Katten
Katten Muchin Rosenman LLP

SPOTLIGHT ON ENTERTAINMENT AND MEDIA LAW

Personal Service With a Smile: A History of California's "Seven-Year" Rule

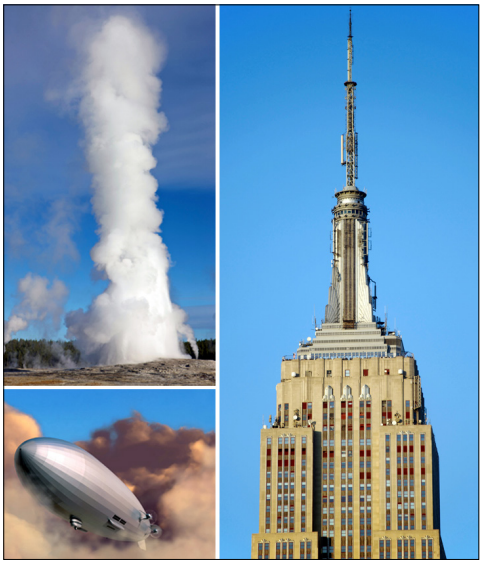
Seven Years Hard Labor [Code]

In 1872, Yellowstone National Park was established as the world's first national park, President Ulysses S. Grant signed the Amnesty Act restoring civil rights to most (but not all) Confederate sympathizers, Boston was devastated by the Great Fire, Calvin Coolidge and Harlan Stone were born, and California enacted Section 1980 of the Civil Code, which read as follows:

> A contract to render personal service, other than a contract of apprenticeship, as provided in the chapter on master and servant, cannot be enforced against the employee beyond the term of two years from the commencement of service under it; but if the employee voluntarily continues his service under it beyond that time, the contract may be referred to as affording a presumptive measure of the compensation.

In 1931, the Star-Spangled Banner became the U.S. national anthem, Nevada legalized gambling, the Empire State Building was completed, Europe was in a banking crisis that threatened global financial markets (some things never change), James Earl Jones, James Dean, Mickey Mantle and Rupert Murdoch were born, Thomas Edison died, and Section 1980 of the Civil Code was amended to make the term seven years and to include, in relevant part:

> Exceptional services. Provided, however, that any contract, otherwise valid, to perform or render service of a special, unique, unusual, extraordinary or intellectual character, which gives it peculiar value, the loss of which cannot be reasonably or adequately compensated in damages in an action at law, may nevertheless be enforced against the person contracting to render such service, for a term not beyond a period of seven years from the commencement of service under it.

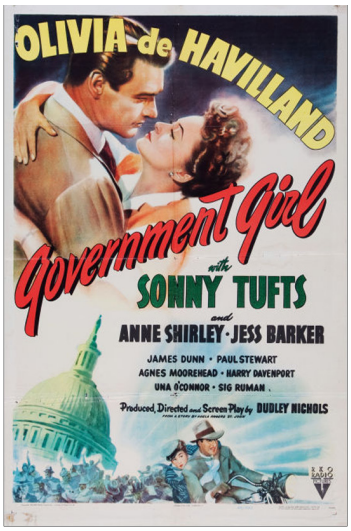


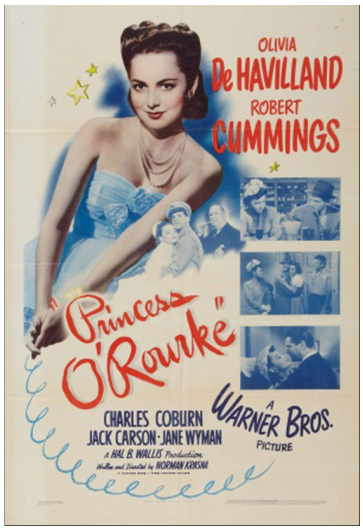
In 1937, the Hindenburg exploded, Amelia Earhart disappeared, the Marihuana Tax Act became law, Japan invaded China, Colin Powell, Warren Beatty, George Takei and George Carlin were born, George Gershwin and a bunch of people on the Hindenburg died, and Section 1980 of the Civil Code was repealed and Section 2855 of the Labor Code was enacted, effectively adopting and streamlining the language of former Section 1980 into a single paragraph.

De Havs and De Havs Not

In 1944, the Allies landed at Normandy, 1st Lieutenant Jackie Robinson was court-martialed (and acquitted) for refusing to move to the back of a segregated U.S. Army bus, Angela Davis and Michael Douglas were born, Glenn Miller and Erwin Rommel died, and Warner Bros. tried and failed to enforce Olivia De Havilland's contract.

Ms. De Havilland, an Academy Award-nominated actress (and eventual winner) was under contract to Warner Bros., providing for an initial 52-week term of service starting in 1936 with six studio options for additional 52-week periods. By 1943, Ms. De Havilland had refused several roles and the term of her contract was accordingly





suspended multiple times by Warner Bros., which argued that the "Seven Year Rule" meant seven years of actual services rendered, and that Ms. De Havilland's suspensions effectively extended the contractual term of service (25 weeks, in her case).

The California court felt otherwise, holding that the language of the Labor Code was clear, and that for Warner Bros. to prevail the court would have to essentially impute language to the effect "…for a term not to exceed seven years ***of actual service*** from the commencement of service under it." The court determined that the code was not subject to such creative interpretation; it means a hard seven years from the moment the contractual services commenced. This case thus set the standard for interpretation of Section 2855, which became know as the "De Havilland Law."

In general, entertainment employers have become quite good at drafting contracts to deal with the particularities of Section 2855, both in terms of the temporal aspects and enforcement. Entertainment law practitioners will surely recognize the language "special, unique, unusual, extraordinary or intellectual character, which gives it peculiar value the loss of which cannot be reasonably or adequately compensated in damages in an action at law." This excerpt may be found in virtually all talent and executive engagement agreements, wherein the person being engaged is effectively stipulating that his/her services qualify as "special, unique, etc." and that in the event of a breach of contract, money damages will not suffice; rather the "special" aspect entitles the employer to injunctive relief.

It's worth a quick detour to point out that many such agreements mention "specific performance"; generally speaking, that is not a remedy courts will enforce in the personal services context (something about the 13th Amendment and slavery/involuntary servitude, go figure). However, courts have been willing to use injunctive relief to prevent a person breaching his/her agreement from performing such services for someone else for a period of time (which makes sense, lest he/she be rewarded for bad behavior).

The Hole Truth

In 1987, "The Simpsons" debuted as a cartoon short on "The Tracey Ullman Show", Ronald Reagan challenged Mikhail Gorbachev to tear down the Berlin Wall, *Hustler Magazine v. Falwell* was argued before the Supreme Court, a bunch of people were born (none of whom yet have a permanent place in history), Andy Warhol, Rita Hayworth, Jackie Gleason, and Fred Astaire died, and the music industry lobby succeeded in getting Section 2855 revised to include a unique, new subsection which reads as follows:

"(b) Notwithstanding subdivision (a) [*which is the "traditional" Section 2855 language*]:

> (1) Any employee who is a party to a contract to render personal service in the production of phonorecords in which sounds are first fixed, as defined in Section 101 of Title 17 of the United States Code, may not invoke the provisions of subdivision (a) without first giving written notice to the employer in accordance with Section 1020 of the Code of Civil Procedure, 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 a contract described in paragraph (1) 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) If a party to a contract described in paragraph (1) 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 that, notwithstanding paragraph (2), shall be commenced within 45 days after the date specified in the notice."

The Recording Industry Association of America/major recording labels led a brave fight up the legislative stairs to ensure that, even if a recording artist could avail herself of the benefits of the "old" Section 2855, under the "new" Section 2855 they could still be held liable for damages for failing to deliver all required records, notwithstanding the seven-year limit. Historically, recording contracts have been tied not to a time frame so much as to the delivery of records. A typical contract would have the artist locked in to deliver seven records, and most artists will tell you that not only can they not deliver seven records in seven years, the label wouldn't let them do it for fear of oversaturation/cannibalization (not to mention tour schedules). Records often would be delivered every two or three years, meaning a contract for delivery of seven records could last two decades. The record companies, of course, argued that if recording artists could use Section 2855, they would in effect be released from delivering the agreed number of records, so the record companies would be damaged by not receiving the full value of their 'investment' in the artist.

Not everyone has sympathy for the record companies. The most well-known opposition to Section 2855(b) (other than a few abortive attempts by musicians and politicians to get it repealed) was Courtney Love and her band Hole. When a toxic relationship with her label turned to litigation, Love invoked her Section 2855(a) right, while the label sought damages for five undelivered albums. Without delving into the rancorous path of the case, the parties settled out of court, and thus the applicability, interpretation, and constitutionality of Section 2855(b) were never fully tested.

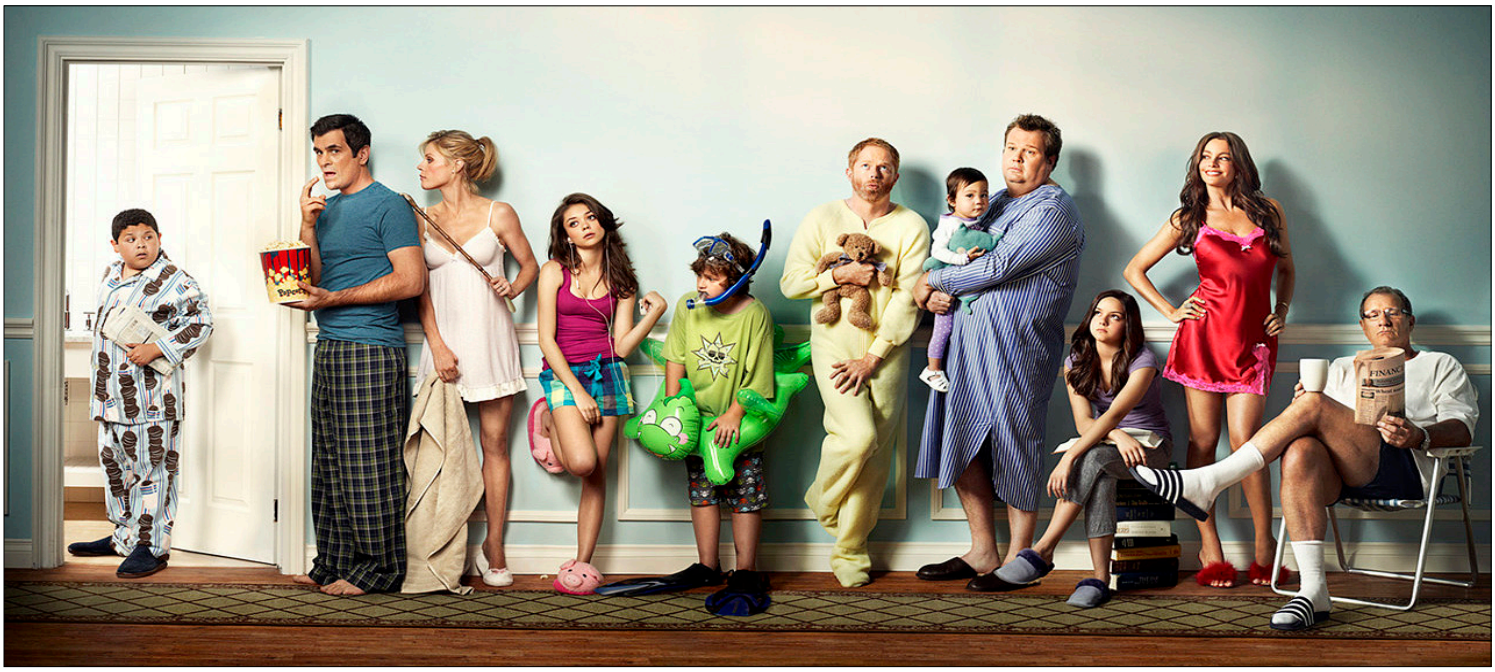
Section 2855(b)(3) creates a unique challenge with respect to the enforceability of music industry contracts. Section 2855(b)(3) provides that if a recording artist avails herself of Section 2855(a), the record company can recover damages for each record required under the contract and not delivered as of the date of contract termination. The problem: what *are* the damages? The actual money that the record company is out of pocket with respect to the undelivered records? The record companies don't want that; they probably haven't spent anything, yet. Lost profits from the undelivered records? Lost profits are notoriously hard to quantify. Obviously, undelivered records by bona fide stars theoretically could mean millions in lost profits.

Artists will see Section 2855(b)(3) as punitive; the labels will view it as remunerative. Either way, how can it even work? Section 2855(b)(3) seems uniquely geared to forcing settlement. However, record companies have averted this problem by inserting a set amount as a "reasonable measure" of "liquidated damages" in the contracts. Seeing a large dollar amount attached to leaving a contract with undelivered records is quite a disincentive for an artist to walk away; in a sense, the record companies have created a workaround to the very provision they lobbied for.

The *Family* That Stays Together…

The real battleground in the entertainment industry today with respect to Section 2855, however, is in the area of contract renegotiation. For whatever reason, a misperception (or a tactic) has propagated suggesting that, rather than simply preventing enforcement of contracts beyond seven years, Section 2855 prohibits the *making* of such contracts, rendering them illegal and voidable.

A plain reading should…*should*…dissuade practitioners from that interpretation. Let us first assume that the services of talent and high-level executives in the entertainment business are by their very nature "special, unique, etc." (thus making the seven-year term enforceable). If the contract at issue is "otherwise valid," it is unambiguously enforceable up to the seven-year mark. If the legislature had desired to simply outlaw contracts extending beyond



seven years, it could have done so easily and clearly, and there would have been no need for language detailing the conditions of enforcement up until the end of the seventh year. To argue that such contracts are automatically illegal would completely undermine the provision. To be clear: if a contract is enforceable in every other way, it is not illegal merely because it can go beyond seven years; it simply cannot be enforced after the end of the seventh year (other than the "exception" imposing damages on recording artists).

Assuming any licensed attorney can read, and is unable to find case law to the contrary (good luck!), why then do performers and executives often file suits claiming the contract is entirely illegal and void? The answer is simple: tactics. Whether someone truly wants out of a contract, or whether the goal is renegotiation, it has become commonplace to assert that the contract is illegal and void in violation of Section 2855. Such a claim usually comes after attempts to renegotiate have failed. Courtney Love's lawsuit to void her contract under Section 2855 was, contrary to popular belief, less about disenchantment with her label when it was absorbed by a larger company, and purportedly more about using an aggressive tactic in light of failed negotiations.

A well-known recent example entails the cast of the television series *Modern Family*. Unhappy with the salaries they were locked into for the remainder of their option contracts, the cast jointly filed suit against the network claiming their option contracts (which allegedly could have exceeded the seven-year threshold) were automatically illegal and void. The complaint stated so in a conclusory fashion. One would think that, for the reasons discussed above, a claim like this could be disposed of at an early stage in the litigation. However, one thing prevents studios and networks from litigating such claims: fear. Employers fear a judgment that, right or wrong, actually *does* hold that contracts that violate the seven-year rule *are* illegal and void (stranger things have happened). Employers also fear damaging important relationships, and the negative publicity that can arise. And perhaps most of all, employers fear that by standing their ground key artists may quit or delay production, or public interest in the show may wane, and the employers will thereby lose the substantial revenues generated by a successful television series.

The lawsuit, then, is tactical, and generally used as a last resort to bring negotiations to a head. Such a lawsuit probably would not work tactically under circumstances in which the plaintiff can be readily replaced; it requires leverage. *Modern Family* is a highly successful network sitcom with an ensemble cast that is essential to its success; *that's* leverage. And when the network balked at substantial across-the-board raises, the cast *en masse* pulled the Section 2855 trigger, and within days the contracts had been renegotiated and the lawsuit withdrawn.

Time Off For Good Behavior

A final note regarding the use and application of Section 2855: obviously, longer-term engagements are often sought and even desirable in some cases. In such cases, in order to avoid the seven-year problem, one might think it is a good idea to simply amend the agreement at some point (say, in the sixth contract year) to extend the relationship. Bad idea.

Jurisprudence surrounding Section 2855 makes it clear that merely extending an existing agreement does not avoid the problem; if anything, the extra time simply makes the contract a greater violator of Section 2855. In order to avoid Section 2855,

there must be an entirely new contract that comes into being after the "old" contract has ended and the employee technically has had "freedom" to find other employment. To effectuate this, many employers have implemented a "lag" day during which the employee is…unemployed…and thus able to seek other opportunities. On the following day, the employer re-engages the employee long-term, in theory without running afoul of Section 2855. But, of course, this can backfire: there is always a risk that when the employee is without a contract – especially an employee with leverage – he or she can suddenly decide that his or her services are worth considerably more than they were two days earlier.

Plucky Number Seven

Section 2855 has evolved from its humble beginnings, when it was used effectively to bring an end to the studio system's stranglehold on talent with long-term holding contracts, to the present day, in which the statute has become a negotiation tool of last resort. It is clear that Section 2855 is here to stay, and those practicing entertainment law in areas where Section 2855 might arise would be well-advised to get to know the law, its actual application, and its usage as a negotiating bludgeon.

For more information, contact:

Gregg B. Ramer

Special Counsel | Entertainment and Media | Katten Muchin Rosenman LLP

+1.310.788.4469 | gregg.ramer@kattenlaw.com | 2029 Century Park East, Suite 2600 | Los Angeles, CA 90067-3012