

**DESIGNING SUCCESS:
HOW ALTERNATIVE DISPUTE
RESOLUTION SYSTEMS CAN
EFFECTIVELY AND EFFICIENTLY
MANAGE CONFLICT (AND PROMOTE
RELATIONSHIPS) BETWEEN ARTISTS
AND RECORD LABELS**

Daniel De Orchis

Introduction

The General Counsel of Universal Music Group (UMG) has approached me¹ in hopes of incorporating the use of Alternative Dispute Resolution (ADR) in the company.² Specifically, the General Counsel has asked me to explore ways that the corporation can manage disputes relating to the issue of creative control³ between artists and their record label managers. In serving the General Counsel, my primary objective is to outline a system of ADR processes that addresses conflicts of creative control with the intended goals of greater expedition, cost-savings, and support for

artist-label relationships⁴ as compared to the manner with which such disputes have historically been dealt.⁵

¹ This is a purely hypothetical scenario to give my paper a practical context, pursuant to the instructions of the class for which this paper was originally assigned. I have not actually been approached by any of UMG's representatives.

² See Appendix A

³ "Creative control" refers to the relative power between the artist and the record label to promote the artist's music and likeness pursuant to a recording contract. Such control spans nearly every aspect of the artist's career, including (but not limited to): selection of songs to be recorded; recording budgets; commercial exploitation of the artist or her music; choice of producers and remixers; content and creation of music videos; name and likeness of the artist; artwork associated with the artist.

⁴ For the purposes of this paper, the "artist-label" relationship refers to the interactions between the artist and the record label after a recording contract has been executed between the parties. Further, this paper is focused on ADR systems in major record labels, as opposed to independent labels, because the

The proposed system must be described alongside industry-specific considerations in order to be understood fully. To that end, this paper aims to elaborate on the issues of creative control; discuss how such issues have historically been resolved; identify stakeholders of creative control disputes and their respective interests; describe the steps of the proposed system; suggest methods of ongoing evaluation and modification of the system; and consider a potential ethical implication in the designing of the proposed system.

The Issue

Before delving into how creative control issues have historically been resolved between artists and their managers, it is more appropriate to first discuss the origins of these issues. A typical recording contract requiring the artist to work exclusively with a record label will lay out a multitude of rights regarding artist's music and name/likeness, and will identify which rights are to reside with which party. Alternatively, it will list which creative rights reside with one party, leaving all other rights to the other party. However, just like any other contract, recording contracts cannot practically (or actually) contemplate every possible "stick" in the bundle of creative control rights. To make matters more complex, technological advancements give rise to previously unforeseen modes of transmission and expression that are not clearly analogous to existing modes, raising the question of whether the contract was ever intended to encompass the new mode in the first place. In an industry where nearly all profits arise from some creative expression of a music artist, the stakes are often too high for either the artist or the label to give ground to the other.

three major music groups (UMG, Sony Music Entertainment, and Warner Music Group) account for a large majority of market share in terms of physical copy and digital sales from 2011-2012. "UMG Lead the New Order of Recorded Music Companies, Sony Dominates Music Publishing," <http://musicandcopyright.wordpress.com/2013/05/01/umg-leads-the-new-order-of-recorded-music-companies-sony-dominates-music-publishing/#more-1011> (accessed April 1, 2014).

⁵ While the ADR system I that later introduce has been designed with creative control disputes in mind, the system may reasonably be applied to resolve a multitude of recording contract disputes that arise in the artist-label relationship.

The Stakeholders

The stakeholders in a creative control dispute can be said to exist in one of two categories. The first comprises the “primary” stakeholders, and this consists of the artist and the record label to which the artist is signed. These parties are said to be the primary stakeholders because the issue of creative control arises solely between the artist and the label as parties to a recording contract. The artist’s primary interest rests in her ability to exercise control over what songs of hers will be recorded, titles of those songs, the choice of tour managers, the themes of music videos, tour schedules, and countless other considerations. In sum, the artist’s interest in this kind of dispute rests in being able to control her very career. The major label’s interests are represented in how it operates its business. Labels want artists to be successful, and often times the major labels will know what features or qualities to exemplify in an artist and her music to make them as palatable to the eyes and ears of the widest audience possible. The label signs the artist with the intent of making money through royalties associated with the artist and her music, and labels’ experience in the music industry aids them in making essentially profit-centric decisions regarding the artist, her music, and her career. Discrepancies between the artist’s vision of her career and the label’s vision of her as a tool for profit lie at the very heart of disputes over creative control.

There are, however, “secondary” stakeholders that are affected by disputes that occur between artists and labels. Simply put, these secondary stakeholders represent the rest of the music industry. The artist and the label are the birthparents of the music that eventually reaches the ears of the audience, and thus reside at the top of the supply chain in the music industry.⁶ Once an artist and the record label effect a recording agreement, the music is recorded at music studios. In the case of physical copies, albums are written onto CDs or other media and then then sold to music distributors, which in turn sell the media to retailers where end customers may purchase the media.⁷ In the case of radio and digital media, the studio bypasses the manufacturers and distributors of the physical media, making the music directly available to radio

⁶ See Appendix B.

⁷ Id.

stations and digital music stores such as iTunes, respectively. Members of the supply chain have an interest in the continuing supply of music upon which their businesses are established. The end consumers – music listeners generally – have an interest in music being readily available for them to purchase or otherwise consume. In addition, artists’ agents, the major label’s parent company, and even lawyers hired by the artist or label represent additional secondary stakeholders that inevitably have an interest in potential creative control disputes and the outcomes of those disputes.

The music industry is unique from other industries in that only three parent companies, commonly called music groups, occupy a whopping percentage of both the worldwide and domestic music markets.⁸ These music groups are able to achieve such dominance in the music market because they effectively control the entire chain of music distribution. Vertical integration not only provides these colossal corporations with substantial cost savings from the studio to the retailer, but it also result in an oligopoly that makes it difficult for industry players outside of the music group to emerge as a valuable link in the chain. The ultimate consequence of vertical integration by the major music groups is that these groups literally *own* facets of the production and distribution network and thereby influence a substantial amount of secondary stakeholders of the artist-label relationship.⁹

⁸ These three major music groups are UMG, Sony Music Entertainment, and Warner Music Group. In 2007, when there were four major music groups (the “Big Three” plus the EMI Group, which has since been acquired by UMG), the total market share of these industry giants totaled about 70% of the world market, and 80% of the U.S. market. “The Big Four Recording Companies,” <http://www.copynot.org/Pages/The%20big%20four%20Record%20Companies.html> (accessed April 2, 2014). Of the three existing major music groups, UMG had the largest market share of 32.8% in 2012. “Universal Music Still Top Dog In 2012,” <http://www.billboard.com/biz/articles/news/1510504/universal-music-still-market-top-dog-in-2012> (accessed April 1, 2014).

⁹ The “supply chain stakeholders” normally would receive due process consideration in the formation of an ADR subordinate to the artist and the label. But because the major music groups own not only the major labels but also the broad distribution of that material, the ADR system that I am designing will substantially take only the artist and label into account. Listeners, artist agents, and music retailers/broadcasters do represent significant stakeholder groups in the scope of the music industry generally. However, for the purposes of my paper, the ADR system will mainly give due process only to the artist and label in the resolution of creative control disputes. (In other words, I aim to avoid a

Historical Resolution

Once an issue of creative control arises between an artist and its label, the parties typically rely on the court system rather than engage in some form of ADR before litigation is contemplated.¹⁰ Litigation itself certainly has its benefits in the context of recording contract disputes. For example, a court's decree may settle a particular issue "once and for all,"¹¹ whereas a voluntary agreement between the parties may be more exposed to "erosion" over time, as greater temporal separation may tempt parties to slip back into their pre-agreement customs. In addition to creating clear judgments to current issues, the court system lays the foundation for precedence that may effectively resolve substantially similar issues that arise in the future.¹² The artist and the label may each have their own incentives in opting to go straight to litigation. In a recording contract, major labels usually have a substantial amount of leverage over the artist in terms of capital and resources.¹³ With this framework in mind, labels may prefer litigation because they can retain high quality legal counsel to out-litigate the individual artist who might have financial difficulty litigating in the first instance.¹⁴ However, artists have their own reason to prefer litigation to other ADR processes because courtrooms place equal protection on the rights of both parties, thus rendering null the often overwhelming bargaining power that the label maintains over the artist while under contract.

system where 7-Eleven has a say on how disputes are resolved at Coca Cola because of 7-Eleven's interest in receiving the newest flavors at its locations.)

¹⁰ "ADR In The Music Industry: Tailoring Dispute Resolution To The Different Stages of The Artist-Label Relationship." *Cardozo Journal of Conflict Resolution*, Vol. 10, pg. 282.

¹¹ *Id.* at 284.

¹² *Id.*

¹³ Phillip W. Hall Jr., Note, *Smells Like Slavery: Unconscionability in Recording Industry Contracts*, 25 *Hastings Comm. & Ent. L.J.* 189, 225 (2002) (detailing the superior bargaining power that labels have in recording contracts over most artists and the resulting inequities felt by artists in dealing with labels generally).

¹⁴ "ADR In The Music Industry" at 284 (noting that "many artists may either not have the financial support needed to carry through with a lengthy lawsuit, or may win their lawsuit, but be completely out of money by the time it comes to a close").

There are several factors that make litigation an equally *unattractive* venue for resolving disputes. First and foremost is the issue of expense. While the major record labels certainly have deep pocketbooks that can handle litigation costs, no label should overlook an opportunity to resolve a dispute faster and at a fraction of the cost, which can be made possible with the implementation of ADR options. And, as noted before, artists rarely have the capital to afford litigation, so pathways that achieve similarly equitable results yet enjoy substantial cost savings would understandably receive widespread support from recording artists. Secondly, litigation often has the effect of tarnishing reputations and threatening the goodwill of the parties. In a climate that is increasingly critical of major record labels, litigation would only serve to augment the public's negative image of the label and to scare away potential artists to other labels. The artist is exposed to the same pitfalls of litigation. Assuming that litigation ruins the relationship between the artist and its opposing party label, few labels would be jumping at the chance to sign an artist that waged war with her prior label on a very public platform.

While litigation may have its benefits, this does not and cannot justify why ADR processes are not widely implemented as a pre-litigation protocol for resolving disputes that arise within the artist-label relationship. The use of ADR systems does not foreclose the possibility of litigation *ipso facto*, and rights-based ADR processes such as arbitration may provide the sense of certainty that parties seek in a resolution. The following section describes how ADR might be implemented in a system designed to effectively and efficiently resolve the struggles of creative control between artists and their labels.

The System¹⁵

Initial Strategizing: Processes Used

The proposed system incorporates the use of two forms of ADR: mediation and arbitration. Mediation is a particularly important component in this system because it relies on the parties reaching a resolution together – a “win-win” instead of a “lose-win.” Especially in the context of the artist-label relationship

¹⁵ See Appendix C

where each party is dependent upon the other for financial success,¹⁶ parties in an “ongoing business relationship know about each other’s business and can appreciate each other’s needs and interests, which is why it is beneficial to consider early mediation over litigation and arbitration.”¹⁷ Unlike other service contracts where one party is contracted to perform a simple service in connection with the other’s business, the artists, collectively perform *the* business of the label, and without the financing and industry connections of the label, the artist may well become the stereotypical “starving artist.”

As important as maintaining the business relationship might be, there will always come a point in time where some resolution with bite is needed. The artist and the major record label are in a unique position in that they sit upon the top of the music supply chain for a vast majority of the music reaching the mainstream media.¹⁸ Downstream “suppliers” of music rely crucially on music that is produced by the record label via artists, and disputes in the artist-label relationship cause delays in this distribution. Thus, while issues may arise within the artist-label context, it is just as important to resolve conflicts in a timely manner as it is to resolve them in a congenial one. Therefore, decisions mandated by an arbitrator can provide the finality of a dispute when substantial time has been invested in reaching a resolution via mediation to no avail.

Initial Setup: In-house ADR Department

The first step in implementing the ADR system is the creation of an ADR subdivision within the record label company itself.¹⁹ This in-house ADR Department will be incorporated

¹⁶ The artist requires the label’s business know-how, marketing, and distribution networks, and the label needs the artist because it is in the business of distributing music.

¹⁷ Page 6, Intellectual Property: ADR vs. Litigation

https://www.adr.org/aaa/ShowPDF?doc=ADRSTG_011420

¹⁸ See Appendix B

¹⁹ This paper will not have a strong focus on *how* the ADR Department will be implemented. Such information is available from companies that have themselves incorporated in-house ADR programs themselves. Rather, the importance of this segment is to suggest a conduit by which the ADR system runs and how this conduit, as laid out, will support the system.

within the pre-existing Legal Department of UMG. Unlike the rest of UMG's Legal Department that handles the legal responsibilities of the corporation, the ADR subdivision's primary purpose is to ensure that the rights of both the artists and UMG's various labels are being represented equally with respect to recording contracts.

Within the ADR Department, there will be three separate groups of individuals. The first are in-house mediators that handle ADR within the Mandatory Mediation phase. The second group comprises an administrative body that collects the data from the exit surveys completed by the artists and labels. The third and final group comprises a representative body of both past artists and label management, and essentially act as the ADR Design Moderators. After the initial creation and implementation of the ADR system, these ADR Design Moderators are responsible for making modifications to the system as needed, paying particular attention to the responses of the parties in the exit surveys.

The cost of establishing and supporting the ADR Department will be fronted by UMG itself. While a corporation may contest such spending as being superfluous and unnecessary, other considerations suggest that a separate department handling ADR disputes may actually prove to be a cost-saving undertaking in several respects. As noted before, litigation expenses normally exceed costs associated with ADR efforts by a wide margin, and any litigation that can be avoided will result in substantial cost savings to UMG.²⁰ Cost savings are not the only incentive for music groups to institute an in-house ADR program. Negative publicity, previously mentioned as a drawback of litigation, can be avoided by first passing cases through an ADR program rather than pursuing litigation prematurely. In addition, the creation of an ADR department can actually *improve* a label or music group's image because it shows the willingness of the company to work with its artists to reach mutually beneficial solutions, as opposed to the common perception that labels abuse their leverage to gain a contracting advantage in a zero-sum game.

²⁰ Many corporations that have established in-house ADR programs have been rewarded with substantial litigation cost savings. <http://bostonlawcollaborative.com/blc/resources/useful-information-about-dispute-resolution.html> (stating that Motorola reported a 75% savings in litigation costs over a 6 year period upon the institution of an ADR program).

*The Process: a Step by Step Tour*²¹

Claims Filing.

The first step in the ADR program is to submit a claim. Either party will enter the system once the artist, his representative, or the label manager assigned to the artist files a claim with the UMG ADR Department.²²

Mandatory Mediation

Once the ADR Department receives the claim, it will notify the parties that a filing was received. From there, the department will assign one of the full-time mediators employed by the ADR Department. In the Mandatory Mediation stage, the primary focus is to get to the bottom of the issue as quickly as possible, and that can be achieved both quickly and with the least amount of expense by utilizing in-house mediators. These mediators will know the inside workings of the industry and are best equipped to resolve disputes on short notice.²³ However, there is always the important question of neutrality, i.e. whether mediators employed by the company really are “neutral” in practice. This is accounted for in two ways in the proposed system. First, a percentage of the mediators’ income will be variable and depend upon the responses to the exit surveys that are filled out by the artist and the label upon finishing the Mandatory Mediation stage. Second, if an artist feels that bias has entered this initial mediation, the artist should not reach an agreement at this stage and instead proceed to either the Optional Mediation or the Arbitration Stages, discussed below. Once a case is assigned to the in-house mediator, the mediator will then contact the parties and work with them to settle on a date and time for the mediation to begin.

Exit Survey: Mandatory Mediation²⁴

²¹ See Appendix C

²² For the purposes of this paper, I will not attempt to describe the point at which the filing of a claim is appropriate. Certainly there must be some mechanism for avoided frivolous claims that arise from the filing party failing to bargain in good faith with other party to begin with.

²³ Stitt, Alan J., “Alternative Dispute Resolutions for Organizations,” pg. 78.

²⁴ See Appendix D.

Upon completion of the Mandatory Mediation, the parties will fill out an exit survey that is designed to record the experience of the parties within the system (using objective criteria) and to gain insight into how the system might be improved (utilizing subjective criteria). The results of these surveys are sent back to the ADR Department for recommendations in improving the system.

Decision Point

If the parties are unsuccessful in reaching an agreement during the Mandatory Mediation phase, then the parties must come to a decision as to whether they wish to enter an additional Optional Mediation²⁵ or continue straight to an Arbitration. This flexibility allows the parties to have one more chance to resolve the creative control issue in an interest-based environment or a more rigid binding Arbitration. After a reasonable amount of time upon the conclusion of the Mandatory Mediation, the parties must agree on which avenue to pursue moving forward.

Optional Mediation

The optional Mediation route is intended as a “last chance” for parties to come to reach an agreement. At this particular mediation, the parties agree on an outside independent mediator through the American Arbitration Association (AAA) to undertake the mediation, with the music group shouldering the cost.²⁶ The Optional Mediation is designed to spur resolution between the parties because failure to reach an agreement at this stage will trigger mandatory Arbitration. To ensure that the artist is not abusing the system and refusing to reach an agreement unless it is most beneficial to her, the artist will be responsible for a reasonable amount (perhaps 10%) of the cost of Arbitration, which will inevitably follow if the parties do not come to an agreement at the Optional Mediation phase.

²⁶ Considering the vast extent of capital that labels have compared to the typical signed artist, it is most equitable to have the optional mediation sponsored by the label.

Exit Survey: Optional Mediation

The survey following the Optional Mediation will have less of a focus on the neutrality of the mediator, and more of a focus on other substantive portions of the Optional Mediation.

Arbitration

The parties reach the Arbitration phase by either electing it immediately following the failure to reach an agreement in Mandatory Mediation, or by triggering it automatically if the parties fail to reach an agreement following Optional Mediation. As noted earlier, the artist will have to cover a small but reasonable percentage of the Arbitration costs, with the label covering the remainder. The parties will agree upon a neutral arbitrator listed by the AAA.

Exit Survey: Arbitration

Following a decision rendered by the arbitrator, the parties will once again fill out another exit survey. This survey will focus not only on the Arbitration itself, but suggestions on how to smooth the process of parties traveling from Mandatory Mediation to the Arbitration portion of the process.

Ethical Issues Identified

Of the numerous ethical considerations that can be associated with this system and any other system, I will focus particularly on the aspect of due process within the ADR system. Upon the implementation of the system, the ADR Design Moderators take on the responsibility of managing the system to make it fair and equitable to both the artist and the label. While the Design Moderators are comprised of both artists and label management, it does not propose representatives from any other stakeholder group.

There are two reasons for this particular arrangement. First, since the music group that owns the label also owns a majority of the distribution channels leading to retailers and music consumers, it would seem redundant to include those stakeholders in the ongoing design changes in the ADR system. Second, as for the due

process of other stakeholders such as end-consumers, music retailers/broadcasters, artist agents, and lawyers for the artist or label, there seems not to be as close of a relation between creative control contract disputes and these secondary parties (see Note 8). However, there are instances where such entities would reasonably have a stake in how disputes are resolved between an artist and a label. For instance, iTunes may need to know of any pending disputes that could delay the launch of an album. In order to get a better look at this issue and how it can be handled, UMG management and the ADR Department would be best served by seeking out popular retailers, informing them of their dispute resolution policy, and inviting any recommendations that they might have.

Appendix A: Initial Consultation with General Counsel²⁷

GC: I'm contacting you because the CEO really needs us to cut down litigation costs, and I'm telling him that we're doing all that we can in the Legal Department. We're hiring great outside counsel but not overly expensive ones, and we are always inviting the artists to settle at any point after an issue arises, even during litigation. I'm out of ideas, and the only other thing I can think of is to implement ADR to save costs, but I have no idea how that could be done.

Me: Well, you came to the right guy. How much money would you be willing to spend?

GC: As long as the process saves money over the current litigation spending once some form of ADR program is established, then I'd say that is a good starting point for me.

Me: Ok, that sounds fair enough. Then in that case, I'll need you to forward me a document outlining the litigation expenses spanning the last five to ten years. In the meantime, I would recommend that you implement an ADR system in-house for you to manage any disputes that arise between artists and UMG-owned labels.

GC: Do you mean to say that you're recommending that we do this all in-house? I don't have the golden key to the corporation's bank accounts, for cryin' out loud.

²⁷ Appendix A elaborates on the hypothetical scenario that appears at the beginning of this paper, and describes a hypothetical dialogue between the General Counsel (GC) of UMG and myself concerning supposed issues that UMG is experiencing and my initial recommendations.

Me: I understand that it will definitely require a significant cost up front, but there will be numerous benefits, both tangible and intangible.

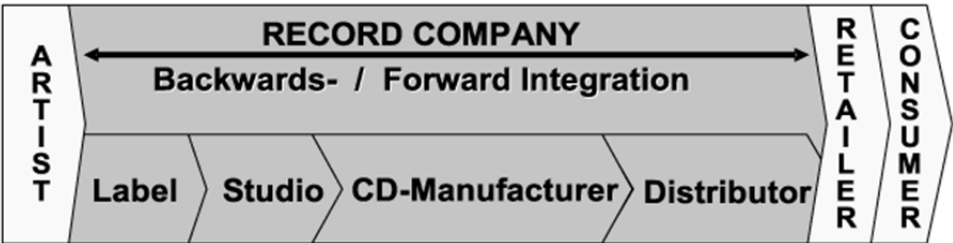
GC: How do you mean?

Me: First, you will have savings of cash that you would normally spend on litigation. ADR is almost always far less expensive than litigation. Second, you could drastically improve the image of UMG and its record labels as a whole if you implement a system that can easily and effectively resolve disputes between the labels and the artists, while giving the artists peace of mind that their voices will be heard in disputes over creative control.

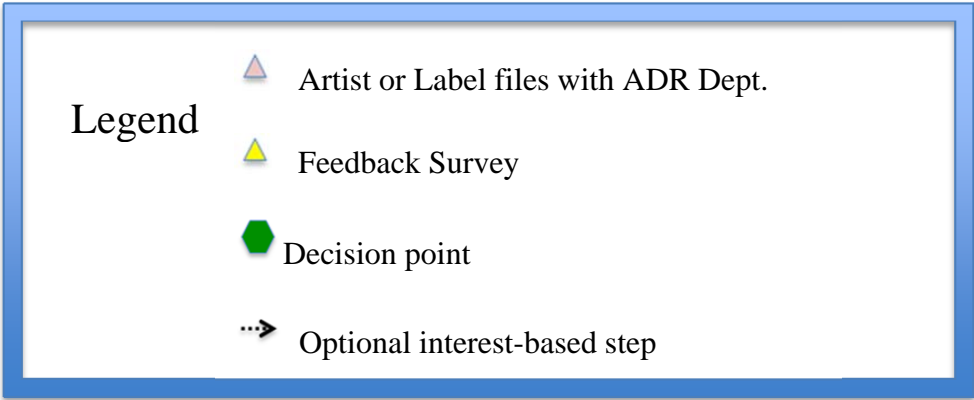
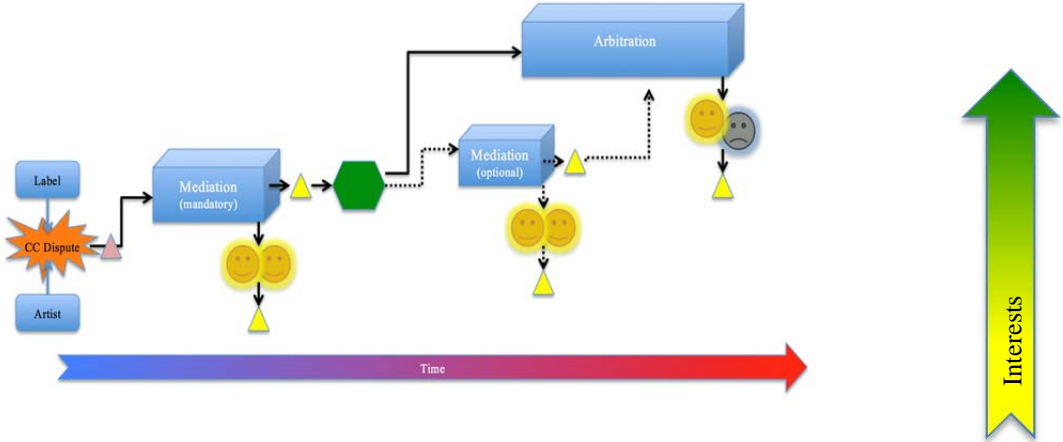
GC: And you're telling me that these artists won't think that this is some sort of ploy by UMG to appear all honest to outsiders but actually retain the same "manipulative" practices?

Me: There are several ways that you can ensure artists that bias is excluded. First, you can incorporate the use of independent, third-party mediators or arbitrators to conduct the ADR. In addition, you can utilize surveys in the system that will allow both the label and the artist to give their opinions on how best to modify the system.

Appendix B



Appendix C



Appendix D: Exit Survey: Mandatory Mediation:

1. Rate the level of neutrality of your mediator on a scale of one to ten, one being least neutral.

1 2 3 4 5 6 7 8 9 10

Additional comments?

2. Did the other party display due diligence in trying to reach an agreement before a claim was filed with the ADR Department?

Yes No

Explain.

3. Was the other part reasonable during the mediation? What do you think could be done or changed to make both parties more open to reaching an agreement?

4. Are there any administrative concerns that you think should be altered in the scheduling of the Mandatory Mediation?

5. All things considered, on a scale of one to ten, one being “not well at all,” how well did your mediator facilitate an agreement, if an agreement was made?

1 2 3 4 5 6 7 8 9 10

N/A

Additional comments?
