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Fee Alternatives

Structuring Artist Concert Deals

By Andrew Darrow

THERE IS NO universal rule regarding the structure of concert deals, but there are five basic types that are standard in the concert-promotion industry. Artists may be paid a "flat guarantee," on a "door" basis, on a "national producer" basis, on a "percentage-of-gross" basis or on an "85/15" or "90/10" basis. The type of deal selected may vary according to the venue — nightclubs may not pay a performer on the same basis as an arena. Furthermore, the clout of the artist — his or her potential audience size or sellout ability — will also influence the payment structure. Well-known artists are usually able to dictate their basis of payment.

The simplest of these payment structures is the flat basis, in which the artist earns a pre-negotiated sum irrespective of the show's gross potential. This method is often used when a musical artist is performing at a non-traditional venue or a special event. In such cases, the promoter of the event pays the artist a flat fee that is substantially higher than the artist's standard guaranteed fee because a gross potential is impossible or unnecessary to calculate.

For example, the artist may be performing at a promotional concert in which there is no charge to the attending audience. The flat guarantee is also used as the contracting method for opening acts and support talent.

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Getting the Jump

How Talent Representatives Can Fight Client Flight

By Edwin F. McPherson

THE ENTERTAINMENT and sports industries spawn two types of representatives, whether they be agents, personal managers, business managers or lawyers: the ones that are already representing clients and the ones that *want to be* representing the formers' clients. In addition, particularly in entertainment and sports, there are many representatives who consistently refer and cross-refer business to each other. For instance, a personal manager might share numerous clients with a particular music lawyer.

A manager, upon first being retained by a new client, might do some "house cleaning" and fire the existing lawyer (or agent, business manager, publicist or promoter) and assemble his or her usual "team." Irrespective of whether this is good or bad for the artist, the house cleaning or "team" approach is *never* good for the replaced representative. The question, then, is: What can an artist's representative terminated without cause do? Under certain circumstances, the aggrieved former representative may sue for tortious interference with contract and/or tortious interference with economic advantage.

Interference with contract is really a species of the broader tort of interference with prospective economic advantage. The only material difference between the two causes of action is the existence of an actual agreement between two or more parties. In an economic advantage situation, the relationship has not risen to the level of a contractual one.

In order to establish a claim for tortious interference with contract, one must plead and prove:

- a valid and existing contract between the complainant and some third party;
- knowledge by the interfering party of the existence of that contract;
- intentional or negligent acts by the interfering party designed to induce the third party to breach its contractual relationship with the complainant;
- actual breach or disruption of the contractual relationship; and
- damages proximately caused by the interfering party's acts.

The proof requirements with respect to a claim for tortious interference with prospective economic advantage are similar:

- an economic relationship between the complainant and some third person containing

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the probability of future economic benefit to the complainant;

- knowledge by the interfering party of the existence of the relationship;
- intentional or negligent acts by the interfering party designed to cause the third party to disrupt the relationship with the complainant;
- actual disruption of the relationship; and
- damages proximately caused by the interfering party's acts.

Even with respect to tortious interference with economic advantage, there must be an *actual* relationship. In other words, a would-be agent cannot legitimately claim that he was *about to* approach an artist about representation and that the potential defendant interfered with this *attempt*, but the would-be agent can claim that he was having discussions or negotiations with the artist, which had not yet resulted in a contract, and that the interfering party disrupted that relationship.

Clearly, in cases in which one of the artist's representatives or a family member or a new representative precipitates the termination of an existing agreement, the elements of tortious interference are all there. The interfering party generally knows of this agreement; the intent underlying the conduct of that party is not usually difficult to ascertain; the disruption of the relationship is similarly easy to demonstrate; and the damages are obvious — add up the client's gross income and factor in the complainant's percentage and/or fee.

However, to be actionable in California, in either a contract or economic advantage situation, the alleged actions by the interfering party must be either "wrongful" or "unlawful" *or* lawful, but without sufficient "justification" or "privilege." No liability will arise in either case where the interfering party's conduct consists solely of something that he or she had an absolute and unequivocal right to do.

The 'Manager's Privilege'

The most notable justification or privilege is commonly referred to as the "manager's privilege." Other forms of justification may include interfering with a contract to improve working conditions, prevent physical injuries and maintain safety and moral standards.

The *manager* in manager's privilege has traditionally referred to an employee of a corporation — as opposed to an outside representative — who has a management function and is acting on behalf of (and presumably for the benefit of) the corporation. However, the definition of "manager" in this context has been broadened to include "agents" and "advisers" who, of course, would include personal managers and other artist representatives.

If privilege is not pleaded in California as an affirmative defense in the interfering party's answer to a complaint, the defense will be deemed waived and lost forever.

In order for the manager's privilege to apply, a manager or agent must have advised his or her principal to breach a contract with a third party because the manager or agent reasonably believed the contract would be contrary to the artist's best interests. The privilege is not absolute. In California, for example, for the privilege to be invoked, a manager or agent must prove that he or she did *not* act out of self-interest and did not personally benefit from the decision. *Aalgaard v. Merchants Nat. Bank Inc.*, 224 Cal.

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previously submitted to the artist, the promoter is solely responsible for that amount. If the promoter spends less than the split point requires, the split point is pre-figured since the artist will then earn more money.

Several variations should be noted. In most cases, rent is a percentage of the gross. If there is a cutoff in the rent at a certain point (i.e., 10 percent with a $15,000 cutoff) or rent is a dollar figure versus a percentage ($10,000 versus 10 percent), the split point should be calculated twice. In either event, first assign a variable value for rent in one set of calculations. If the split point is past the dollar figure, at which the cutoff would come in, then recalculate the split using rent as a flat, fixed expense.

Similarly, ticket commissions, as an expense, are generally a straight percentage of the gross. However, circumstances may arise in which there is no percentage charge at the venue box office for sales but there is an outlet charge, or both charges are different percentages (i.e., 3 percent - box office/5 percent - outlets) or where tickets are charged by credit card. In these cases, try calculating ticket commissions on a fixed-expense basis based on a break-even audience at the highest ticket commission.

Finally, insurance is sometimes shown as a flat figure, a flat per-ticket figure or a combination of both. Here, too, try calculating the insurance cost on a fixed-expense basis based on a break-even audience. If any of these variable expenses is expressed as a fixed expense, as above, be certain not to use it again as a variable. In essence, recalculate from step one to achieve the lowest possible split point .

One last note: All state taxes on the face of a performance contract should always be taken off the gross. The promoter should never receive a profit on taxes.