

# Rock May Never Die, But It Sure Has Matured

A brief history of how corporatization has transformed the concert industry and the contractual relationships that bind its players.

“Hey, hey, my, my, rock and roll can never die.”

— *My My, Hey Hey (Out of the Blue)*

Neil Young’s proclamation of rock and roll’s immortality expressed the defiance of a youth-infused countercultural movement that ultimately upended the musical status quo and many social norms. It became a mantra for an entire generation in a song frequently performed and in lyrics repeatedly chanted.

Still, for all the song’s artistry and defiance, money has always been an element of the music industry — even rock and roll. After all, it is the means for artists not only to reach an audience, but also to monetize their talents.

In rock’s formative years, it was relatively simple. Even by the time of *Out of the Blue*, however, the industry was transforming into a corporatized environment dominated by multi-national corporations. Concerts, for example, have become as much about beer sales, merchandising and advertising as the performance itself.

Taking a popular act on the road became a huge undertaking involving the artists, their “back line” (supporting musicians and back-up singers), managers and booking agents, sound engineers, equipment companies, transportation companies, caterers, promoters, venue operators

and ticketing companies. These entities enter into sometimes complex contractual relationships for each tour. This article will explore the concert industry’s transformation and the web of contracts supporting the tours of major popular artists.

## In the Beginning, There Was the Music

Rock and roll developed contemporaneously with the culmination of several technological advances in music (*e.g.*, the invention of the electric guitar, the “Rickenbacker,” in 1931), recording and broadcasting.<sup>1</sup> As radio and then television spread into every home, broadcast programs, perhaps most famously *American Bandstand*, introduced artists to a wide fan base. The ever-increasing quality of records and stereos allowed fans to listen to their favorite artists in their home whenever they chose and thereby solidified a

fan base willing to pay to experience their favorite artists' perform live. Artists began traveling the country to perform in different cities and towns. At that time, artists primarily toured to engage their fans and introduce new music to drive record sales.

Independent promoters, often self-made, popped up in different localities to assist artists in marketing concerts, selecting a venue, scaling the concert (setting the ticket prices for each part of the venue), and selling tickets. Many of the initial rock promoters, such as Bill Graham in San Francisco, Larry Magid in Philadelphia and Don Law in Boston, became nearly as well known as the artists they promoted. Negotiations were relatively uncomplicated, with the artists dealing directly with promoters.

Managers and booking agents involved in the film and literary industries viewed rock and roll as a fad and were initially uninterested in representing musicians.<sup>2</sup> Promoters typically paid the artists a flat fee, which meant that they assumed all the risk but garnered all the profits from successful shows. It has been reported that, whenever his home was complimented, Bill Graham would credit "flat deals at the Fillmore."<sup>3</sup>

The performances were raw and spontaneous. The venues were relatively small, often converted movie theaters or clubs. Production was minimal, with little or no lighting and poor sound systems.<sup>4</sup> Shows might last for hours, with co-headliners performing completely different musical styles on the same bill.

Ticketing was also straightforward. Fans could generally only purchase tickets at the venue box office. This required a separate trip to purchase tickets in advance and many tickets were sold on the day of the show.

### **It's One for The Money**

The concert industry ultimately exploded as demand to see live performances from the stars created by radio and television exposure grew exponentially. Promoters began to book larger outdoor amphitheaters, sports arenas and even stadiums. Outdoor amphitheaters were also constructed specifically to host popular music concerts and have become an industry mainstay.

Concert revenues jumped. This enabled popular music artists to obtain more sophisticated management. Money and

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the realization that, regardless of whether it was immortal, rock was going to be around for the foreseeable future, induced major booking agencies, such as the William Morris Agency (now William Morris Endeavor) and Creative Artists Agency, to open music desks to represent musicians.

Booking agents would route the tour (determine in which cities the musician would appear and the route of travel), and negotiate with independent promoters in each city to become involved with the concert.

Booking agents began to demand that promoters split ticket revenues with artists. While sharing profits with the artists, promoters still assumed all of the risk as they typically offered minimum guarantees to the artists. Promotional agreements provided for artists to receive the greater of a specified guarantee or percentage of ticket sales. Promoters also generally provided a percentage of the guarantee to the artists in advance of the show.

Artists demanded an increasing share of the concert proceeds, particularly as record sales declined with the advent of (legal and illegal) music downloads. That percentage today may be as high as 95 percent of ticket sales (net of costs), while some artists command over 100 percent. Touring has become so important to artists that developing (and some established) artists actually offer their recordings for free on sites, such as SoundCloud, to build a fan base.<sup>5</sup>

In addition to monetary terms, promotional agreements may contain radius

clauses. After agreeing to back a concert, the promoter seeks to limit the artist from appearing within the venue's geographic market near in time to the concert for fear that the alternative performance will siphon away fans. Generally, the more popular the artist, the narrower the temporal and geographic limitation because there is more demand for popular artists' shows.

Artists also incorporate "tour riders" into promotional agreements. These riders include mandates about everything involved with the artist's appearance at a venue from dressing room amenities to catering and staging and production. While some of the more unreasonable artist demands are the subject of popular lore, venues are like oases to a desert caravan. Artists generally spend the tour traveling between venues, so they depend upon the promoter or venue for their meals, supplies and even to clean their clothes. Again, although some demands may seem overreaching, artists naturally seek to specify the catering and other services they will be provided.

With the use of increasingly larger venues, the complexity and size of the production grew accordingly. Today, elaborate sets, lighting, pyrotechnics and video screens are considered necessary to engage fans sitting far from the stage. Enhanced production is also the product of artist choice and the loosening of financial constraints upon their creativity.

Madonna, for instance, has offered elaborate shows with back-up dancers and numerous costumes. Some shows can require as many as 15 tractor-trailers to transport their production. Though not always on that scale, the production is significant for any arena or stadium show. Even Bruce Springsteen, who utilizes a sparse production, requires numerous tractor-trailers to support his tours.

Artists bear the responsibility of designing and acquiring the production, paying their supporting musicians, and transporting themselves, their band and all of their production equipment. Assuring these costs will be covered is one of the reasons artists require financial guarantees from promoters. Artists may lease their production equipment. As typical in leases, the production and sound companies require the artists to indemnify them for any damage to the equipment. Artists, in turn, should insure this risk. One of

claims arising from the 2011 stage collapse prior to the country duo Sugarland's concert in Indianapolis was for the value of the equipment damaged in the collapse.

When there are opening or supporting performers, contracts or specifications between the artists, or in interrelated agreements with the promoters, may specify the timing of the support performers' show, dictate sound levels and limit how much of the stage they may use. Stage limitations sometimes have a functional purpose as the headliner's equipment may be set up at the back of the stage to facilitate a quick transition between shows. Differentiating between the opening and headlining act is often a consideration as well.

Early in his career, country music superstar Eric Church was removed from a Rascal Flatts tour for extending his show beyond the specified deadline.<sup>6</sup> Rascal Flatts' justification for removing Church from the tour highlights another reality of concert performances — they claimed his delays were extending the shows be-

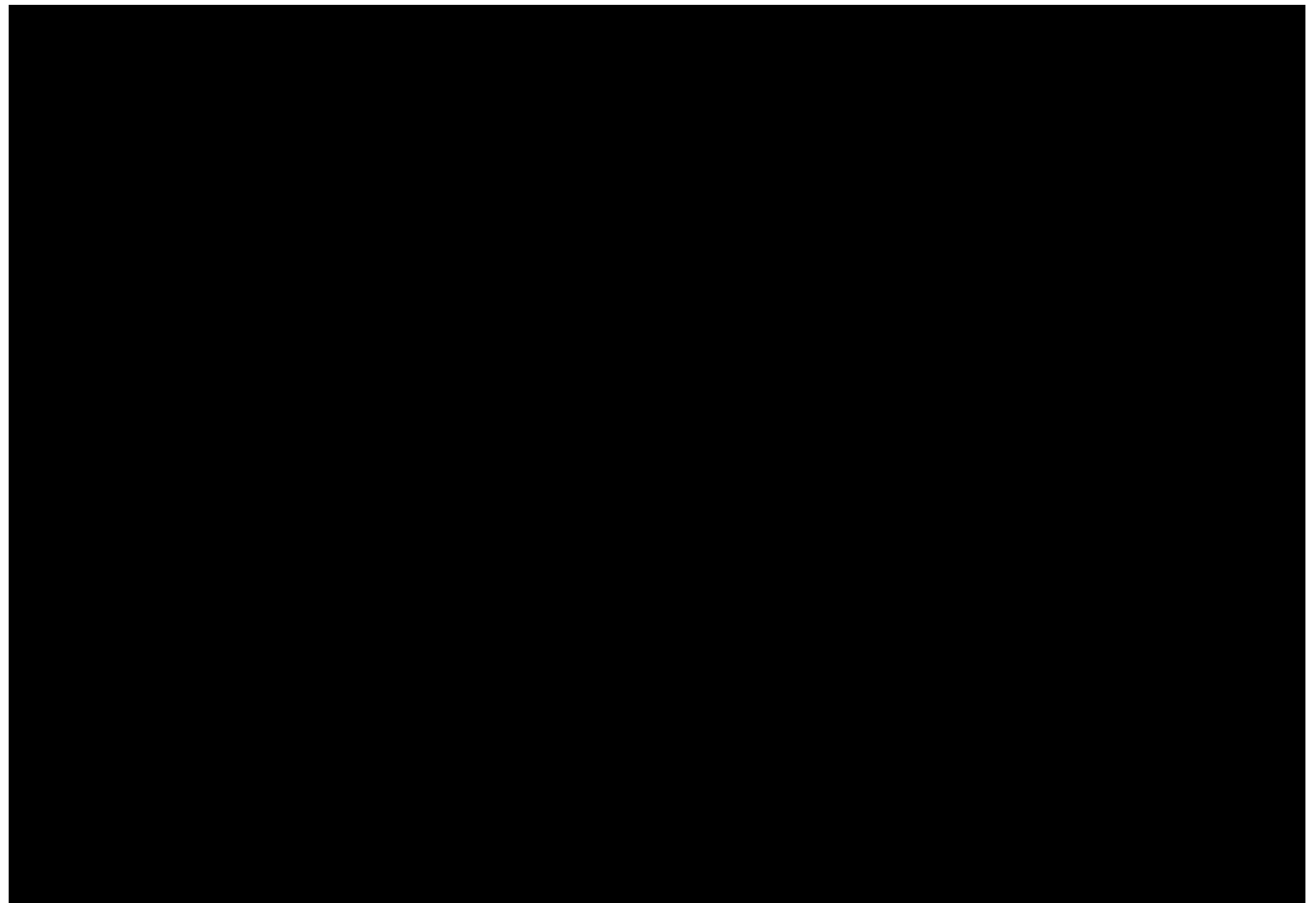
yond the curfew.<sup>7</sup> Municipalities fine venues for curfew violations and promotional agreements often require the headliner to reimburse the promoter or venues for these fines.

As artists have commanded most of the ticket revenues, venues have sought additional revenue sources. While arenas and stadiums may charge meaningful rental payments, venues primarily generate revenues from concession and merchandising sales and parking fees. Venues also supplement their revenues through the sale of advertising space at the venue, naming rights, season ticket sales and corporate sponsorships. Promoters may sell the rights to sponsor the show or a series of shows. An additional revenue stream is sharing in ticketing fees that ticketing companies charge.

In the 1970s, entrepreneurial computer scientists began developing programs to support the sale of concert tickets at multiple locations.<sup>8</sup> Ticketron, Tickets.com and Ticketmaster were founded to offer these services to venues and promoters

as well as sports and other entertainment entities. The internet's ubiquitous presence allowed ticket companies to offer online sales, which are now the dominant means of selling tickets. Ticket companies generate revenues through now infamous service fees added to the price of the ticket. Venues and promoters negotiate for a share of those fees.

Because the ticket company sells the tickets these days, an important subject of negotiation is when they will release the ticket revenues to the venue or promoter. Promoters seek to obtain the funds as soon as possible to use, among other things, for advance payments to artists. Conversely, the ticketing company seeks to retain a reserve for ticket refunds. This can be crucial in the event the show is cancelled. For example, it has been reported that TicketFly, a ticketing company, made weekly advances of the ticket sale proceeds to the bankrupt promoters of the Pemberton Music Festival in British Columbia that eventually failed amid claims of mismanagement.<sup>9</sup>



Venues also increasingly use information about ticket purchasers to market future concerts, so another key area of negotiation is protecting this information. There is also significant cross-licensing of the parties' trademarks and logos. The ticketing company will also obtain assurance of its right to use the artist's name and likeness.

**Enter the Giants**

Ticketmaster ultimately outperformed or acquired its rivals and became the dominant ticketing company in the country. By 2003, it was found to have exclusive contracts covering 75 percent of ticket sales at larger arenas in 31 of the 41 regional markets in the United States.<sup>10</sup> Ticketmaster sells so many tickets that Ticketmaster.com developed into a top five e-commerce site.

Promoters also began to transition from sole proprietorships to larger companies and ultimately to publicly held corporations. One of the reasons for this transformation was promoters offering to promote multiple tour dates and ultimately an artist's entire tour. Canadian promoter Michael Cohl is credited with offering the first national tour deal for the Rolling Stones' 1989 Steel Wheels tour. When a tour deal is contemplated, instead of dealing with a number of regionally based promoters, the artist's representatives negotiate with promoters operating on a national (and ultimately international) basis.

In the late 1990s, SFX Entertainment began rolling-up local promoters to support national tour deals. Clear Channel Communications acquired SFX, and spun the business off several years later into a separate publicly traded company — Live Nation. In addition to concert promo-

tion, Live Nation purchased or obtained long-term leases on numerous amphitheaters and other venues.

There are a few other entities promoting on a national basis, including AEG Presents, whose parent manages sports arenas. Nevertheless, Live Nation dwarfs its competitors. Its Chief Executive Officer has stated that it is larger than every other promoter in the world combined.<sup>11</sup> It then acquired Ticketmaster.

The participation of large corporate entities in the music industry certainly has changed its dynamic and complicated the contract relationships among its participants. For instance, Ticketmaster's affiliation with Live Nation has intensified negotiations over protecting the purchaser information of competing venues and promoters. Fans and some artists have challenged the reasonableness of Ticketmaster's fees. Pearl Jam attempted to circumvent Ticketmaster on one tour, and found itself playing a host of fair grounds and similar venues.

Additionally, the negotiation of a tour contract is a challenging endeavor. For instance, the artist's guarantee is now negotiated on a tour-wide basis. A key component of national tour contracts is "cross-collateralization," which means that the artist's guarantee and percentage is based upon the performance of the entire tour. In this way, a successful show may compensate for an underperforming show in another location. Both the promotion of the tour and the venues in which the artist will appear may also be negotiated together. Live Nation also offered superstars so-called 360° deals in which it handled all aspects of the artists' career.

**And the Band Played On**

Music remains the core of the industry. Without it, there would be no fans and no revenues.

Still, the industry is now a corporatized multi-billion-dollar business involving an army of managers, agents, lawyers, accountants, ticketing specialists and financiers.

Probably not what Neil Young envisioned. ♦

NOTES

1. See e.g., Scaruffi, Peter, *A History of Rock and Dance Music* (2003); Smith Theo, *A Brief History of the Music Industry*, Music Think Tank, <http://www.musicthinktank.com/mtt-open/a-brief-history-of-the-music-industry>.
2. Budnick, Dean and Baron, Josh, *Ticket Masters, The Rise of the Concert Industry and How the Public Got Scalped*, pp. 43-44 ECW Press, Toronto (2011).
3. *Id.*, p. 45.
4. "Something Must Happen," *Billboard*, November 14, 1970.
5. Gerber, Ross, "Making Money in the Music Industry," <https://www.forbes.com/sites/greatspeculations/2014/07/29/making-money-in-the-music-industry/#36af74aa4b41>.
6. Doyle, Patrick, "Eric Church: Boozin' and Crusin' with Country's Rowdiest Star," *Rolling Stone*, May 12, 2012, p. 5.
7. "Rascal Flatts Reveals Why Eric Church Was Removed From Tour," <http://kmps.cbslocal.com/2014/02/04/rascal-flatts-reveals-why-eric-church-was-removed-from-tour/>.
8. *Ticket Masters*, *supra*, pp. 27-40.
9. Sisario, Ben, "Frye Was Bad. For the Concert Industry, This One Could Be Worse," *The New York Times*, June 1, 2017, p. 4.
10. *Ticketmaster Corp. v. Tickets.Com, Inc.*, Civil Action No. 99-07654 HLH (C.D.Ca. March 25, 2003).
11. *Live Nation Entertainment*, First Quarter 2011.

FEATURE

**Stolen Cultural Property** *continued from page 11*

23. FBI, "18th-Century Paintings Returned to Peru," April 8, 2010, [https://archives.fbi.gov/archives/news/stories/2010/april/peru\\_040810.28](https://archives.fbi.gov/archives/news/stories/2010/april/peru_040810.28).

24. 18 U.S.C. §§ 2314-2315 (2013) (Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting; Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps).

25. 333 F.3d 393 (2d Cir. 2003). See also *United States v. McClain*, 545 F.2d 988 (5th Cir. 1977).

26. Ministry of Culture: Supreme Council of Antiquities, *Law No. 117 of 1983*, as Amended by *Law No. 3 of 2010 Promulgating the Antiquities' Protection Law*, available at <http://www.unesco.org/culture/natlaws/>

[media/pdf/egypt/egypt\\_law3\\_2010\\_entof.pdf](media/pdf/egypt/egypt_law3_2010_entof.pdf), accessed May 29, 2014.

27. Jennifer Anglim Kreder, "The Choice between Civil and Criminal Remedies in Stolen Art Litigation," 28 *Vand. J Transnat'l L.* (2005): 1199, 1222-23.

28. *Republic of Peru v. Yale University*, No. 1:08-cv-02109 (D.D.C. July 30, 2009) (transferring case to Connecticut); *Republic of Peru v. Yale University*, No. 3:09-cv-01332 (D. Conn. Oct. 9, 2009); settlement agreement, No. 3:09-cv-01332 (D. Conn. Dec. 23, 2010).

29. Diane Orson, *Finders Not Keepers*, NPR, December 18, 2011, <http://www.npr.org/2012/01/01/143653050/finders-not-keepers-yale-returns-artifacts-to-peru>.