MPT 1 - Sample Answer # 1

BRIEF IN SUPPORT OF DEFENDANT FRANKLIN FLAGS AMUSEMENT PARK'S MOTION FOR SUMMARY JUDGMENT

Legal Argument

I. Because Franklin Flags Amusement Park adequately provided supervision and safety personnel beyond the duty required by law, the Defendant is not liable to the Plaintiff for her unpredictable reaction inside the Haunted House and is entitled to summary judgment on her claim for damages for her broken nose

The first issue in considering Vera Monroe ("Plaintiff") and her negligence claim against Franklin Flags Amusement Park ("Park") is to determine what duty Park owed and whether there was a breach of that duty. In Franklin, the duty is to act reasonably under the circumstances and not put others in a position of risk. Larson v. Franklin Hi Club,Inc. (distinguishing Dozer). The court will consider this as the first part of any tort analysis and ask the question of whether a defendant acted unreasonably under the circumstances relating to the plaintiff. Id. Further, in situations where a Defendant operates an event such as a theme park or haunted house, where individuals are expected to be startled or frightened, the operator does not have a duty to guard against the bizarre or unpredictable reactions of patrons. Id. Patrons at such establishments are considered *invitees* and the operator impliedly represents to those patrons that he has reasonably inspected and maintained the premises and equipment, and that the premises are safe for the purposes intended. Id. The court will grant summary judgment when there is not material issue of fact as to whether factors such as adequate provision of personnel and supervision are not disputed. **Id. (**In Larson, the court focused on the possibility of a *lack* of supervision in denying the defendant's motion for summary judgment).

Here, Park is entitled to summary judgment because there is not genuine issue of material fact as to whether the operator adequately satisfied the duty owed to invitees by providing adequate supervision and personnel. Unlike Larson, where the court focused on the lack of supervision and personnel provided at a haunted house, the Park has shown through discovery that there were adequate safety precautions in place. *Deposition of Mike Matson*. The owner hired individuals--who were a part of the haunted house--to supervise the safety of the attraction. *Id.* Similarly, the owner went beyond providing a reasonably safe environment for invitees such as the Plaintiff by providing a doctor on-site. *Id.* While there is no question that Park owed the Plaintiff a duty, the presence of personnel and a medical expert on the scene show that the operator's duty was adequately satisfied. A reasonable person in the Plaintiff's position would not have run into a wall when frightened by employee. Further, the facts show that the employee dressed as a zombie immediately asked the Plaintiff for assistance. *Deposition of Camille Brewster*. It was the Plaintiff's unpredictable reaction and immediate exit from the House that prevented the employee from providing adequate and immediate medical assistance. *Deposition of Camille Brewster* (noting that the Plaintiff immediately left the House). It is likely that the Plaintiff will contend that the personnel and safety precautions were inadequate, as the safety personnel were a part of the Haunted House and not readily identifiable. However, given the purpose of the haunted house and the employee's instructions to help patrons to

whatever extent might be necessary, the supervision and personnel were reasonable and adequate. Because the Park provided reasonable personnel for supervision, as well as the added precaution of an on-site physician, there is no genuine issue of fact as to whether Park satisfied it's duty under the law.

II. Because Franklin Flags Amusement Park did not fail to exercise reasonable care over any known and unreasonably dangerous conditions of the graveyard outside the Haunted House at the Park, the Defendant did not breach a duty to the Plaintiff causing her sprained ankle and is entitled to summary judgment on that issue

In analyzing the Plaintiff's negligence claim against Park, the second prong in the analysis is to consider whether there was a breach of duty that resulted in injury or loss. Larson. Franklin law provides that an owner or custodian of property is answerable for damage caused by dangerous conditions, provided that the unreasonably dangerous condition is known to the owner (or easily discoverable) and that the damage could have been prevented by an exercise of reasonable care. Parker. Furthermore, in situations involving amusement parks, the court will consider what the *plaintiff* knew about the condition of a premises from previous experiences to determine whether the owner could be liable for an injury. Costello v. Shadowland Amusements,Inc. Where a prudent person in the Plaintiff's same circumstances, using ordinary care, would not have incurred an injury on the premises, the court will not impose liability. Id.

In the case at hand, Park is not liable to the Plaintiff for her sprained ankle that she incurred after slipping in the graveyard. The owner of the Park has noted that while most of his theme park is paved, the graveyard area was left in its natural condition for realism. *Deposition of Mike Matson.* While the Plaintiff will likely argue that this natural condition was "unreasonably dangerous", the facts show that the Plaintiff was the only injury in the park that year. *Deposition of Camille Brewster*. Similar to the case in Parker, the Plaintiff was aware of the natural condition of the graveyard, the purpose of the park (to frighten and entertain customers), and the startling nature of the event. *Deposition of Vera Monroe.* The facts also indicate that the Plaintiff had been to the park on several occasions and was aware that it had been raining in Franklin for the previous three days. *Id.* Looking objectively at the Plaintiff's circumstances, a prudent person using ordinary care in exiting the graveyard would not have incurred a sprained ankle on the premises. The owner of the Park ensured that all known and unreasonably dangerous conditions were made safe for patrons and, similar to Parker, should not be held liable for injuries occur when the Plaintiff knew of the muddy terrain. There is no genuine issue of material fact as the Park's due care to protect patrons, and summary judgment should be granted for the Defendant on the Plaintiff's claim for a sprained ankle.

III. Because the Defendant provided adequate safety personnel and reasonably kept the premises safe from known dangerous conditions, the Defendant is entitled to summary judgment as to the Plaintiff's claims for damages for a broken wrist

In analyzing the Plaintiff's final claim for damages due to broken wrist, the issue is whether Park breached the duty of reasonable care and that breach caused the Plaintiff's injury. As

mentioned above, there is no question that Park owed the defendant a duty of reasonable care while on the Park premises. Larson, Dozer. Beyond the requirement of providing adequate safety personnel and reasonably keeping the premises free from known unreasonable dangers, the Franklin courts will consider the plaintiff's conduct and knowledge in determining causation and awarding damages. Larson. Where the defendant knows of the purpose and nature of an event such as a haunted house, the court will consider that knowledge and voluntary participation in analyzing tort claims. Id.

Here, there is no genuine issue as to whether the Plaintiff voluntarily encountered the scares at the Haunted House. The Plaintiff admitted in her deposition that she and her husband thought it would be a fun event on Halloween. *Deposition of Vera Monroe*. The Plaintiff's husband was amused by her shrieks in the haunted house and did not seem concerned by her fear. *Id.* Further, by the time the Plaintiff encountered the employee in the parking lot, she had experienced several frightening events in the park (the zombie and vampire). Id. While opposing counsel will likely note that the Plaintiff thought the scares were over, a prudent person in the Plaintiff's circumstances would not have reacted to the masked man at the park's exist in a manner similar to the Plaintiff. Further, the facts note that the operator instructed the employees--both the zombie in the House and the masked man at the exit--to offer assistance to any patron in need, while creating a fun atmosphere. *Deposition of Owner, Camille Brewster.* After the Plaintiff had already sustained injuries in the house and the graveyard, a reasonable prudent person in the Plaintiff's position would have known not to be frightened and to ask the employee for assistance. Thus, because the Park provided adequate safety personnel and made the premises safe from unreasonable, known dangers, the Defendant is entitled to summary judgment on the Plaintiff's claim for a broken wrist.

Conclusion

As there is no genuine issue of material fact, the Defendant is entitled to summary judgment as a matter of law on all of the Plaintiff's claims for relief.

MPT 1 - Sample Answer # 2

III. Legal Argument

A. The Court should grant the Defendant's Motion for Summary Judgment because there no is genuine issue of material fact and the party is entitled to judgment as a matter of law.

Under *Larson* (2002) a court should grant a Motion for Summary Judgment when there no is genuine issue of material fact and the party is entitled to judgment as a matter of law. A material fact is a fact that would influence the outcome of the controversy. Here the Defendant does not dispute the facts as alleged in the three depositions, so no issue of fact is need to be determined by the jury. Even so, with the facts as alleged, the Plaintiff does not succeed on the merits of either her negligence cause of actions. As a result the court should grant the Defendant's motion.

B. The defendant did not act unreasonably under the circumstances when the Plaintiff was frightened and injured herself by running into a wall in the last room of the Defendant's haunted house.

Under *Larson* (2002) a negligence action must consider (1) if there is a duty, (2) if so what is the duty on the particular defendant given the particular circumstances, (3) whether there was a breach of that duty, and whether the injury was within the scope of the protection extended. It should be noted that Assumption of the Risk is no longer a viable defense but instead is a factor to be considered to determine the plaintiff's comparative negligence.

In *Larson* the Plaintiff entered a local club's haunted house, and upon being startled in the attraction tripped over himself and broke his arm and dislocated his shoulder. There court placed a heavy emphasis on the fact that patrons that enter such an attraction are expected to be surprised, and the owners do not have a duty "to guard against patrons reacting in bizarre...or unpredictable ways." The patron must realize that they are "accepting the rules of the game" when they enter.

Here the Defendant had no duty to protect against the bizarre reaction of the Plaintiff. The employee stated that the Plaintiff's severe reaction was the only one of its kind that night. Turning and running full steam into a wall in an attraction known to be fake and for the very purpose of be scared, the reaction of the Plaintiff was beyond the duty imposed on the Defendant to prevent risk of harm.

This case can be contrasted to *Costello* where the Defendant placed a bench in the middle of a darkened room for which the Plaintiff was injured. In this case there was no unseen hazard in the room that might not have been expected but instead the Plaintiff ran directly into one of the room's walls. Obviously the walls should be expected to be there and do not present an unknown or unforeseeable hazard.

Furthermore, *Larson* looks to the adequate training and presence of staff members to indicate whether the areas was reasonably safe under an invitee status. Here the Defendant posting a staff member in every room, had a doctor on site, and the staffers were trained to contact the doctor if any medical need arose. In fact the staff member where the Plaintiff was hurt tried to aid following the stated policy, however, due to the

Plaintiff's bizarre reaction, she was unable to help.

C. As an invitee the Plaintiff was treated reasonably safe path in the graveyard free from unreasonably dangerous conditions.

Under *Parker* (2005) the custodian of a property is answerable for dangerous conditions but only upon the showing that the owner knew, and that could have been prevented had reasonable care been exercised. Factors to be considered are the past accident history and the degree to which the danger could have been observed by the potential victim. Furthermore the condition must constitute a danger that would be reasonably expected to cause injury to a prudent person.

In the case of *Parker* the Plaintiff entered into a corn maze which she knew was very rocky and posed a risk for tripping. She entered the maze and tripped over a said rock injuring herself. She was the only reported accident. The Court found that mere presence of rocks on the path did not impose liability. The Plaintiff was denied relief.

The *Parker* case is very similar to the case as it relates to the Plaintiffs slip and fall in the mock graveyard. Like *Parker* this was an outdoor venue for which patrons were led down an earthen path to a destination. Like *Parker* the path was not paved and could easily be seen as not being paved. In fact the path was purposefully not paved in the current case because a dirt path is more consistent with a real graveyard thus better simulating the experience according to Mr. Matson's deposition.

The graveyard path was muddy which resulted in the Plaintiff's fall. However, this is exactly what the Plaintiff should has expected on an outdoor dirt path. The Plaintiff in her own deposition recalled the weather leading up to Halloween as "really raining a lot, without letup for the previous three days." Just like the Plaintiff in *Parker* knowing of the obvious risk of rocks, the Plaintiff in this case knew of the rain, and thus knew the dirt path was subject to be muddy. Thus just as *Parker* stated "any reasonable person would not be surprised" to find the injurious condition. The Plaintiff here could not be surprised, and in fact should have expected the path to be muddy. Furthermore, no amount of reasonable care can make a dirt path dry after three full days of rain as was here in this case. Finally, even if the muddy conditions were not to be expected, there was ground lighting illuminating the path so the condition could be known by the Plaintiff.

Finally, there was no breach of a duty imposed on the Defendant under the particular circumstances in relation to no posting of staff by the Defendant in the graveyard. As Mr. Matson stated in his deposition no staff was assigned there because the graveyard was simply a pass through with no active park activity taking place in the area.

D. The Defendant acted reasonably under the particular circumstances at the end of the haunted house attraction where the Plaintiff fell and injured her wrist.

Under the *Larson* test as stated above, given the particular circumstances of the haunted house environment there was no breach of duty by the Defendant. Here the Defendant's worker, in costume, at the end of the attraction offered one more "scare" opportunity to its patrons. Given that this was at the end of a mock graveyard, this type of act may be reasonably expected by patrons. And again, the unforseen reaction by the Plaintiff, after

she accepted the "rules of the game" (*Larson*) the Defendant acted reasonably.

MPT 1 - Sample Answer # 3

DEFENDANT FRANKLIN FLAGS AMUSEMENT PARK'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

III. LEGAL ARGUMENT

Summary judgment is appropriate and must be granted where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. Larson. Here, the facts clearly show that Defendant Franklin Flags Amusement Park acted with reasonable care in conducting the haunted house attraction, keeping the premises reasonably safe, and adequately instructing its personnel. For the reasons set out below, this court should grant the defendant's motion for summary judgment.

A. Because the plaintiff was in a setting where she expected to be scared, the defendant's actions of scaring the plaintiff were reasonable under the circumstances.

Individuals have a duty to act reasonably under the circumstances and to avoid putting others at risk. Larson. The precise duty owed depends on the particular setting and circumstances. Id. The operator of an event that is expected to be surprising or startling does not act unreasonably by fulfilling those expectations. Id. For example, in Larson, the plaintiff was a patron at a "House of Horrors" designed to scare patrons. Id. The plaintiff voluntarily entered the warehouse, knowing that frightening exhibits were to be expected. Id. The Court reversed summary judgment in favor of the plaintiff, finding that the operator of the haunted house did not breach its duty to act reasonably. Id.

Larson is distinguishable from a situation where someone is not expecting to be scared. In that instance, it may not be reasonable to frighten someone. For example, in Dozer, the plaintiff was afraid of spiders, and the defendant knew of the plaintiff's particular fear. While the plaintiff was at work--a place where one does not normally expect to be frightened--the defendant placed spiders on the plaintiff's desk, which led to the plaintiff sustaining injuries. Id. Under those circumstances, the court found the defendant's conduct to be unreasonable. Id.

This case is much more similar to Larson than it is to Dozer. Like the plaintiff in Larson, Ms. Monroe was in a haunted house, a setting where she and the other patrons expected to be scared. Ms. Monroe even admitted in her deposition that she went into the Haunted House with the expectation of being scared. (Monroe Dep.) When Ms. Brewster, dressed as a zombie, frightened Ms. Monroe, Ms. Monroe had already walked through the entire haunted house and reached the last room. (Id.) At that point in time, she had already seen that the haunted house was spooky, and had already seen other people dressed in costumes designed to frighten her. (Id.) By the time Ms. Monroe reached the parking lot and encountered the staff member with the chainsaw, Ms. Monroe was even more aware that staff members dressed in costumes would be present. (Id.) In light of these facts, the defendant, acting through its staff members, did not act unreasonably under the circumstances. In this setting, a haunted house attraction on Halloween, the defendant's actions were reasonable. The defendant clearly did not breach its duty of care by frightening Ms. Monroe as she expected to be frightened.

B. The defendant satisfied its duty to protect the plaintiff from unreasonably dangerous conditions on the premises because any dangerous conditions were easily observable by patrons and a reasonably prudent person would have avoided being injured by them.

A landowner that opens its land to the public has a duty to protect patrons from unreasonably dangerous conditions on the land. Larson. If a property owner knows or should reasonably know of an unreasonably dangerous condition, the owner has a duty to exercise reasonable care to prevent injury or damage from that condition. Costello. In determining whether a condition is unreasonably dangerous, a court will consider the past accident history of the premises and whether the danger was observable by a reasonably prudent person. Id. In addition to being unreasonably dangerous, the condition must be reasonably expected to cause injury to a prudent person. Costello.

In Parker, the plaintiff visited a cornfield maze that she had visited at least twice before. Parker. The maze was very rocky, but the plaintiff was aware of that fact and even warned her friends that they should be careful because of the rocky terrain. Id. However, the plaintiff tripped on a rock and injured herself. Id. The court found that because the plaintiff was aware of the danger and a reasonably prudent person would not be surprised to find rocks on the path, the condition was not unreasonably dangerous and no liability was imposed on the defendant. Id.

Parker is distinguishable from Costello, where the plaintiff entered a dimly lit room with a bench placed in the center of it. Costello. When the plaintiff was startled, she stepped back and tripped over the bench, injuring herself. Id. The plaintiff was not aware of the placement of the bench, and the bench placement could not be observed because of the dim lighting. Id. Under those conditions, the court found that the defendant unreasonably placed the plaintiff at risk. Id.

This case is much more similar to Parker than it is to Costello. Ms. Monroe was injured by two conditions on the defendant's land--the wall in the haunted house and the muddy path in the graveyard--but neither condition was unreasonably dangerous because both were observable to a reasonably prudent person, and Ms. Monroe did in fact observe each condition. Although the room in which Ms. Monroe ran into the wall was dimly lit, the condition was not unreasonably dangerous. First, all rooms have walls. This is different from the bench placed in the middle of the room in Costello. Whereas a reasonably prudent person may not have been aware of the bench, a reasonably prudent person would have been aware of the wall in the room where Ms. Monroe was injured. In addition, the room where Ms. Monroe was injured, although dimly lit, had an illuminated exit sign showing where the wall was located. Ms. Monroe admitted that she saw the exit sign before she ran into the wall. (Monroe Dep.) Thus, it is clear that the placement of the wall and the dim lighting of the room did not create an unreasonably dangerous condition.

Likewise, the muddy path in the graveyard was not unreasonably dangerous. Ms. Monroe saw the muddy path before she slipped in the mud. (Monroe Dep.) She was also aware that it had been raining for the past several days. (Id.) Any reasonably prudent person would realize that rain would cause dirt to become slippery mud. This is similar to the rocks in Parker, where the plaintiff was aware of their existence, and the court found they were not unreasonably dangerous. Because any reasonably prudent person would be aware of

the conditions that led to Ms. Monroe's injuries, they were not unreasonably dangerous, and the defendant did not breach its duty to Ms. Monroe.

C. The defendant fulfilled its duty to provide adequate personnel and supervision for patrons by placing staff members throughout the amusement park and instructing those employees.

An operator of an amusement attraction has a duty to provide adequate personnel and supervision in order to protect patrons from unreasonably dangerous conditions. Larson. The defendant here clearly fulfilled that duty. Staff members were placed in each room of the Haunted House, as well as in the parking lot. (Matson Dep.) Each of these employees was instructed to offer to assist patrons, and to call the doctor, who was also stationed at the amusement park, in the case of an emergency. (Id.) Ms. Brewster, an employee of the defendant, tried to help Ms. Monroe after Ms. Monroe ran into the wall. (Brewster Dep.) Ms. Brewster was first aid certified, and she asked Ms. Monroe if she was okay. (Id.) Ms. Monroe did not respond and instead left the room. (Id.) The defendant's employees were adequately instructed and did all they could do to help the plaintiff. They are not to blame for the fact that Ms. Monroe did not accept their help.

The facts of this case make it clear that Defendant Franklin Flags Amusement Park is entitled to judgment as a matter of law. Franklin Flags did not breach any duty of care owed to the plaintiff. In light of the foregoing, the defendant respectfully asks that this court grant its motion for summary judgment against the plaintiff, Ms. Monroe.

Dated this the 30th day of July, 2013.

Respectfully Submitted,

/s/ Applicant

Applicant

Teasdale, Gottlieb & Lasparri, P.C.

MPT 2 - Sample Answer # 1

MEMORANDUM

TO: Levi Morris

FROM: Examinee

RE: Palindrome Recording Contract

This memorandum identifies contract provisions that need to be redrafted, redrafts those provisions, and includes explanations for each change. *Asterisks* are used to identify inserted or replaced text. Bracketed ellipses [. . .] are used to identify where language has been deleted.

1. Definitions

"Artist" or "you" shall mean *Palindrome Partnership* [. . .]

The artist definition was altered to properly identify the legal entity of Palindrome Partnership as the entity entering into the contract. This alteration was based on Smyth's interview and the Agreement Among Members of Palindrome provided by Smyth. Furthermore, the reference to individual members of the band was deleted in order to make it clear that the members are not liable to the contract as individuals but as members of the Palindrome Partnership.

There are no changes to the Album, Contract Period, or Master definitions.

3. Term and Delivery Obligations

3.01 - No Change

3.02 - No Change

3.03 The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon *two (2)* separate options, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill your Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period will not begin until the Recording Commitment in question has been fulfilled. *The total time of the Initial Contract Period and any additional Option Periods shall not exceed four (4) years.*

This provision was altered so that the contract is limited to a maximum of three albums (the initial contract period plus two potential option periods) and a maximum of four years. These changes were made based on the Smyth interview and the band's concern with being locked into one recording contract for too long of a time period. Furthermore, by limiting the time period in this manner, we ensure that the total contract period will be less than the statutory maximum. Franklin Labor Code § 2855(b) states that a contract for the production of audio merchandise shall not be enforceable beyond ten years form the commencement of first fixing sounds under the contract. Under the previous language,

Polyphon could have extended the options resulting in a contract period of more than ten years if an album was not produced timely.

4. Approvals

4.01 *Artist* shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and shall have the sole authority to assign one or more producers who shall collaborate with *Artist* on the production of each Master and each Album.

This contract provision was simply changed to give Palindrome Partners the sole decision making authority involving artistic direction. This authority is clearly an important issue of concern based on the interview with Smyth.

8. Merchandise, Marketing, and Other Rights

8.01 Artist warrants that it owns the federally registered trademark PALINDROME (Reg. No. 5,423,888) and hereby *grant a nonexclusive license* in that trademark to Polyphon. Polyphon may use the trademark on such products [. . .] it sees fit to produce. *All products, however, must use high quality materials, including the use of high-quality fabrics for all clothing merchandise. Twenty-five (25) percent of all the revenue derived from such product shall belong to Polyphon and seventy-five (75) percent shall belong to Artist. Artist expressly retains ownership of the trademark and the right to further license the use of the trademark to other entities.*

This provision was altered significantly. The first change was to make clear that the band was granting a nonexclusive license. Under the original wording, the band retained no interest in the trademark. Furthermore, the original language may have been construed by the courts as a "naked assignment in gross." See Panama Hats of Franklin. Such an assignment is where a trademark is transferred but no other assets of the business, such as the associated good will, are also transferred. A naked assignment in gross of a trademark is not valid. Therefore, the trademark is open for acquisition by a subsequent user of the trademark. Such a result is clearly contrary to the band's wishes and would be devastating for their business.

The second change was to require that high quality materials be used by Polypon in creating band merchandise. This has the effect of meeting the band's wishes for the quality of the merchandise associated with the band but also has important legal significance. A trademark holder has not only the right to control the quality of licensed goods, but also the duty to control quality. M&P Sportswear. Therefore, in the license agreement, the trademark holder must establish the standards of quality of the trademarked goods. Failure to due so results in uncontrolled licensing, and the failure to assure the public of any standard of quality can result in the loss of the right to the trademark. Therefore, it is imperative that the quality of the goods be stated in the licensing agreement.

Thirdly, this provision was altered to change language that originally granted all of the income from Polypon's use of the trademark to Polypon. The new provision meets the band's wishes identified by Smyth that the band should receive 75 percent of the revenue from Polypon's use of the trademark.

Finally, an additional sentence was added to make it clear that the band retained ownership of the trademark and could license its use to other entities.

8.02 Artist hereby authorizes Polyphon [. . .] to use Artist's, and each *partner* of Artist's, name, image, and likeness in connection with any marketing or promotional efforts and to use the Masters in conjunction with the advertising, promotion, or sale of any goods or services. *All such marketing and promotional efforts by Polyphon must receive prior approval from Artist and Artist retains the right to veto any proposal for marketing and promotion.*

This provision was altered to limit Polyphon's use of the band's name and image by requiring prior approval from the band. I decided to leave the contract language broad and not specifically mention the band's concern regarding alcoholic beverages in order to allow such advertising to occur in the future if the band changes its mind.

MPT 2 - Sample Answer # 2

To: Levi Morris

From: Examinee

Re: Palindrome Recording Contract

Below I have identified the portions of Palindrome's recording contract with Polyphon that need to be redrafted so that they can better meet the band's wishes and comply with the law. According to the band, its most important goals are: 1) to make sure they can leave the label if they want to; 2) to keep control of all artistic decisions; 3) to have final approval of the band's marketing and promotional material--particularly to prevent the band's name from being used to advertise alcohol; and 4) to keep control over their merchandise and trademark. My changes from the original contractual language are indicated in bold.

I. Term and Delivery Obligations

1. Contract Period: 3.03: The initial Contract Period will begin on the date of this Agreement and will run for one year. You hereby grant Polyphon **two (2) separate options**, each to extend the term of this Agreement for one additional Contract Period of one year per option ("Option Period"). In the event that you do not fulfill you Recording Commitment for the initial Contract Period or any Option Period, that period will continue to run and the next Option Period shall not begin until the Recording Commitment in question has been fulfilled, **with the exception that the total time of the initial Contract Period and any Option Period shall not exceed four (4) years from the date of the this Agreement.**

Since Otto indicated that the band would not want to be locked into a contract with Polyphon for more than three albums or four years, I changed Polyphon's number of options from eight to two. The contract period and each option will run one year each, so that is a total of three years. Additionally, the band is required per the current contract to produce one album per contract period, so the total number of albums the band would produce for Polyphon would be three. I also placed an outer limit of four years on the extension time of the contract, which provides that the contract and option periods may extend if the band fails to produce an album in the year time frame. This way, the most the band could be bound to Polyphon is four years.

Franklin's Personal Services Contracts statute does not help us on this matter. Section 2855(a) provides that no contract to render personal services may be enforced against the person contracting to render the services may be enforced beyond five years, which is one year longer than Otto expressed a desire to be bound. Additionally, § 2855(b) provides that contracts to render personal services in the production of phonorecords may not be enforced beyond the person contracting to render the services may not be enforced beyond ten years. The band's services appear to fall under the definition of "phonorecord:" " all forms of audio-only reproduction, now or hereafter known, manufactured, and distributed for home use." That means that the way the contract is now written, the band could be bound for as many as ten years--the initial year contract, the eight years of options, and any extension of the contract for not producing the required albums on time. Therefore, I have changed the language above.

II. Approvals

1. Artistic Discretion: **Artist** shall, in its sole discretion, make the final determination of the Masters to be included in each Album, and have the sole authority to **selec**t one or more producers to who shall collaborate with **Artist** on the production of each Master and each Album.

Since Otto indicated the band wants to make all artistic decisions relating to song selection and producers, I have changed the language to give the discretion to the band instead of Polyphon.

III. Merchandise, Marketing, and Other Rights

1. Trademark Clause: 8.01 Artist warrants that it owns the federally registered trademark PALINDROME and hereby **grants Polyphon a limited license to use the trademark. This license entitles Polyphon the right to manufacture and sell T-shirts and other merchandise using the trademark. The merchandise Polyphon manufactures must meet the standards of quality of the trademarked goods established by Artist. Artist retains the right of final approval on all merchandise items Polyphon manufactures Polyphon using the trademark. Artist retains the right to terminate the license if the quality control conditions are not met. In exchange for the license, Artist is entitled to three-quarters of the revenue from the merchandise manufactured and sold using the trademark.**

In order to comply with the band's desire to keep ownership of the trademark and to comply with trademark law, I have changed the right granted to Polyphon from a flat-out title transfer to a license. In *Panama Hats of Franklin, Inc. v. Elson Enterprises, LLC*, the District Court of Franklin stated that a "naked" assignment of a trademark is not valid and may also cause the assignor of the trademark to lose all rights in the trademark. The court explained that a trademark is an assurance to the customer of the goods and thus cannot be divorced from the goods themselves--it must be transferred along with other assets of a business or at least the business's goodwill. In *Panama Hats*, the contract only transferred Allied Hat Co's trademark in a certain name for a hat with no other assets of the business. The court found that this assignment was invalid. Since the current contract only purports to transfer the title to the band's trademark and none of the partnership's other assets, the result would probably be similar. Since the band wants to keep ownership of the trademark, I did not redraft the clause to include a transfer of assets to validate assignment of the trademark; instead I gave Polyphon a limited license to use the trademark for specified purposes. It is especially important this provision not be left as in because it might cause the band to lose all the rights in the trademark and allow the first subsequent user of the trademark to acquire rights in it.

I also included a quality control provision both to meet the band's goal of continuing to assure the band's name is only on quality products and to comply with applicable law. The District Court of Franklin made it clear in *M&P Sportswear, Inc. v. Tops Clothing Co.* that a license to use a trademark without any specific provisions for quality control may cause a trademark owner to lose all rights in the trademark because a trademark is an indication of the source of the goods that will cause the public to expect a certain quality. If the

trademark owner fails to take steps to ensure quality by putting a quality control provision in the trademark licensing agreement, the trademark might be considered "abandoned" if the quality of the goods bearing it declines and causes the mark to lose its significance. *M&P Sportswear*. Therefore, this contractual provision needs to be changed to include a quality control provision as I have done above so that the band will not lose its rights in the trademark and will able to keep its ownership interest as it wishes.

To meet the band's goal of retaining most of the revenue of the merchandise produced with its trademark, I included the three-quarter percentage of revenue from the merchandise as the licensing fee. Otto indicated that the band would be willing give Polyphon a quarter of the revenue on the items they produce and sell, so this provision accomplishes that while also serving as the price for the license.

2. Marketing Clause: 8.02 Artist hereby authorizes Polyphon to use Artist's, and each member of Artist's, name, image, and likeness in connection with marketing or promotional efforts and to use Masters in conjunction with the advertising, promotion, or sale of any goods or services, **subject to Artist's final approval.**

Since Otto indicated that the band wants to be able to control how it is portrayed in advertisements and other marketing, I changed this clause to make all marketing decisions subject to the band's final approval. This way, the band can veto any marketing decisions it finds unsavory, such as those relating to alcohol sales.