

Contract Negotiation
May 28, 2020
Closed Caption Transcript

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11:02:28 >> VANESSA: Hi everybody. I think we're still
11:02:31 getting some people in. But I'll get started.
11:02:34 Welcome. This is the contract negotiation
11:02:38 workshop go hosted by the American composers
11:02:44 foreign Springboard for the arts. I Vanessa, and
11:02:47 this the series we've been doing with our
11:02:51 partners way started in response to COVID-19, and
11:02:54 it's our joint effort to give information,
11:02:58 resources tool boxes for artists at this time.
11:03:02 There are a number of series of webinars that
11:03:04 have already happened in this series you're
11:03:06 welcome to visit. We are recording this, so
11:03:11 these have now been archived on the ACF website,
11:03:15 under the resources tab. If you click on the
11:03:19 creative development webinars, you will see some
11:03:23 past webinars, otherwise this will be recorded.
11:03:28 And audio transcribed. We will make the links
11:03:30 available. You can turn on the closed caption
11:03:34 feature in Zoom to add the audio transcriptions
11:03:37 to your screen in real time. Please keep your
11:03:41 own computer and phone muted during this session.
11:03:43 Some of the questions you sent ahead of time will
11:03:45 be covered with the presentation, we'll also
11:03:48 monitor the chat and collecting questionsal that
11:03:51 come in. If at the end there are questions that
11:03:53 haven't been answered, we can connect with you
11:03:55 off line to work to get answers for you. At this
11:03:59 time, it's my pleasure to introduce Andy who is the
11:04:01 artist resources director for Springboard for the
11:04:04 arts. And he will introduce our special guest
11:04:04 today.
11:04:07 >> TERRY:
11:04:11 >> Thank you very much, I'm Andy, artist
11:04:14 resources director and the coordinate four the
11:04:16 Minnesota lawyers for the arts program. The two
11:04:19 attorneys joining us have been involved with the
11:04:21 Minnesota lawyers for the arts program for long
11:04:25 time, they are both very knowledgeable and very

11:04:28 enjoyable people to talk to, I will be happy to
11:04:32 introduce them. Since 1988 Terry has been
11:04:38 navigating high business situation, the author of
11:04:42 the book big force negotiation, lawyer of the
11:04:45 year in Minnesota, a super lawyer and received
11:04:47 the president's award from the Minnesota state
11:04:50 bar association, he practices in Minneapolis and
11:04:56 he can hear his show on Sunday morning on KQRS
11:05:00 radio. And Alex Mueller an award winning
11:05:06 composer, and entertainment attorney. Minnesota
11:05:14 state board association. Alex's practice is
11:05:16 concentrated to entertainment law, works with
11:05:28 businesses of all sizes, so with that, I'm going
11:05:33 to turn it over now to Al Alex and Terry.
11:05:34 Thanks.

11:05:35 >> ALEX: Thanks, Andy.

11:05:37 >> TERRY: Thanks, Andy. Hi everybody.

11:05:42 >> ALEX: So just to get started, I wanted to
11:05:44 cover a little bit about contract basics. There
11:05:47 were a few questions that came in from people who
11:05:49 registered. So this will be kind of a theme as
11:05:52 we go through some of the problem-solving around
11:05:55 COVID-19 issues, but just remember that a
11:05:59 contract is essentially a bargain for exchange.
11:06:01 You and the other party agree to what you have to
11:06:04 do, and what you want them to do, they are very
11:06:07 flexible, and they are determined by what you put
11:06:09 in the agreement, so long as you're not making an
11:06:10 agreement for anything that's illegal. You can
11:06:14 really have a lot of leeway to do what you want.
11:06:16 What is in the written agreement is ultimately
11:06:20 what is binding, typically external evidence is
11:06:22 not part of the agreement, won't be considered.
11:06:26 So you want to have something in writing.
11:06:27 Whenever possible.

11:06:31 Not having it in writing creates an evidence
11:06:33 question of who said what, and whether an
11:06:38 agreement actually ever existed.

11:06:41 >> TERRY: I can say it more simply. You can
11:06:44 agree to anything want to agree to, and whatever
11:06:46 you agree to is what's in the writing when there
11:06:50 is a writing. Unless it's ambiguous. Which it
11:06:51 always is.

11:06:55 So one of the big lessons I've learned over the

11:07:00 years is get it in writing, understand what it
11:07:05 says, but trust your business partner or don't go
11:07:08 into a contract with someone you don't trust,
11:07:11 because the contract can't keep them from
11:07:12 cheating.

11:07:17 >> ALEX: Right. A couple of questions about
11:07:21 what terms are included in a typical composer
11:07:26 contract. In short, who, what, when/where, how
11:07:27 much and rights.

11:07:30 So the who, makes sure that person signing the
11:07:32 contract has the organizational authority to do
11:07:37 so. If you're contracting with a school or
11:07:40 another nonprofit type of organization, make sure
11:07:42 that your contact at the organization might not
11:07:44 be the person that needs to be the one signing
11:07:47 that contract. And similarly, if you own your
11:07:51 own publishing entity as a composer, you might
11:07:54 consider having the entity be the signatory
11:07:56 rather than you as a person, even though you are
11:07:58 the one that's going to be performing all the
11:08:01 work, just to keep your business structure
11:08:02 separate from your personal business.

11:08:07 The what? In a composer commission agreement,
11:08:10 whether that's for an opera, for a concert band
11:08:12 piece, for a film score, any of those things,
11:08:16 usually there are some parameters for what the
11:08:18 instrumentation is going to be, the length of the
11:08:21 piece, there might be theme, subject matter, or
11:08:24 on a particular occasion that the work is
11:08:28 intended for, like an anniversary or celebration,
11:08:31 might be expectations for the skill level, if
11:08:33 you're writing for a high school band, for
11:08:36 example.

11:08:40 When? Make sure that you know of any firm
11:08:43 deadlines, if it's being written for an event,
11:08:45 you need to have enough time to do it, depending
11:08:49 on how fast you work, an event happening next
11:08:52 month might not give you enough time. You want
11:08:54 to have some percussion usually to finish up a
11:08:56 work.

11:08:58 Discussion discuss with the client whether
11:09:01 there's any milestones or check-ins along the
11:09:04 way. Do they want to hear a theme as you're
11:09:07 working? Usually on film scores the directors

11:09:10 want to hear something in progress. Concerntain
11:09:12 commissions, that's usually not as typical, but
11:09:17 it could happen. Is a premier date set? Is the
11:09:19 location set? Are you second as the composer to
11:09:24 attend resourckerrals, are you expected to attend
11:09:27 the performance? You have your composing fee,
11:09:30 obviously, but you want to account for costs,
11:09:33 those could be expenses like printing, shipping
11:09:36 scores, if you're second to attend the premier?
11:09:40 Are you getting a travel stipend? Are they
11:09:43 expecting that you attend a resourcal and
11:09:46 performance and you're staying over night? All
11:09:49 those types of things should be something your
11:09:53 contract contemplates, and it's fine to roll all
11:09:56 much into your cost, the next section is rights.
11:09:58 This is the most important one. In copyright,
11:10:01 there's actually a plural, there's six rights in
11:10:04 the copyright act. You have the right to Copt,
11:10:08 distribute the copies, make drivetive works,
11:10:11 perform is work, perform audio recordings on the
11:10:15 Internet. In the music instrument, there's a
11:10:18 bunch of other names, grand rights, performance
11:10:21 rights, mechanical rights, master use,
11:10:25 synchronization rights, print right referring to
11:10:29 sheet music. Show don't line up one to one, but
11:10:31 you want to make sure that your contracts
11:10:36 consider all of these rights. Also keep in mind
11:10:38 there's two copyright works involved, the
11:10:41 underlying composition, and then there's any
11:10:43 sound recording and sometimes those are not owned
11:10:45 by the same person.
11:10:48 So, for instance, if I wrote the music but
11:10:51 someone else records it, they have rights in that
11:10:53 recording, and I have rights in the underlying
11:10:56 composition, so if somebody for a film wants to
11:10:58 use that other artist's recording, they have to
11:11:01 get permission from them and from me, because I
11:11:04 own the sheet music. You know, the underlying
11:11:06 composition. And I can't give the rights to the
11:11:12 recording, because I don't own that one.
11:11:13 >> TERRY: Does anybody still write on sheet
11:11:15 music any more?
11:11:18 >> ALEX: Yes, it's 12 cents every time you sell
11:11:21 one. A lot of composers have moved to

11:11:24 self-publishing, there's still a lot of sheet
11:11:27 music published for high school bands, grade
11:11:29 school orchestra, that type of thing,
11:11:39 Also Alfred music. For records, loft times
11:11:41 there's not sheet music at all, they record in
11:11:44 the session, and nothing something written down,
11:11:48 except maybe a few scratches for chords, but you
11:11:49 still have rights in the composition, whether you
11:11:51 wrote it down or not.
11:11:56 What we see in composer agreements, oftentimes
11:11:59 people giving up too much rights, too many of the
11:12:02 rights. For instance, I've seen commissions for
11:12:04 high school band piece giving the right to make
11:12:07 the first commercial recording, which doesn't
11:12:09 make sense, because they are never going to do
11:12:11 that. So as the composer, when you create the
11:12:13 work, you have the right to make the first
11:12:17 commercial recording before what we have
11:12:20 statutory rights, mechanical recording comes into
11:12:22 place after that first recording exists. So if
11:12:25 you give away the right to make the first
11:12:27 commercial recording to a high school, who is
11:12:30 never going to do it, no one else can ever make a
11:12:32 recording unless you make one.
11:12:35 So that can be a problem.
11:12:38 Not having the right type of rights is another
11:12:39 issue.
11:12:43 So this has happened where a composer's
11:12:45 commissioned by -- this is a true store', more
11:12:47 than once this has happened. Composer is
11:12:50 commissioned by a community orchestra to write a
11:12:54 piece, and then later, the community orchestra
11:12:59 had the idea that wouldn't this be nice, it sort
11:13:03 of sounds like ballet music. Wouldn't it be nice
11:13:09 if we ask the local dance group to perform it to
11:13:12 your piece. The problem with that is ballet is
11:13:15 grand rights as opposed to performing rights,
11:13:19 this composer hadn't contemplated that in their
11:13:22 contract, and because the PROs don't license
11:13:24 grand rights, this composer couldn't get any
11:13:28 royalties on any of these concerts performed by
11:13:31 this orchestra, because now they fell under grand
11:13:33 rights and not performing rights, don't make that
11:13:34 mistake.

11:13:39 Another really important thing regarding rights
11:13:42 is a concept called work for hire or work made
11:13:44 for hire. They are the same thing. This is a
11:13:48 device in the copyright act, it's literally
11:13:50 printed in the statute. It transfers the
11:13:54 ownership away from the creator of the work to
11:13:57 the commissioning party so long as there's a
11:14:01 signed writing that says the work is a work for
11:14:03 hire. Don't use this term at all in your
11:14:06 contract if that's not what you intend. I have
11:14:08 seen people think this is the title of a type
11:14:11 contract. They'll call it instead of composer
11:14:14 agreement, they'll call it composer work for
11:14:16 fire, and it tries to say later composer retains
11:14:19 all the rights. Don't do that. Don't use these
11:14:22 words at all unless you intend to give the
11:14:26 commissioning party all of the copyrights.
11:14:28 I tend to recommend if for some reason you want
11:14:31 to split the copyrights with the commissioning
11:14:35 party, it's better to use an assignment, which
11:14:37 will give them some portion of it, you can give
11:14:39 them half or just the rights to collect the
11:14:43 royalties, like, for instance, sometimes parties
11:14:47 only care about the sink rights. You can make
11:14:49 recordings and release it on spot afire or
11:14:53 whatever, but we want the right to the premier
11:14:56 and license any sync agreements, you can give
11:15:01 them just that portion and not all the
11:15:01 copyrights.
11:15:04 >> TERRY: Just to underline what Alex just said
11:15:07 with regard to work for hire, from other side,
11:15:09 from the side of the person who is hiring you to
11:15:14 compose something, if I get a work-for-hire
11:15:17 agreement, my advice to the client is I own
11:15:20 everything. Composer owns nothing. You're
11:15:23 paying -- they are paying you 100 bucks to paint
11:15:26 your fence, that's what they are doing, and if
11:15:29 that's the deal you want, that's great.
11:15:34 But any time you see could, you should think
11:15:38 this is a one-time job and a one-time check.
11:15:41 >> ALEX: Yep. And there are some situations
11:15:43 where it's common to use the work-for-hire. Like
11:15:46 if you write for Disney, you get the opportunity
11:15:49 to score a film for Disney, you're going to sign

11:15:51 a work-for-hire.

11:15:55 That's just how those work. And the main risk
11:15:57 for work-for-hire is because you're parting with
11:15:59 all the copyrights, and copyright in the United
11:16:02 States is life of the author plus 70 years,
11:16:05 you're missing out on potential additional
11:16:08 revenue, other than what you got paid the one
11:16:09 time to make the work. That's why you don't want
11:16:14 to part with your copyrights without a number
11:16:19 with a lot of zeros, that's when work-for-hire is
11:16:20 appropriate.

11:16:23 If you're dealing with an unsophisticated
11:16:26 party, somebody who is maybe an arts organization
11:16:29 that hasn't commissioned music before, be
11:16:31 prepared to teach them what's involved,
11:16:32 especially when it comes to the rights, and when
11:16:36 it comes to the time line. Often, they really
11:16:38 don't know what's involved. They don't realize
11:16:41 it takes a hundred hours or whatever it takes you
11:16:44 to complete a band score that's continue minutes
11:16:46 long and do all the parts.

11:16:49 So make sure that you're the one who knows how
11:16:51 this works, you're the one that should be
11:16:54 communicating that to your -- should be
11:16:57 communicating that to your client. It's a good
11:17:02 to have your contract template. Even if they are
11:17:04 a sophisticated party. You don't want to wait
11:17:07 for them to come up with terms that are agreeable
11:17:10 for you. Put in front of them what you want and
11:17:12 expect, and see if you have a meeting of the
11:17:13 minds.

11:17:14 Don't use a template that you don't understand.
11:17:17 I see this all the time. People go on a
11:17:21 Facebook group, does anybody have a template for
11:17:24 blah blah blah, do you ask your friends for
11:17:26 prescription drugs? That's about what that
11:17:26 means.

11:17:29 There's a lot of flexibility.

11:17:32 >> TERRY: Alex, these are artists, sometimes
11:17:33 they actually do.

11:17:33 (laughter).

11:17:35 >> ALEX: Don't do that.

11:17:39 There's a lot of flexibility in contracts.

11:17:41 Even when people throw around words like, oh,

11:17:43 this is standard, this is just what's in it's
11:17:44 standard.
11:17:47 So you don't want to be in a situation where
11:17:49 your best interests are not served because the
11:17:51 template you found doesn't fit what you're trying
11:17:51 to do.
11:17:55 Other risks with parties who don't know what
11:17:58 they are doing, if you have a lawyer, because
11:18:00 you're being a serious business person and you
11:18:03 have an attorney helping you, if you're using a
11:18:07 lawyer, and they don't, you want to be careful
11:18:10 that your legal fees aren't accumulating because
11:18:12 they don't know what they are doing and they
11:18:14 won't get a lawyer, because your lawyer has to
11:18:16 fix things multiple times or explain it to them.
11:18:21 I've had this happen with a couple clients, I've
11:18:23 told the client I'm not billing you for this,
11:18:25 they don't know what they are doing and they are
11:18:27 taking up lots of our time.
11:18:30 There are a few guides to commissioning music
11:18:34 floating around. I know American composers firm
11:18:37 has a page on this, and meet the composer had put
11:18:39 one together a number of years ago, I think it's
11:18:42 still around, and that's a really good document
11:18:45 to look at. You could give that to your client,
11:18:47 or adapt something like that for your own needs
11:18:50 that explains here is what I charge, here is how
11:18:54 long it takes me, here's how the contract looks,
11:19:00 and lay it all out.
11:19:02 Now, a lot of things are changing because of
11:19:06 COVID-19. We have a lot of uncertainty.
11:19:08 So Terry you want to talk about that.
11:19:09 >> TERRY: What's COVID-19?
11:19:12 >> ALEX: It's a very serious disease.
11:19:15 >> TERRY: Yeah.
11:19:17 >> ALEX: It killed 100,000 people in the US.
11:19:23 >> TERRY: Yes, and so it is really, really
11:19:26 created somewhat I used to call law school
11:19:30 exercises in the contract world, especially
11:19:44 around events, performing artists, weddings.
11:19:47 There's a plethora of people out there right now
11:19:53 who are trying to keep the money that's been
11:19:55 deposited, for example, if you were scheduled to
11:20:02 play at a wedding, to keep the money for the

11:20:08 venue, to -- or for event hosts, weddings, other
11:20:14 sponsors, promoters, to try to get deposits back,
11:20:19 because now that the event is not happening, the
11:20:21 contract can't be performed.

11:20:25 So I'm going to talk about a couple of
11:20:28 different things. One, who is going to be liable
11:20:34 under a contract? But also, the concepts of
11:20:39 illegality, impossibility, and force majeure,
11:20:42 these are all legal terms of art, but they are
11:20:45 very important in this time.

11:20:51 If you're a performing artist or otherwise want
11:20:54 to get paid because an event is booked and going
11:21:00 to take place, there are ways to get paid and
11:21:05 there are ways to keep the money that's been
11:21:07 deposited. And that's what we're going to talk
11:21:09 about today.

11:21:15 So first of all, fundamental contract law.

11:21:19 Contracts are generally enforceable against the
11:21:23 party that signs it. So Alex mentioned in
11:21:30 passing that you might want to have your contract
11:21:33 signed, if you have an LLC, or if you don't have
11:21:39 one, get one. If you're in business, get one.
11:21:44 Because it protects you personally from any
11:21:50 liability for disasters that happen. But also,
11:21:55 in a contract situation, it can protect your
11:22:00 personal assets if things really go south.

11:22:06 So that -- the party that signs the contract,
11:22:13 Joanne Smith compositions, LLC signs the
11:22:15 contract, and then if you're supposed to be paid
11:22:20 for something, you get a deposit. And now that
11:22:24 event is cancelled.

11:22:24 What do you do?

11:22:31 Well, what you ought to look at in the contract
11:22:35 is first of all, there's a concept, and this
11:22:38 sounds very legalese, called force majeure.

11:22:46 A long time ago, they called it act of God.

11:22:49 And then they called it act of nature. And now
11:22:54 they use Latin force majeure because what it is is
11:22:58 a list of things that could completely undermine
11:23:01 the purpose of the contract, and if that happens,
11:23:03 we agree at the beginning that we're just going
11:23:08 to void the contract and we'll give you your
11:23:14 money back, and we won't expect to play that
11:23:16 night.

11:23:19 >> ALEX: Terry is force majeure one list that
11:23:22 exists somewhere that includes all those things
11:23:24 or is it one list specific to an individual
11:23:25 contract.
11:23:27 >> TERRY: Every contract is going to have an
11:23:28 individual list.
11:23:31 Now, at the end of that list, it's going to
11:23:34 say, or other similar events, which is where
11:23:37 lawyers come in to lit a case whether that's what
11:23:39 you were thinking of or not.
11:23:45 But a force majeure event, a hundred years ago
11:23:48 never included a strike. But a hundred years
11:23:51 ago, there was -- in the 1920s, actually, there
11:23:59 were a series of strikes that disrupted
11:24:01 manufacturing contracts. These were violent
11:24:05 strikes. If you go back, if you've seen gangs of
11:24:08 New York, that wasn't it, but it was like that.
11:24:13 Street fighting. It was awful. Anyway, so a
11:24:16 strike became something that lawyers will talk
11:24:19 about on a significant contract is that going to
11:24:21 be a force majeure or not?
11:24:25 Imagine if you're a national hockey league
11:24:30 sponsor. You're going to put out \$5 million, and
11:24:35 if there's a player strike, you need that in the
11:24:36 contract.
11:24:39 Typical force majeure are what you really think
11:24:44 of as the acts of avenging God. Hurricanes,
11:24:53 fires, earthquakes, unbelievably bad weather that
11:24:56 prevents delivery trucks from even crossing the
11:25:03 country so they can't... so in 2001, what
11:25:06 happened? A terrorist attack on the United
11:25:07 States.
11:25:12 Since then, force majeure clauses almost always
11:25:13 include terrorist attacks.
11:25:17 Now, going forward, you're going to see the
11:25:20 word pandemic, which had appeared a little bit
11:25:22 over the last 10 years, but now that's going to
11:25:27 be a force majeure clause.
11:25:30 Which leads me to the next piece, because if
11:25:34 you have an existing contract now, you are
11:25:38 supposed to play somewhere on June 1st, and they
11:25:41 can't open the bar where you're supposed to play
11:25:46 or the concert hall.
11:25:49 You don't have pandemic in your force majeure

11:25:49 clause.

11:25:52 You may not even have a force majeure clause.

11:25:55 Unless you got a really good lawyer, but we'll

11:25:57 talk about that later.

11:26:05 So how is it that we deal with something that

11:26:08 clearly undermines the purpose of the contract?

11:26:13 Right? They are hiring you, and they are paying

11:26:20 you \$25,000 to play in front of 25,000 people.

11:26:22 Or better yet, they are paying you \$5,000 to play

11:26:26 in front of 350 people where they sell alcohol.

11:26:28 They can't open the place.

11:26:33 They can't open it because the governor has

11:26:36 said you're not permitted to have a gathering of

11:26:37 more than 10 people.

11:26:42 So does that mean that they have to pay you

11:26:43 \$2,500 to play for 10 people?

11:26:46 Probably not.

11:26:53 And that's the concept of impossibility. A

11:26:59 contract is void if it's impossible. So my own

11:27:02 daughter scheduled to get married in April of

11:27:06 this year in palm springs. And in southern

11:27:11 California. They turned -- they shut down all

11:27:16 gatherings of over 10 people, shut down the hotel

11:27:18 where the wedding was supposed to be. It was

11:27:21 absolutely impossible to perform the contract.

11:27:24 But it was also illegal.

11:27:30 Second part of void contracts is a contract is

11:27:31 void if it's illegal.

11:27:38 So, in other words, I can't pay you to drive

11:27:45 boot leg whiskey across from Canada, an illegal

11:27:47 act we'll call it. If you deliver the whiskey

11:27:51 and I refuse to pay you, you don't get to go to

11:27:53 court and enforce that contract, because it's an

11:27:54 illegal act.

11:28:00 So apply that to your bar gig. Let's say the

11:28:03 bar was not allowed to be open at all.

11:28:05 Therefore, it is an illegal act.

11:28:09 To have that gathering, to have that concert.

11:28:12 Now, they can put you on stage by yourself, and

11:28:15 that dove tails with the impossibility I talked

11:28:17 about before, because that's not what the

11:28:19 contract was for.

11:28:25 So an illegal contract is void. An impossible

11:28:28 contract is void. If you've got a force majeure

11:28:32 list, that will also void the contract.

11:28:38 But you really have to talk about when you're

11:28:41 thinking of -- what you're going to do is get a

11:28:43 call, they are going to say, hey, we sent you

11:28:47 that thousand dollar deposit, and now our

11:28:50 contract is void because it's illegal to perform

11:28:53 in the bar on the night that you were supposed to

11:28:56 perform. Or the wedding has been cancelled,

11:28:58 because the venue can't host it. Therefore our

11:29:00 contract is void, send plea back the thousand

11:29:00 dollars.

11:29:07 As the person -- when I'm representing people

11:29:13 who are in those shoes, I'm telling them to chase

11:29:16 down the money, and legally, there's a very

11:29:21 strong argument. But from the composer side, you

11:29:25 also have -- or the performing artist's side, you

11:29:28 also have an argument, which is presumably you

11:29:30 have a no refunds under any circumstances clause

11:29:32 in your contract.

11:29:35 And now you decide whether you want to fight

11:29:38 over that thousand dollar deposit or that

11:29:43 500-dollar deposit. I think this is a key point.

11:29:48 You have a relationship with this venue. And

11:29:51 you have a representation. People want

11:29:54 performing artists who are, of course, super

11:29:58 talented, and entertaining and draw a crowd, but

11:30:00 also that are easy to work with.

11:30:08 If you fight over the \$200, then what very well

11:30:12 might happen is they'll say, yeah, go ahead, keep

11:30:19 your \$200, and then delete your phone number from

11:30:22 their contacts. That's the last thing you want

11:30:25 to have happen. By the way, venue people know

11:30:27 each other and they talk to each other R. other.

11:30:30 They said, yeah, so and so insisted on keeping

11:30:33 the \$200, we'll see how she feels about that next

11:30:38 year when we don't book her. So then the

11:30:39 question is, does that mean you have to give back

11:30:40 the \$200?

11:30:44 No. There's a win-win way to handle it.

11:30:52 If somebody's asking you for your deposit back,

11:30:54 you don't want to fight it without -- unless you

11:30:57 really want to fight it, but you're risking your

11:30:59 reputation.

11:31:02 But you don't want to give it back, because

11:31:05 which of us has too much money in the bank at
11:31:07 this point, especially at this point.
11:31:12 And what do you really want to have happen?
11:31:15 You want to get as many bookings as possible for
11:31:18 as long as possible out as you can prebook
11:31:20 yourself. If you're the rolling stones, you're
11:31:24 booked for the next 17 years, even though they'll
11:31:27 be how old? I don't know. But so here's what
11:31:31 you do. Someone calls you and asks for a
11:31:34 deposit, say, yeah, that's a bummer, I really
11:31:39 love playing your event, and I had a great time
11:31:42 at it last year, I'll toll you what let's do.
11:31:44 Let's transfer the deposit from this year to next
11:31:48 year. I'll commit to next year's event right
11:31:48 now.
11:31:52 And we'll consider that the deposit. I'll even
11:31:55 do it at the same price.
11:32:00 And that will allow you to, A, be polite and
11:32:02 nice and kind and have a good relationship with
11:32:09 the booker; B, keep the 200 buck forces now: and
11:32:13 C, get a gig for next year already.
11:32:16 At this stage, if you're fully booked for the
11:32:18 next six months, if could you transfer that all
11:32:23 into the summer and fall of 2021, that's a pretty
11:32:24 good place to be.
11:32:29 Under the uncertain times we're in now.
11:32:31 Wouldn't you agree, Alex.
11:32:34 >> ALEX: Yes. I have a string quartet that
11:32:36 plays weddings, that's what we've been doing.
11:32:40 We're just moving with couples to their new date
11:32:41 that are next year.
11:32:45 I just want to highlight too, you can make
11:32:47 changes to a contract after you've signed it.
11:32:50 You just sign a new piece of paper that says,
11:32:53 we're making this change, and then you both sign
11:32:54 it, and now that's part of the contract.
11:33:02 >> TERRY: Yeah. So that's called an amendment.
11:33:06 And it could be actually as simple as an e-mail
11:33:09 saying, hey, this will confirm our agreement that
11:33:13 we're changing, we're amending, use whatever word
11:33:17 you want, but we're changing the contract for
11:33:23 June 6, 2020, until now apply to your event on
11:33:24 June I thinkth, 2021.
11:33:26 And that's enough.

11:33:33 That with a lot of follow-up as months go back,
11:33:36 because you always want to do that anyway. But
11:33:39 you'll have a contract that's -- you have a
11:33:47 booking for next year. It really is a win-win
11:33:50 for everybody. Even for the booker who says,
11:33:54 yeah, this is great, I've got one more act booked
11:33:54 for next year.
11:33:56 Right?
11:33:59 >> ALEX: Yep.
11:34:01 >> TERRY: So the last thing I want to talk
11:34:04 about, and then we'll open this up for questions,
11:34:08 is what do we want to put into new contracts?
11:34:12 What should contracts look like now?
11:34:19 Raise your hand if you have ever thought of
11:34:23 a -- if you ever had an event cancelled by a
11:34:25 pandemic before 2020, raise your hand.
11:34:28 Now, I can't see anybody out there, but I'm
11:34:32 assuming nobody is raising their hand.
11:34:36 So... but now, everybody has had events
11:34:42 cancelled with pandemics. And I think that event
11:34:46 venues are going to write a -- I think it might
11:34:52 even be outside of the force majeure clause. I've
11:34:55 seen drafts of clauses that say, if there's a
11:34:58 pandemic, here's what will happen.
11:35:03 And this is why you want to have your own
11:35:07 contract to send out. Because if the booker
11:35:10 sends you their contract and it says, in case of
11:35:12 pandemic, you will return the money within 30
11:35:18 days of written request. And then you're bound
11:35:20 to that. Right?
11:35:24 On the other hand, if your contract says, in
11:35:29 the event of pandemic, then the deposit shall
11:35:32 be -- this contract shall not be void, but the
11:35:35 deposit will be transferred to a future book
11:35:35 being.
11:35:40 -- booking. See the difference there? How
11:35:42 different is the phone call from the booker who
11:35:47 says, I'm canceling, send the money back, or our
11:35:49 canceling, our contract says you have to apply
11:35:53 the deposit to a booking for -- a later booking?
11:35:56 And again, everybody is happy to have another
11:35:58 booking, and to keep the \$200.
11:36:06 >> ALEX: There's still a lot of uncertainty
11:36:08 about contracts that are happening or supposed to

11:36:12 have happened in the next six months here, and
11:36:15 some presenters I know are looking at alternative
11:36:18 formats, like having drive-in consuperintendents,
11:36:20 or doing stealing.
11:36:23 We had one question from a registrant that was
11:36:26 asking about opera specifically, and this would
11:36:30 be grand rights again. Streaming is a problem
11:36:33 for grand rights, because those things are
11:36:36 negotiated directly with the publisher, the
11:36:38 rights holder, even if you're doing it live in a
11:36:40 theater. Remember the example with the composer
11:36:45 who couldn't get performance royalties from
11:36:47 ASCAT, because they don't cover grand rights,
11:36:51 have you to go right to the publisher. Typically
11:36:54 in those agreements, you're not allowed to
11:36:57 stream, record video or give out DVDs or anything
11:37:00 like that. So if you're going to shift your
11:37:06 concert or your opera to online, will' stick with
11:37:10 opera for now. If you're going to shift to an
11:37:12 online format, you're going to have to
11:37:15 renegotiate portions of the contract, because you
11:37:16 don't have the rights to do that. If you're
11:37:20 licensing the work yourself, you're
11:37:22 self-published, can you do this if your work is
11:37:26 published through someone else and your publisher
11:37:29 is not on top of this, get on the phone and tell
11:37:32 them to. I would say avoid platforms like
11:37:35 Facebook and YouTube that automatically make an
11:37:36 archived video of the stream, because you're not
11:37:39 going to have the rights to make that even if you
11:37:43 get the rights to stream live. I know a lot of
11:37:46 organizations are trying to use platforms that
11:37:51 allow a pay wall, so they'll sell a ticket
11:37:54 through Eventbrite or ticket master and it sends
11:37:57 them a Zoom link and password, so you are
11:38:00 limiting the size of an audience just like you
11:38:02 would in an actual theater.
11:38:05 Another idea I've seen is selling
11:38:07 subscriptions, season subscription tickets this
11:38:10 way, but I would say the caveat there is you're
11:38:13 not going to be able to get the same high prices
11:38:21 that you could for a theater pass, because your
11:38:24 experience is different, people buying season
11:38:27 sports passes and season opera tickets are

11:38:28 expecting to go to the theater, have that
11:38:30 experience, have that social interaction. When
11:38:33 you switch it to an online medium, you're
11:38:37 competing with services like Netflix, and Netflix
11:38:39 offers 12 buck as month, and they have thousands
11:38:42 of hours of content in there. So I would say be
11:38:45 mindful of your price point when you're offering
11:38:48 the work in a different format.

11:38:53 >> There were a couple questions that just came
11:38:56 in that we can do right now. There was a
11:38:58 question about language here, and in terms of
11:39:02 including language like quote in case of shut
11:39:06 down by civic authorities. Is it useful to get
11:39:11 that granular with the situations Utah scry
11:39:11 scribing?

11:39:14 >> ALEX: I think you can. Terry can weigh in on
11:39:17 this. You might save a litigation question if
11:39:20 you make it that specific. Like if there's a
11:39:22 stay-at-home order, this is what we're doing.
11:39:27 But if you say if there's a pandemic, and then
11:39:29 you disagree whether there's a pandemic going on
11:39:31 now, there's a question which leaves potential
11:39:34 for litigation. Terry, what are your thoughts?

11:39:36 >> TERRY: My thought is this comes to what I
11:39:39 call the green M and M standard.

11:39:44 I wish I could remember the name right now, but
11:39:49 there was a major artist, rock and roll star who
11:39:53 insisted in his rider that he have a bowl of M
11:39:55 and Ms all green in his dressing room.

11:39:59 If you can request that kind of thing in your
11:40:04 rider, then can you request just about anything.

11:40:12 But the reality is most of us don't meet that
11:40:13 standard.

11:40:16 So what you want to have in your standard
11:40:19 contract is something -- you want to have it
11:40:21 short, sweet, and powerful.

11:40:28 So when we talk about granular level, like if
11:40:33 case of shutdown by civic authorities, I think
11:40:38 that it's better to be just maybe a level above
11:40:44 that. In case of shutdown caused by law, or you
11:40:47 can use governmental authority, which are not
11:40:48 exactly the same thing.

11:40:54 This is what shall happen.

11:40:58 What's most important in that clause is the

11:41:01 second half. What happens if it's shut down.
11:41:09 Now, contrary to what I just said, I think
11:41:13 pandemic/COVID-19, you have a contract that's
11:41:16 going to be enforced in the next 12 months,
11:41:19 you're going to perform in the next 12 months,
11:41:23 right now, that I would have an agreement as to
11:41:27 what are we going to do if COVID-19 has a second
11:41:32 wave or a third wave? If we're shutdown by
11:41:36 COVID-19, here's our plan.
11:41:38 Now, it should income your standard contract,
11:41:40 because you want to be able to just send the
11:41:42 contract and have them sign it. You don't want
11:41:47 to hire a lawyer to negotiate a -- I'm sorry, did
11:41:48 I just say that out loud?
11:41:56 You don't want to hire a lawyer to negotiate a
11:41:59 3,500-dollar gig deal on the fine points of
11:42:02 what's going to happen on COVID-19.
11:42:06 You want to have that in your standard
11:42:08 contract. And I think you do want to have a
11:42:13 provision that says -- and my recommendation,
11:42:16 general recommendation, everything is specific,
11:42:22 but my general recommendation is say if COVID-19
11:42:24 shuts this gig down, we're going to transfer the
11:42:27 deposit to the next gig, and we book it.
11:42:28 >> ALEX: Mm-hmm.
11:42:30 >> There is a -- another question here, do you
11:42:33 have any comments on what artist managers should
11:42:35 include in contracts regarding COVID-19 protocols
11:42:39 at venues, for example, can we require in
11:42:42 contracts that audience members must wear masks.
11:42:44 >> ALEX: You can make, just in general, you can
11:42:46 make requirements for patrons part of their
11:42:49 ticket purchase. So like when you go a baseball
11:42:53 game, you may or may not be aware that you sign a
11:42:57 waiver about if you get hit by a baseball. Can
11:42:59 you definitely require certain behaviors of
11:43:00 patrons as part of your contract with them to
11:43:03 give them a ticket. As far as what those
11:43:06 parameters should be, I would prefer to the state
11:43:08 guidelines. There's whole bunch of information
11:43:13 that just came out that talks about COVID-19
11:43:15 preparedness plans and what the expectations are.
11:43:28 >> TERRY: I can add to that.
11:43:36 Very specifically, about wearing masks, I think

11:43:42 you can have a requirement easier to accept. I'm
11:43:46 pragmatic. Easier to accept for the venue is
11:43:51 that they have to follow state or CDC or whatever
11:43:55 guidelines are out there with respect to public
11:43:56 safety issues.
11:44:03 >> ALEX: Yeah. There was a question about
11:44:07 how -- this could be a whole other discussion.
11:44:11 How is is COVID-19 specifically affecting
11:44:14 composers, the main issues are events are not
11:44:16 happening that would generate royalties for us.
11:44:20 For instance, I work in film media. A plot of
11:44:24 productions were were able to shoot. Some got
11:44:29 close and couldn't finish, and that eventually
11:44:31 trickled down to the composers who are in post
11:44:33 production, so this movie is not getting made.
11:44:37 We don't need a score in the for seeable future,
11:44:40 you're not getting paid. Okay, every time I
11:44:42 opened my e-mail for a while, it was like, this
11:44:44 one is not happening, this one is not happening,
11:44:46 you're not getting paid for this. If you agree
11:44:49 to let -- say you got commissioned for a piece I
11:44:52 was supposed to premier this year and they decide
11:44:55 they are going to stream it instead of having it
11:44:57 at their hall, you have all of those concerns
11:44:59 about what platform they are using. Are they
11:45:03 using a pay wall? You basically have to think
11:45:05 like you're licensing grand rights now, because
11:45:09 these platforms don't pay performance royalties
11:45:11 the same way that a concert hall would. So if
11:45:14 you have someone that's doing a show on Facebook,
11:45:18 you're not, as the composer you're not going to
11:45:19 get get paid for that. That's how it works right
11:45:22 now. They don't have a music licensing structure
11:45:25 sorted out that allows you to get paid or allows
11:45:28 you to track it. You won't get paid royalties.
11:45:31 Normally a concert royalty is really good. Even
11:45:35 if you have a venue, have you like maybe 50
11:45:38 people there, it seats 100, 250 people. You are
11:45:43 easily going to get 50 bucks for that
11:45:45 performance. If you have something played at a
11:45:48 college, it's easily 50 bucks for that
11:45:50 performance. If they do it on Facebook, you're
11:45:52 going to get nothing. Go back and do those
11:45:54 contracts in a way that makes sense for everybody

11:45:56 involved.

11:45:59 Andy, other questions?

11:46:04 >> Okay. Yeah. There is. So let's see.

11:46:06 Regarding the contract amendment to apply to a

11:46:10 future date, if it is not possible for the vendor

11:46:13 to identify a date yet, how can an adjust ensure

11:46:16 that a general future date is followed through on

11:46:18 in a reasonable time period?

11:46:21 >> ALEX: That's kind of up to everyone involved.

11:46:24 A lot of times when you're putting a music

11:46:26 festival together, they don't spout specific

11:46:28 dates in it quite yet. They will be looking a

11:46:31 year or two out with what's called a letter of

11:46:35 intent. They are like, hey, we want you to play

11:46:38 this festival, are you interested? And you're

11:46:40 basically saying yes, I'm interested, and this is

11:46:42 kind of bare bones what we talked about, but they

11:46:46 are not making you commit to specific days yet.

11:46:52 If you have a contract in that event, like state

11:46:55 fair got cancelled, they may be looking at neck

11:46:57 year, they don't know that you're going to be on

11:47:00 Thursday next year quite yet, but you know it's

11:47:03 happening in that two weeks, you can be granular

11:47:06 again or broadly. But if they try and reschedule

11:47:09 you and commit to a date five years out, maybe

11:47:12 you don't want to do that. It's totally up to

11:47:13 you.

11:47:16 >> TERRY: And you can put an expiration on it.

11:47:22 Let's say it's a bar gig. So it's not an event

11:47:28 like the state fair. You can say an event

11:47:30 sometime before year end 2021.

11:47:36 So hopefully you follow up, you'll get the

11:47:40 booking, but if nothing else, you get to keep the

11:47:43 deposit a year and a half from now when everybody

11:47:46 has forgotten about it.

11:47:48 >> VANESSA: I'm going to take over from Andy

11:47:51 now, a few more questions here. One is back to

11:47:54 negotiating contracts for the cue her.

11:47:56 >> Would you recommend having a pandemic clause

11:47:58 that might cover possible scenarios from pandemic

11:48:02 related travel disruptions, local outbreaks or

11:48:06 infected ensemble members, would there be a

11:48:08 difference between domestic and international

11:48:13 events? And would be there sort of a generally a

11:48:16 agreed COVID-19 clause in the future.

11:48:17 >> ALEX: I don't know about a general clause, I

11:48:19 have been seeing happening with international

11:48:22 issues so the contract is subject to where the

11:48:25 work takes place. So if it requires you to

11:48:27 travel somewhere to perform it, you could

11:48:31 absolutely run into international issues. Like

11:48:34 we had a film crew that was supposed to travel

11:48:36 out of the country that could not because of a

11:48:38 travel ban preventing them from landing where

11:48:40 they were supposed to get to.

11:48:44 Terry, you want to comment on that?

11:48:47 >> TERRY: Yeah. With regard to standard

11:48:52 clauses, actually, first I'll visit what Alex

11:48:56 said. What what I've seen happening now is, for

11:49:01 example, we've been able to void contracts is

11:49:04 impossible, because -- wedding contract where

11:49:07 people were travel for example India and from

11:49:10 Europe where those borders are closed right now,

11:49:15 the travel is illegal. It's a applicants sticky,

11:49:17 because -- it's a little sticky because how

11:49:20 important is it to have your cousin Fred at your

11:49:23 wedding. On the other hand, if its your mother,

11:49:25 maybe that's a little different thing.

11:49:29 With regard to standard clauses, there are two

11:49:32 general clauses. First of all, I think you ought

11:49:35 to have, any gig you're doing in the next 12

11:49:37 months, and make through the end of 2021, there

11:49:45 ought to be a COVID-19/pandemic specific clause

11:49:48 in it. If this happens, here's what we're going

11:49:51 to do, because nobody knows what's going to

11:49:53 happen.

11:49:57 So but there's two standard clauses that will

11:50:00 emerge.

11:50:06 One that the venue, the paying party will have

11:50:10 one in the contract is if we have to cancel, you

11:50:14 have to give us our money back, short time frame.

11:50:16 And that's it. Done.

11:50:18 Okay? That's not what the artist wants.

11:50:22 What the artist wants is what I talked about

11:50:25 before, which is, I'll go through it again, it

11:50:30 should say, if it's shut down by COVID-19 or a

11:50:35 pandemic, then we're keeping the deposit for now.

11:50:37 We're going to allow you to transfer it to a

11:50:42 future booking to take place, if it's an event,
11:50:48 then it's at the 2021 state fair. If it's just a
11:50:50 regular gig or tour or something, then you have
11:50:56 on a date within the next 12 months, or by year
11:51:00 end 2021.

11:51:04 And those clauses clash, and kind of gets us
11:51:07 back to the green M and Ms, right in how big a
11:51:11 deal are you? What can you insist on? But if,
11:51:15 as most of us fall within the standard contract,
11:51:19 which is I put in air quarts because it's not
11:51:22 really standard, if you have a standard contract,
11:51:24 and it's got your language in it and you present
11:51:27 it to them, they will often not want to fight
11:51:31 about it, they'll sign it. You're one of many
11:51:34 people they are booking. Boom, done, and now if
11:51:37 things go south, you've got your language in it.

11:51:40 >> VANESSA: I have a tandem to that too, which
11:51:42 the legal protection for health considerations,
11:51:47 both protecting the performers from any legal
11:51:53 action from concert attendees or organizers or
11:51:57 similarly if the performers end up having health
11:51:59 issues as a result. Event, are there
11:52:01 considerations in the contract for those?

11:52:06 >> ALEX: You could. Personally, if I was hiring
11:52:08 performers, I would rather that they were honest
11:52:12 and told me they were sick. And then I would
11:52:15 literally pay them any way to not come than to
11:52:17 make all my other players sick.

11:52:25 >> TERRY: Yeah. And there's the
11:52:29 consuperintendent of assumption of risk, which is
11:52:36 another legal concept where if you jump off a
11:52:41 building on a bungee cord, you've assumed the
11:52:43 risk, it's in their waiver, it's in their
11:52:44 standard contract.

11:52:52 But with COVID-19, I think a player who comes
11:52:57 when they are well probably assumes the risk.
11:53:00 But maybe it ought to be dealt with in the
11:53:03 contract. But what I think is unless I'm a big
11:53:08 deal, or very likely to get sick, I don't think I
11:53:11 want to ask for that. If I get sick at your
11:53:15 venue, I'm going to sue you. I think they'll
11:53:16 just sign somebody else.

11:53:20 On the other hand, I don't think it's
11:53:27 unreasonable to ask for the protocols we talked

11:53:29 about.

11:53:33 >> ALEX: You can require those down stream too.

11:53:36 If I say I'm recording a film score so I'm hiring

11:53:39 the players for the session, I can make that part

11:53:42 of the contract I have with the players that

11:53:45 everyone has to have PPE, they have to provide it

11:53:47 themselves, and this is just one of the

11:53:53 expectations for coming to this space and how to

11:53:54 act on it.

11:54:00 >> VANESSA: Thank you. So we just have -- it's

11:54:02 11:53 just putting that out there. We have a few

11:54:04 more questions, and if you have questions you

11:54:07 want to ask, please put it in the chat box.

11:54:09 >> I have some more general questions here, for

11:54:12 contracts directly with performers that don't

11:54:16 involve transactions, I provide music, they

11:54:20 provide recordings is it still better to sign

11:54:22 with my LLC rather than myself as a person?

11:54:27 >> TERRY: Alex, I'll take it.

11:54:29 Generally speaking, I think it's bet tower sign

11:54:36 with your LLC. -- better to sign with your LLC

11:54:41 from a lawyer's perspective, the beatles had

11:54:45 apple music. A whole different apple company.

11:54:49 Everybody represented the Beatles and maw cart

11:54:54 knee and linen, nobody said, oh, apple wrote

11:54:59 those sangs. I don't think it affects the

11:55:03 recognize ability of your -- of who wrote the

11:55:06 work. It's just a legal term that nobody ever

11:55:06 sees.

11:55:13 >> VANESSA: Thank you. Another question is DCI

11:55:18 streaming flow marching grand rights, and would

11:55:24 DCIDVDI sales would be considered grand rights?

11:55:27 >> ALEX: Grand rights has to do with whether

11:55:30 there's a theatrical over arching thing to the

11:55:34 performance. DVD is districting on a physical

11:55:38 medium. If it involves video, you need a sink

11:55:41 license for that. That's not grand rights, grand

11:55:43 rights is another species of performing rights

11:55:45 essentially, but they wanted to separate them a

11:55:47 long time ago, because grand rights are perceived

11:55:50 to be much more lucrative, whereas performance

11:55:55 rights in like you're playing at a recital, a

11:55:59 concert, that type of thing, those are any song

11:56:01 is just as good as any other song, it's the size

11:56:04 of the hall that determines it.
11:56:06 I don't actually know the answer to that off
11:56:11 the top of my head. I think that -- we're
11:56:16 talking about drum Corps. That may apply to all
11:56:20 marching band stuff that has choreography. I
11:56:22 don't know off the top of my head if that
11:56:25 implications grand rights or not. If you're
11:56:28 streaming it you run into the issues you're not
11:56:31 going to generate royalties for the composers.
11:56:37 And if you're doing VDVD's same issue, you need
11:56:41 sync rights to do those, those aren't covered by
11:56:43 performing rights at all.
11:56:44 >> VANESSA: I don't have any other questions in
11:56:48 the chat box. Do you want to offer any kind of
11:56:51 last thoughts or resources for folks to look at?
11:56:56 >> ALEX: Yep. Do eve battling from Andy? I
11:56:59 know he had to take off. So there's in Minnesota
11:57:01 we have the Minnesota volunteer lawyer for the
11:57:05 arts. You can get a free 30-minute consult with
11:57:07 folks like Terry or I. There's a link on
11:57:09 Springboard for the arts page to the national
11:57:11 version much if you're not located in Minnesota.
11:57:21 >> TERRY: I would add to that, don't hesitate a
11:57:24 state to call. Some people think that getting a
11:57:26 free half hour with a lawyer is imposing on us,
11:57:29 we wouldn't do it if we didn't enjoy doing it.
11:57:32 And if you got a real problem, you can hire us,
11:57:36 but most of the questions that we handle are
11:57:39 things we've seen before, and we can help you,
11:57:42 and we're happy to do it. I'd rather talk to you
11:57:44 guys than normal people.
11:57:49 >> VANESSA: Thank you. I'm also also going to
11:57:51 put in the chat box here what I referred to at
11:57:54 the very top, which is our page on the ACF
11:57:58 website where this will be archived, and put for
11:58:01 folks to watch again, or to share others as well
11:58:04 as some other sessions we've offered. I want to
11:58:08 thank you both so much for your time today. So
11:58:12 incredibly helpful. Such a broad subject, and so
11:58:14 many intricate details to be mindful of. I'm
11:58:17 getting a lot of thanks in the chat box, just so
11:58:20 you know. Really appreciate it. For those of
11:58:22 you that maybe have questions later, please feel
11:58:24 free to reach out to us or Springboard for the

11:58:28 Arts, we're happy to continue the conversation.

11:58:30 >> TERRY: Thanks for having us.

11:58:32 >> ALEX: Thank you so much.

11:58:32 >> Thank you.