



Goldstein & Guilliams PLC

Arts & Entertainment Law, Management, and Immigration

www.ggartslaw.com

Main: (646) 561-9886

Fax: (646) 561-9820

This is provided for informational purposes only. Please do consult with an attorney familiar with your specific circumstances, challenges, and quirks before drawing any conclusions or doing anything rash!

WHO HAVE YOU BEEN SLEEPING WITH? Understanding Legal Relationships in the Arts

1. Agents v. Producers

- a. An “agent” is an individual or entity who represents another person or entity in a contractual transaction or acts on behalf of another person or entity in a business relationship or negotiation. The other person or entity is known as the “principal.” In the performing arts, the artist is the agent’s “principal.” Thus, even managers are “agents” as far as the law is concerned.
 - 1) Agents are not liable for the breaches or liabilities of their artists, provided: (1) it’s clear that the agent is acting as an “agent” and (2) the artist is clearly identified (i.e., it’s clear to the other party that the agent is representing the artist). Merely using the terms “agent” or “manager” do not legally protect an agent from liability. A contract must clearly indicate that the agent is signing “on behalf of” the artist.
 - 2) Agents ARE liable for any crimes or torts (ie: fraud, copyright infringement, acts of negligence, or acts of intentional harm) that they may commit, directly or indirectly, on behalf of an artist or under the artist’s direction. (For example, a hit man is just as guilty of murder as the person who hired him.) For example, if an artist performs a show with unlicensed material, the agent who booked the show may be liable as well.
 - 3) All agents owe a “fiduciary duty” to their principals. A “fiduciary duty” includes the obligation to act in the best interest of the principal, to avoid all conflicts of interest, to follow the directives of the principal, and to protect all trade secrets and confidential information of the principal. This means that the artist is the agent’s client, not the presenter/venue. Ethical considerations and industry relationships notwithstanding, an agent owes a fiduciary duty to the artist, not the presenter/venue. In addition, all contacts, leads, inquiries, booking information, documents, or other information used or developed by an agent in the course of representing an artist must be disclosed to the artist, even after the agent/artist relationship terminates.
 - 4) An agent must be “authorized” by an artist to act on behalf of the artist. Otherwise, an agent who claims to be able to book or sell the services of an artist, but who has not actually been authorized by that artist can be personally liable for wrongfully representing another without authority, including liability for fraud, for any damages which may be incurred by the presenter/venue, and for any damages which may be incurred by the artist.
- b. A “producer” is an individual or entity that is hired by a presenter/venue to produce or provide an artist or a performance. The producer assumes all the risks, liabilities (as well as profits and losses) and pays the artist a fee to perform at the venue.
 - 1) In such instances, the presenter/venue hires the producer, not the artist, and the producer hires the artist.
 - 2) In such instances, the producer may be regarded as the artist’s “employer” and responsible for taxes and withholding.
- c. If a presenter/venue engages an artist through the artist’s agent, and the artist cancels or breaches the agreement, the agent has no liability. However, if a presenter/venue engages a producer to “produce” or “provide” the artist, and the artist cancels or breaches the agreement, then the producer is liable.

- d. Merely using the titles “agent” or “producer” do not determine whether or not someone is, in fact, acting as an “agent” or “producer.” Rather, the language of the engagement contract is critical in determining whether an agent is acting as an “agent” or a “producer.”
- e. An agent is acting as an “agent” if the engagement contract is set up as follows:
- 1) “The Livarschpott Center for Arts engages Artist by and through its Manager, Acme Management”;
or
 - 2) “This engagement contract is entered into by and between the Livarschpott Center for the arts and Acme Management on behalf of (o/b/o) Artist;” or
 - 3) “This agreement is issued by Acme Management between Artist and the Livarschpott Center for the Arts;” or
 - 4) “This agreement is made by and between the Livarschpott Center for the Arts and Artist, represented by Acme Management.”
- f. An agent is actually a “producer” if the engagement contract is set up as follows:
- 1) “The Livarschpott Center for the Arts engages Acme Management to provide a performance of Artist;” or
 - 2) “This agreement is made by and between the Livarschpott Center for the Arts and Acme Management for a performance of Artist;” or
 - 3) “Acme Management hereby agrees to furnish the services of Artist to the Livarschpott Center for the Arts; or
 - 4) “This constitutes our agreement that the Livarschpott Center for the Arts hereby engages the services of Acme Management regarding the engagement of Artist.”
- g. If a presenter/venue is hiring the artist through the artist’s agent, then the presenter/venue should issue the applicable tax forms (1099 or 1042-S, whichever is applicable) in the name of the artist regardless of whether or not the actual payment is issued to the artist’s agent. This is to reflect that the presenter/venue is hiring the artist, not the agent. For example, let’s assume a quartet called Breaking Wind is represented by Acme Management and is booked at the Livarschpott Center. If the engagement agreement states that the engagement fee should be paid to Acme Management, then the Livarschpott Center should make the check payable to “Acme Management o/b/o Breaking Wind” and issue the 1099 to Breaking Wind. (“o/b/o” = “On Behalf Of”).
- 1) If a presenter/venue (or their comptroller or accounting program) insists on issuing the tax form only to the actual payee on the check, do not panic! The agent merely needs to deduct its commission from the engagement fee, pay the balance to the artist, and issue the artist the appropriate form (1099 or 1042-S, whichever is applicable) for the full amount of the engagement fee. That’s right, the 1099 should reflect the full engagement fee, not the balance of the fee left after the agent’s commission is deducted. This is because the agent’s commission is a fee paid by the artist to the agent. For tax purposes, the artist is receiving the full engagement fee, even though the agent may deduct its commission from the fee. (Technically, the artist should be issuing a 1099 to the agent, but good luck getting that to happen!) So, if the engagement fee is \$10,000 and the agent’s commission is 10%, and the presenter/venue insists on issuing the 1099 to the agent reflecting \$10,000, then the agent would pay \$9000 to the artist, but issue a 1099 to the artist reflecting \$10,000.
 - 2) Of course, an agent could also alleviate this problem by allowing the presenter/venue to issue the payment directly to the artist.
- h. If a presenter/venue is hiring the agent as a producer, then the presenter/venue should issue the applicable tax forms in the name of the producer. The producer should, in turn, issue its own applicable tax forms (1099, 1042S, W-4, or whatever is applicable) to the artist.
- 1) For example, if the Livarschpott Center hires Acme Management to produce a performance of Breaking Wind and pays Acme a fee of \$10,000, then the Livarschpott Center would issue a 1099 to Acme reflecting \$10,000. If Acme had agreed to hire Breaking Wind for \$6,000, then Acme would pay Breaking Wind \$6,000 and issue a 1099 to Breaking Wind reflecting \$6,000.

- i. There are some state-owned or operated presenters/venues who are restricted by state statutes and regulations as to who they can pay and how. Such presenters/venues cannot issue an artist's payment to the agent unless the agent becomes the "producer."

2. Employees v. Independent Contractors

- a. Whether or not a contract calls an artist an "independent contractor" or an "employee" is completely and utterly irrelevant in determining whether or not the artist will, in fact, be regarded as an "independent contractor" or an "employee" for tax and withholding purposes. Similarly, whether or not an artist is issued a 1099 or any other form is irrelevant. The actual determination will depend on the facts and circumstances of the relationship.
- b. State and federal agencies use a number of factors to determine whether or not an artist is being hired as an "independent contractor" or an "employee" including: the amount of control the hiring party has over the services of the artist; whether or not the artist is an individual or an incorporated entity; the degree of instruction and direction given to the artist by the hiring party; whether or not the artist is performing a pre-rehearsed "turn key" performance or is being hired to rehearse and perform a new performance; the frequency and regularity of services; and whether or not the artist is provided with props, costumes, and other materials. This is by no means an exhaustive list. The final determination is always very subjective.
- c. When an agent acts as a "producer", then state and federal authorities may hold the agent responsible for the artist's employment taxes and other withholdings.
- d. As a general rule, when an artist is engaged to show up at a venue and perform a pre-rehearsed, pre-set performance that has been independently developed and produced by the artist (ie: you wind them up and let them go), the artist is probably an independent contractor. On the other hand, when the artist will be given direction and instruction in the development of the performance (ie: the artist joins an ensemble or is cast in a production), then the artist is probably an employee.

4. Licensors

- a. You cannot grant rights to materials you do not own or control. If you do, it's like selling a car you don't own.
- b. You cannot receive rights to materials from someone who does not own or control such rights. In other words, don't assume that just because someone grants you the rights you want, they actually have the rights to grant.
- c. Always ask for proof or verification that the person granting you permission or a license actually has the authority to do so.

5. Signatories

- a. An employee, agent, or representative of an organization who signs a contract on behalf of such organization can legally bind the organization even if the employee, agent, or representative had no internal authority to execute the contract. In other words, you cannot cancel an executed agreement claiming that one of your employees, volunteers, agents, etc acted without authority.
- b. You cannot enjoy the liability protection of a corporation unless you make sure that your contracts are issued in the name of the corporation.
- c. If you are signing on behalf of a corporation, your signature must clearly indicate (i.e., it's clear to the other party) that you are signing on behalf of the corporation and not personally. Otherwise, you may become personally liable.
- d. If you sign on behalf of an organization that has not actually been "incorporated", then you are personally liable. For example, if you call yourself Acme Management, but Acme Management is neither an LLC nor a C or S Corp, then you will be personally liable regardless of how you sign the contract.