

THE SOUND OF MUSIC: LEGAL ISSUES WITH MUSIC FESTIVALS

Presented by the
American Bar Association
Solo, Small Firm and General Practice Division,
Young Lawyers Division,
Forum Committee on Entertainment and Sports Industries,
Section of Intellectual Property Law and
Center for Professional Development



American Bar Association
Center for Professional Development
321 North Clark Street, Suite 1900
Chicago, IL 60654-7598
www.americanbar.org
800.285.2221



CDs, DVDs, ONLINE COURSES, DOWNLOADS, and COURSE MATERIALS

ABA self-study products are offered in a variety of formats.

Find our full range of options at www.ShopABA.org

Submit a Question

Visit https://americanbar.qualtrics.com/SE/?SID=SV_2uB91twXeymw6FL&pCode=CE1605LGP to submit a question on the content of this course to program faculty. We'll route your question to a faculty member or qualified commentator in 2 business days.

The materials contained herein represent the opinions of the authors and editors and should not be construed to be the action of the American Bar Association Solo, Small Firm and General Practice Division, Young Lawyers Division, Forum Committee on Entertainment and Sports Industries, Section of Intellectual Property Law or Center for Professional Development unless adopted pursuant to the bylaws of the Association.

Nothing contained in this book is to be considered as the rendering of legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel. This book and any forms and agreements herein are intended for educational and informational purposes only.

© 2016 American Bar Association. All rights reserved.

This publication accompanies the audio program entitled "The Sound of Music: Legal Issues With Music Festivals" broadcast on May 10, 2016 (event code: CE1605LGP).

The Sound of Music: Legal Issues with Music Festivals

www.americanbar.org | www.abacle.org



Introduction

- Artist Agreements
- Ticketing
- Content Capture
- Event Sponsorship
- Brand Management

www.americanbar.org | www.abacle.org



Artist Agreements: Introduction

- Radius Clause
- Cancellation Provisions
- Rights Acquisition
- Festival as “Tax Man”

Artist Agreements: Radius Clauses

- Artists and Festivals (Promoters) Use Radius Clauses to Balance Their Respective Interests:
 - Performances in close proximity may affect ticket sales at each venue.
 - Performances at different size venues within a region may affect ticket sales.
 - Festivals may compromise on the radius, particularly for a popular Artist, but will consult with Artist’s management on concert announcement and ticket sale date strategies.
 - Varies by Festival:
 - Summerfest – 100 miles, 45 days prior and 30 days after performance date.
 - Bonnaroo* – 300 miles, 60 days before and after performance date.
 - Lollapalooza* – 300 miles, 6 months before and 3 months after performance date.
- (* based on media reports)

Artist Agreements: Cancellation Provisions

- Artist Cancellation
 - **Bruce Springsteen:** As you, my fans, know I'm scheduled to play in Greensboro, North Carolina this Sunday. As we also know, North Carolina has just passed HB2, which the media are referring to as the "bathroom" law. HB2 — known officially as the Public Facilities Privacy and Security Act — dictates which bathrooms transgender people are permitted to use. Just as important, the law also attacks the rights of LGBT citizens to sue when their human rights are violated in the workplace. No other group of North Carolinians faces such a burden.
 - Breach of contract w/ promoter? Tickets were refunded
- Event Cancellation
 - **Force Majeure:** Neither party shall be liable for any failure or delay in performance under this Agreement, to the extent such failures or delays are due to causes beyond that party's reasonable control and occurring without its fault or negligence, including, without limitation, acts of God, weather, earthquakes, hurricanes, floods, disease or other natural disasters, wars, riots, insurrections and/or any other cause beyond the reasonable control of the party whose performance is affected.
 - % of payment owed to Artist if cancellation greater than or less than 45 days from Event
 - May consider increasing the days to 60 or decreasing to 30 depending on the performer
 - Consider what insurance coverage makes sense for weather or other cancellations

Artist Agreements: Rights to Acquire

- Promotion of Event
 - Identity
 - Preexisting Works (Recordings, Videos, etc.)
 - Projection at Venue
 - Use to Promote Future Events
- Transmission or Recording of Performance
- Sponsor Congruity

Artist Agreements: Festival as “Tax Man”

- **Federal**

- The IRS treats a promoter or venue, who pays the artists as a “withholding agent” (I.R.C. § 1446).
- Foreign performers are subject to U.S. tax on their U.S. income.
- If there is no tax treaty between the artist’s country of residence and the U.S., the venue/promoter should withhold 30% on payments made to the artist.

- If artists wish to avoid the 30% withholding, they should negotiate a “central withholding agreement” directly with the IRS and provide proof to festival.
- As a withholding agent, you are liable for any tax required to be withheld from the payment to the artist.
- Foreign performers, or entities receiving payment, should provide you with a Form W-8BEN-E.
- See IRS Publication 515 for more information. <https://www.irs.gov/pub/irs-pdf/p515.pdf>

- **State**

- Many states have a non-resident entertainers tax.
- For example, in Wisconsin all non-resident entertainers are subject to this tax.
- The festival withholds 6% of the payments made to artists.

Ticketing: Introduction

- **What Is a Ticket?**

Generally considered a license to enter a venue at a specific time on a specific date and sit in a specific seat or remain in a specific area to view what is presented at that time, subject to the terms and conditions and policies of the venue.

- **No Guarantee of Subjective Satisfaction**
- **Transferability**
- **Is A Ticket Ever A Contract?**

Ticketing: Agreements with Purchasers

- Terms of Purchase - may appear on the back of ticket or as a click-through
 - Refund, transfer & other applicable policies (eg, weapons policy)
 - Allowed activities (eg, code of conduct, recording)
 - Event may photograph attendees and use images in marketing materials
 - Assumption of Risk
 - Disclaimer of warranties
 - Standard boilerplate provisions: Indemnification, Choice of Law
- Consult the e-Sign Act if relying on electronic agreements

Tickets: Intersection with Artist Agreements

- Reserve Seating Venues
 - Offers to artists will include a reference to seating areas and proposed scaling of tickets.
 - Disclose any special seating arrangements, such as seat licenses, or VIP areas. Artists are interested in the potential seats, and the ticket price and rarely question the amount the festival may receive for seat licenses.
 - Artist's proposed stage plot may affect seating, so any seat license agreements should indicate the possibility of relocation.
 - In the past few years, artist related pre-sales, sometimes sponsored by credit card companies, have become more prevalent. These usually involve prime seating locations, or in some cases, removal of seats and creation of a pit.
 - Artists will also request "holds" on seats to accommodate family and friends. Be aware of this possibility when offering seat licenses, or season tickets.
- General Admission Events
 - Disclose VIP seating and indicate if areas require a special ticket or are sponsored.
 - Some artists object to so-called "poser decks" on side stages, and agreements related to those viewing areas should reflect that possibility.

Tickets: RFID & Data Collection

- What is RFID? Radio-frequency identification
- A tag embedded in a wristband or badge & can be scanned by hand-held devices or other detectors
- Can be used to identify activities of attendees
- Can also be used by attendees to access venues, purchase goods, or participate in special promotions/giveaways
- What might govern how data can be used?
 - Event's privacy policy
 - Ticket purchase terms & conditions
 - RFID-specific policy

Content Capture: Introduction

- Proceeds From Performances
 - Sound Recordings
 - Video Recordings
 - Live Streaming or Broadcasting
 - On-Demand Streaming
 - Photographs

Content Capture: Introduction

- Implicated Parties
 - Artists
 - Music Publishers
 - Record Companies
 - Audience
 - Sponsors

Content Capture: Introduction

- Implicated Rights
 - Copyright
 - Musical Compositions
 - Pre-existing Content Incorporated In Audio Track or Visual Frame (Sound Recordings, Videos, Photographs, Visual Art, etc.)
 - Trademarks
 - Identity Rights

Rights Matrix

<u>Proceeds from Performance</u>	<u>Parties</u>	<u>Rights</u>
Sound Recordings	Performer, Record Label, Publisher, Producer	Performer Identity and Copyright Contribution, Record Company Exclusivity, Publisher Copyright
Video Recordings	Performer, Record Label, Publisher, Producer	Performer Identity and Copyright Contribution, Record Company Exclusivity, Publisher Copyright
Live-Streaming or Broadcasting	Performer, Publisher, Producer	Performer Identity and Copyright Contribution, Publisher Copyright
On Demand Streaming	Performer, Record Label, Publisher, Producer	Performer Identity and Copyright Contribution, Record Company Exclusivity, Publisher Copyright
Photographs	Performer, Photographer	Performer Identity

Content Capture: Streaming

- Include language in the artist agreement to allow for streaming
- Make sure the proper rights holders are signatories to the agreement and/or that the signatory has the signing authority on behalf of the rights holder
- Identify where the performance will be streamed (audio and/or audio-visual) - website?

Content Capture: Video on Demand / Archival Use

- Clarify the term of the VOD in any artist agreements
- Pay attention to all relevant rights holders because VOD is different than streaming - greater exposure
- Make sure that there is an up to date Copyright Agent listed on the platforms where the content is posted to comply with safe harbor / notice & takedown requirements

Content Capture: Photos

- Ask performers and attendees to allow the festival to use photographs from the event in all media & for commercial purposes
- Signage can be posted providing notice that certain locations will be filmed
 - Note: effectiveness of notice depends on whether the end usage will be commercial:
 - Greenstein v. The Greif Company, 2009 WL 117368 (non-commercial use OK)
 - Bosley v. Wildwett.com, 310 F.Supp.2d 914 (N.D. Ohio 2004) (commercial use not OK)

Content Capture: Handheld Devices

- General Admission Festival
- Most general admission festivals will permit handheld devices, but professional equipment is usually not permitted, unless the user has been pre-approved by the event or the artists.
- The continuing evolution of smartphones and social media apps present new challenges, but also benefits to festivals.
 - Facebook, Instagram, Snapchat, Twitter and Vine are all used to record musical performances.
 - Periscope lets you broadcast live video instantly and includes a replay feature.
 - Artist attitudes differ on the use of smartphones to record performances. Some encourage it, while others have concerns that the poor quality of some devices will have a negative affect.
 - Smartphones apps do assist festival patrons with stage lineups, and food and merchandise locations which benefit the promoters.

Content Capture: Handheld Devices

- Reserved Seating and VIP Areas
 - Patrons in these areas will be notified in advance, that recording audio and video is not permitted. Video screens will repeat the message throughout the performance.

Event Sponsorship: Considerations

Activation: What Brands Should Think About Beyond Benefits of Sponsor Package

- Social Media
- Special Content
- Brand Congruity (artist sponsors, sponsors of use of performance proceeds)
- Contests/Sweepstakes
- On-Site Activities
 - Product Trial
 - Hospitality
 - Recording of Event Activities and Use of Recordings

Event Sponsorship: Topics

- **Category Exclusivity**
 - Develop internal policies to establish levels of sponsorship and corresponding benefits.
 - Include detailed definitions of exclusive categories to avoid uncertainty.
 - For example if Sponsor A produces multiple products in related, but distinct product categories, be specific when describing the scope of exclusivity.
 - With regard to exclusivity related to digital or technology products, avoid clauses such as, “now existing or developed in the future”.
 - Consider the effect of category exclusivity when pursuing potential future sponsors.
- **Brand Alignment**
 - Sponsors may request their brand identity to be represented in festival advertising and promotions.

Event Sponsorship: Topics

- Specify the scope, such as general awareness ads, or ads related to the area they sponsor, etc.
- Define the extent of the alignment. Is it across all media platforms or limited?
- **Product Sampling**
 - Limit the size, number of samples, and time of day when sampling may occur, particularly with beverage and food samples.
 - Be aware of state and local law related to free samples of alcoholic beverages and food.
- **Non-Profit Festival Organizations**
 - Sponsor signage or other presence at the event, should be in the form of an acknowledgment, rather than advertising. Sponsor's name and logo are fine, but promotion of their products; a "call to action" to purchase their products; or comparative or qualitative depiction of their products, could result in a portion of the sponsorship donation be treated as unrelated business income, and subject to tax.

Brand Management: Introduction

- Brand protection
- Ambush Marketing
- Bootlegging

Brand Management: TM Registration & Licensing

- Federal Trademark Registration
 - Use in Interstate Commerce
 - ITU for more local festivals that hope to expand
 - Broad applications to include food, merchandise, and other categories of goods/services
- Trademark Licensing
 - Bring competitors into the fold through TM licensing
 - Include quality control provisions to prevent naked licensing
 - Docket expiration dates for TM licenses

Brand Management: Ambush Marketing

- How to Track Ambush Marketers?
 - Tracking social media activity & account names (Twitter, Craigslist, Facebook)
 - Google Alerts
 - Create a submission email that event & friends of the event can use
 - Note potential clients that declined participation - they may go guerilla
- How to Police Ambush Marketers?
 - Create a hierarchy for types of unauthorized marketing that is the most actionable
 - Creates conflicts with event sponsors
 - Deceives artists into paying the guerilla marketer to perform
 - Dilutes the TM
 - Cease & Desist Letters: Be careful b/c a letter can go viral!
- Reservation of rights: consider sending a closure letter to preserve rights even if the marketer refuses to comply with your requests

Brand Management: Bootlegging

- Merchandise

- Sales of artist and festival related merchandise are a significant source of revenue for both parties.
- Festivals usually receive a percentage of artist's merchandise sales.
- Festival and artist have a shared interest to prevent sales of T-shirts or other wearables near the festival venue.
- The most frequently used tool to prevent unauthorized sales, is filing so-called "Jane and John Doe" complaints in federal court, seeking a restraining order and injunction to stop illegal and unauthorized vendors from selling unlicensed merchandise near festivals or concert venues.
- Most recently country artist Eric Church used this tactic. Others who have filed similar actions include:
 - Billy Joel, Rolling Stones, Living Colour, Guns N' Roses, Faith No More, and Metallica.
- Unauthorized sales usually take place near the festival, so at Summerfest, we use our security bicycle patrols to monitor activity in the neighborhood surrounding the venue. Local police assist by monitoring whether street-vendors have proper city licenses.

www.americanbar.org | www.abacle.org



Thank You!

For any additional questions, please do not hesitate to contact us directly:

Thomas R. Leavens tleavens@lsglegal.com

Heather R. Liberman - heather@sxsw.com

Frank Nicotera - fnicotera@summerfest.com

www.americanbar.org | www.abacle.org

