successful artists' albums is highly unreliable, and that established artists should be treated no differently than new artists in lost profits analysis.

n111. See supra note 85.

n112. See id.

n113. See Passman, supra note 57, at 102.

n114. See Hearings, supra note 40, at 31 (statement of Don Henley).

n115. See supra pp. 2642-43.

n116. See Philips, supra note 48 (describing several failed multimillion dollar contracts).

n117. This theory of liability is consistent with the rule that advances, which are recoupable from an
artist's royalties, are not returnable in the event an artist's album fails. See supra p. 2648.

n118. See Philips, supra note 10 (noting that when artists "take multimillion-dollar advances from the companies and ... walk away before they fulfill the obligations in their contracts" they must "come up with the money to cover damages that the companies incur" (quoting a recording industry executive)). If an artist has delivered some of the contractually required albums, calculating what portion of the advance is recoverable as damages for each undelivered album would be simple. One could simply divide the advance amount by the number of required albums. Thus, for example, the recoverable amount under a three-album deal with a $6 million advance, if the artist has delivered only one album, would be $4 million.

n119. See supra pp. 2637-38.

n120. See supra p. 2636.


n122. See supra section II.A.3.

n123. Basing liability on the actual investment a record company makes in an artist is consistent with the theory of restitution as a remedy for breach of contract. The reasonable certainty requirement precludes resort to the lost profits/expectation theory set forth by the record companies. See supra pp. 2644-47. In circumstances in which recording artists invoke section 2855(a) prior to delivering the contractually required number of albums, restitution is the best theory for damages under section 2855 (b)(3). See Farnsworth, supra note 60, at 855 (noting that "the case in which the benefit conferred on the party in breach consists simply of the payment of money ... is the clearest case for restitution. If the injured party has paid part or all of the price in advance for a performance that is not forthcoming, that party can get restitution of what has been paid." (citation omitted)).

n124. See, e.g., Leeds, Courtney Love Settles, supra note 43.

n125. See id.
n126. See Cappello & Thielemann, supra note 14, at 16.

n127. See Chaitovitz Statement, supra note 84, at 7 ("There is nothing unique about the pre-production costs associated with the phonorecord industry. Artists working in other fields, such as film ... also often require substantial advances, investment and promotion of the artist over the course of several years and several projects before the artist achieves a level of success that generates profits for the employing company.").

n128. Love Cross Complaint, supra note 36, at 21.

n129. See supra p. 2635.

n130. See supra pp. 2638-39.


n132. Id.

n133. Id.

n134. 29 Cal. Jur., supra note 60, at 89.

n135. Id.

n136. Chaitovitz Statement, supra note 84, at 8.

n137. Neither the free agency model nor the long-term contract model serves the policy purposes of the system established under section 2855. Long-term contracts clearly frustrate the policy goals of section 2855(a) - employee movement and compensation based on experience and marketing value. And in
some cases, free agency may allow artists to exit contracts without fulfilling certain commitments - for instance, a frustrated artist may simply wait out her contract and leave the company after allowing seven years to lapse without recording or delivering albums.

n138. See supra p. 2643 & note 84.

n139. See supra note 79 and accompanying text. Requiring three or four albums would serve both the record companies' and the artists' interests. A higher number would create problems for artists similar to those created by the seven-album requirement. A lower number would not provide companies adequate returns on their artist investments. Record companies would likely not be resistant to this proposal. See Hearings II, supra note 49, at 81 (statement of Hilary Rosen) (noting "a trend towards albums delivered less frequently than there used to be").

n140. See supra p. 2637.

n141. See supra p. 2645.

n142. See supra pp. 2645-46 and note 99.

n143. See supra pp. 2645-46.

n144. See Love Cross Complaint, supra note 36, at 18.

n145. See Hearings II, supra note 49, at 25 (statement of Hilary Rosen) ("What is at issue ... is how this Section should apply to the artists who do make it - not your average artist, but your highly successful star.").

n146. See, e.g., Kot, supra note 86 (noting that repeal of section 2855(b) and subsequent artist free agency "will likely be the first major step toward forcing an overhaul of record-company business strategy").
n147. Id. (quoting Michael Nathanson, music analyst, Sanford C. Bernstein & Co.).