

When The Music Stops: Best Practices For Band Agreements

By **Matthew Wilson** (October 15, 2018, 6:54 PM EDT)

The American journalist and cultural gadfly Hunter S. Thompson once described the music business as “a cruel and shallow money trench, a long plastic hallway where thieves and pimps run free, and good men die like dogs. There’s also a negative side.” That’s anything but a ringing endorsement, to be certain. As a writer for Rolling Stone, Thompson echoed the sentiments of artists that resented the power of the record companies and distrusted the kingmaker-businessmen (“suits”) that accompanied them. Fast forward to 2018 and the landscape has substantially changed. The term “sell out” mostly applies to ticket sales, and artists such as Taylor Swift are cheered for demonstrating savvy business acumen.

Generally speaking, the “music business” is no longer a pejorative term. Important matters such as liability shields, insurance, tax-planning, and brand protection are prioritized by the business-focused artist. At the same time, Page Six and TMZ are littered with stories about fights and lawsuits among band members concerning business-related issues. The likely cause? Far too many artists, along with their professional advisers, continue to disregard what should be the most basic, if not the most critical, business concern related to any group: the partnership. The recent news about Lindsey Buckingham suing Fleetwood Mac after he was kicked off the tour and out of the band demonstrates the problems that can arise when a group lacks a written partnership agreement.



Matthew Wilson

In most states, the members of a music group are deemed to be legal partners by virtue of operating as a group. In other words, in the absence of a formal arrangement (such as in the instance of Fleetwood Mac), a group is considered a legal partnership if it presents itself as such to the public. Each member of the group is an equal partner and will share equally in the upside, as well as the downside, of the group’s activities. While this arrangement may sound appealing at first glance, equality of opportunity might also translate into shared misery for the unwary. For instance, the bad acts of a single rogue member might subject every member of the group to personal liability. Default partnership rules mean that each individual represents the group for all business purposes. So, any single member can bind the whole group to contractual obligations; spend the money of the group; and use or license the property of the group — all without the consent of the other members. Put simply, “all for one, and one for all” isn’t always the best axiom when it comes to business arrangements.

A professional adviser will often recommend that working musicians form a legal entity (e.g., corporation or limited liability company) for the purpose of engaging in business activities. Entity status provides the working group with a number of legal benefits, with the most important being liability

protection. While most groups are quick to heed the formality suggestion, many also fail to discuss the multitude of operational and planning concepts that are important for a musical partnership to consider. This appears to be the unfortunate reality for Fleetwood Mac. The following concepts are examples of band-specific matters that are best addressed in the governing documents of the group's legal entity:

- How are group decisions made? While many bands operate on a basis of unanimity, flexibility and efficiency can be a concern and deadlocks can be debilitating. As such, delegation of authority and/or simple majority votes might be appropriate for day-to-day decisions, with super-majority or unanimity applying only to major decisions (e.g., signing recording deals, licensing approvals, or making changing to the business team). Of course, some groups adopt a dictatorship model in which a single member directs the ship.
- Who owns group property and how can it be used? Instruments, production gear, wardrobes, vehicles and other assets are often purchased and insured by an operating entity. The members should consider whether an individual can use any such assets outside of the group context. For example, can a member use her favorite guitar while touring with a side project or can she take it with her if she leaves the band? Sale and lease policies can also be important in some instances.
- What are the member's duties to the group? Many musicians engage in side projects or other outside activities. Accordingly, the group should define the scope of each member's obligations to the group and the expectations imposed on the individual members. As with any business, a job description, time commitment, and in some instances, exclusivity requirement, are not uncommon in the music partnership context. According to the Buckingham complaint, the guitarist's solo project activities were a cause of contention for his ex-bandmates.
- How is revenue shared among the group members? Is all revenue contributed to the collective pot and shared equally? Depending on the particular dynamic of the group, monies might be divided unequally based on the source. A group may want to make a new member a partner but pay that member at a lower percentage rate.
- How can a member be fired and what happens if a member is fired or quits? Establishing a standard of performance not only defines the expectations of the members but can also serve as a basis for termination of an underperforming member. In the Fleetwood Mac lawsuit, Lindsey Buckingham's complaint takes the position that the group could not fire him "without cause." Many groups prescribe the grounds and procedures required to terminate and replace a member. Groups that are active on the touring front should consider the procedure in the event a member quits mid-tour or otherwise fails to perform his contracted commitments. Other important matters include put/call rights associated with the partnership interests, post-termination asset distribution, and potential pecuniary penalties on a departing member.
- Who can use the group name? The group may sanction when and how an individual member can use the name in connection with outside activities. More importantly, in the event that the group disbands, use of the name becomes of vital importance for the ex-members — just ask Pink Floyd, Credence Clearwater Revival and The Beach Boys. Associated with this issue is the ownership and use of the group's domain name and intellectual properties.
- How is private sensitive information about group members protected? Asking a bandmate or even a new member to sign a confidentiality agreement might be a discomforting task.

However, confidentiality obligations are often baked into a partnership agreement and help to assure that the deepest and darkest secrets remain private. In the absence of formal agreement, what will stop Lindsey Buckingham from dishing the details about his former bandmates in a tell-all?

- Does the family of a deceased group member succeed the partnership interests of that member? A group may want to take care of the family in the event of a group member's disability or untimely death, but may not want to involve the estate in the business decisions of the band. The conversion of partnership interests to economic interests is a common approach adopted by many groups. Others elect to create discretionary call and/or put rights for the partnership interests in the event of disability or death, prescribing the applicable purchase price and payment procedures.

These are but a few of the kinds of matters that should be addressed in the group partnership agreement; but they are often neglected — *always* to the detriment of the group. It's no surprise that talks involving finances, member death and/or breaking up tend to be delayed, if not wholly avoided. However, while potentially uncomfortable and certainly less exciting than making art, discussing these concepts and memorializing in writing the expectations of the members will mitigate headaches and heartaches, along with legal fees, down the road. The recent, and much publicized, fight between Donald Fagen and the estate of Walter Becker concerning ownership (and forced buy-out) of Steely Dan, and the lawsuit by Lindsey Buckingham against Fleetwood Mac, are reminders of the importance of the group partnership agreement.

Being a member of a successful music group is a proverbial roller coaster replete with a seemingly limitless supply of unknowns around each corner. While it's virtually impossible to anticipate all of the challenges ahead, hammering out a mutually acceptable road map for the partnership may ultimately prove to be the most significant business-planning activity in the life of a group. Preparing for the future can be a drag, but not having a plan can be far worse. It also goes without saying that friends (and bandmates) tend to be more amenable to negotiation and compromise when they still like each other or, at least, are communicating with one another. We all hope that the band goes on forever; but prudence and experience suggest that every group should be prepared for what happens when the music stops — and the members "Go [Their] Own Way."

Matthew V. Wilson is of counsel at Arnall Golden Gregory LLP and leader of the firm's sports and entertainment industry team.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.