

USA concert touring issues



Author: Bernard M. Resnick and Priscilla J. Mattison

In this article we will give a general overview of the current state of the concert touring business in the USA, and highlight some of the industry issues most relevant to lawyers today.



>>State of the USA Touring Market

The USA has traditionally been an appealing and potentially lucrative market for many foreign performing musicians. According to Gary Bongiovanni of the trade publication Pollstar, the USA used to be a “huge market” for touring musicians, yet as a long-term trend, the touring business is now shifting, and broadening overseas[1]. More markets outside the USA are opening up; new facilities are being built, and more people in more countries can support higher ticket prices. Still, the USA is unique as a touring destination. It has 100 markets with modern buildings for concerts – more cities than most touring musicians will even try to play. The USA – or North America – still accounts for a substantial amount of worldwide touring income[2]. Live Nation Entertainment (“LNE”), the largest live entertainment company in the world, earns the lion’s share of its ticket sales revenue from North America concerts; a recent corporate presentation states that 2009 ticket sales revenue for its North America concerts was \$1,349,600,000, compared to \$743,800,000 for international concerts, and the company’s estimate for 2010 ticket sales revenue is \$1,354,800,000 for North America concerts, compared to \$653,600,000 for international concerts[3]. Bongiovanni points out that most English speaking acts, e.g., from the USA and the UK, still do only around 20% of their shows in other regions of the world, such as Europe and

Australia. Increasingly, non-English speaking acts are coming to the USA, primarily to play to expatriate communities. “Everybody”, Bongiovanni remarks, “wants to crack the USA market.”

In the short term, at least, the USA touring market is experiencing a difficult period. According to Bongiovanni, total gross ticket sales for the top 100 tours in North America were down by about 14% in dollars in the first six months of 2010, with unit sales down by about 10%. Billboard reported that North American box office dollars were down almost \$250 million January - June from the same period in 2009, a decrease of nearly 22%, with attendance down nearly 30% year to year^[4]. Despite the industry’s hopes for live concerts to offset slumping profits from sales of recorded music, the summer of 2010 has seen slow ticket sales and numerous high-profile cancellations. A recent Billboard article referred to a “perfect storm” of factors affecting the live music industry, including “a down economy, congested touring traffic, inconsistent ticket pricing, poorly conceived tours and consumer skepticism.^[5]”

Walt Reeder, Jr. of Big Bloc Entertainment, Inc., a Pennsylvania-based national urban talent booking agency, observes that some touring acts’ talent fees are too high for the current economy^[6]. The overpricing, he points out, has a trickle-down effect wherein ticket prices are high because promoters must recoup their money, and high ticket prices result in poor attendance. Reeder attributes the overly high demands of some acts to a combination of bad management and artist ego. Management, he says, sometimes thinks that record sales translate into the amount of money the artist should receive on touring, although performer fees should instead be based on “how many fannies they can put in seats.” Also, he notes, markets are different; an artist’s worth as a concert performer in Atlanta may be different than her worth in Philadelphia. Management fails, Reeder states, when it does not do feasibility studies, since there is not always demand for an artist in every market.

Despite some recent grim USA touring business numbers, certain artists and segments are doing well. Festivals such as Coachella, Lollapalooza and Bonnaroo were strong. Club level acts that are more affordable are still doing okay^[7]. Top stars such as Bon

Jovi and James Taylor/Carole King have had successful tours. Another such success story is Lady Gaga, whose “Monster Ball” tour is expected to gross nearly \$200 million worldwide[8]. Lady Gaga’s manager, Troy Carter of Coalition Media, LLC, has worked with the artist and her concert promoters to develop a strategy of offering big budget concert production at moderate price structures. He explains that the touring strategy has been “to follow the blueprint of long term touring acts. Start small and don’t move up in size until you know you’ve outgrown the size of the venues that you’ve been playing. The smaller venues give acts a chance to refine their live act sans the pressure, and at the same time allows the natural discovery process to take place amongst fans.”[9]

Expectations about the near term future of the USA live music business are mixed. Although some wonder whether a “generational shift” in the way music is valued may be affecting the concert business, [10] Pollstar concludes that “The Sky Is Not Falling” and that over time the concert business will remain healthy because “fans still crave live music. [11]” Tickets priced consistently and in line with audience expectations (and the broader economy) may improve sales. New digital tools that help venues and bands improve their scheduling, inform fans about shows, and permit direct band-to-fan sales, may expand the market. LNE expresses optimism about the ability of new distribution channels such as overhauled mobile applications and kiosks to drive sales[12]. Most likely, there will be a period of belt-tightening, but the USA will continue to be an attractive market for visiting artists for the foreseeable future.

>>Challenges of Touring the USA

Touring the USA presents a challenge for visiting artists. One reason is the country’s sheer size. The USA has nearly 300 cities with populations over 100,000 residents, and more than 50 metropolitan areas with populations over 1,000,000 residents. It is a physically large country, stretching 5,000 kilometers (3,000 miles) from east coast to west coast and approximately 2,500 kilometers (1,500 miles) from its northern border with Canada to its southern border with Mexico. Across this expanse, the country is also culturally diverse. Although traveling between the states does not raise all the

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same issues as traveling between countries in other regions of the world, touring the USA is still a major endeavor.

Some of the main challenges facing foreign musicians touring the USA are:

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1. *The vast distances between its many cities, and the resulting considerable costs for hotels, transportation, food, and staff due to the time required to move the tour from one locale to the next*
2. *The need to find trustworthy and reliable agents, venues, and promoters who can assist the artist on more than a local or even regional scale*
3. *The need to coordinate concerts with radio, internet, mobile and other promotions, due to the country's decentralized media outlets*
4. *The difference in regional musical tastes in some music genres, requiring advance research and expert agents and promoters to gauge the touring artist's target market and demographic audience well in advance*
5. *Venue styles which, for performers in some genres, may dictate the type of artists suitable to perform*
6. *Currency rate fluctuations, which can result in the visiting artist having a difficult time securing a proper fee in his home currency^[13]*
7. *Immigration issues (discussed further below)*
8. *Tax issues (discussed further below).*

It is common sense but worth repeating that trustworthy agents, venues, and promoters are key to successful touring. As events continue to remind us, tours can be marred by abusive audience members, audience member drug overdoses, stampedes, professional bootleggers, and other problems. Foreign musicians might be surprised to know that in some parts of the USA concert-goers may be legally permitted to carry handguns. Some operators in the tour business turn out to be scam artists. As with any business venture, it is advisable to seek out trustworthy partners and to enter into proper, detailed written agreements.

>>Typical Tour Negotiation Issues

The specifics of the typical contract issues to be negotiated between artist, promoter, agent and manager in connection with tours within the USA are beyond the scope of this article. However, in general, the touchstone points for negotiation normally include:

1. *Artist's Fee: Is the artist's fee a guaranteed amount, a percentage of the gate receipts, or a combination of the two?*
2. *Transportation/lodging: Is the artist responsible for paying these costs for herself and her crew?*
3. *Rider: Which of the artist's technical and hospitality requirements will be provided by the promoter, and which will be the artist's responsibility?*
4. *Division of tour merchandise revenue: Will the artist be required to share some of the t-shirt and other similar memorabilia revenue with the promoter, and if so, how much?*
5. *Coordination of tour sponsor requirements: If the artist is fortunate enough to have a tour sponsor, how can the artist fulfill her obligations with respect to brand category exclusivity and other contractual stipulations so as not to conflict with similar sponsorship deals entered into by the promoter and/or the venue?*
6. *Selection and payment of support artists: Who is responsible for determining whether a support artist performs prior to the headline artist, and, if so, who is the support artist and who pays the support artist's fee?*
7. *Meet & Greet, After Party, VIP Admission: Do the artist's corporate sponsorship agreement, the local venue, or the promoter require the artist to attend extra events before or after the concert, and if so, who is responsible for coordinating and funding these events? Does the artist have any control over front row seating, admission to sound check, or other fan perquisites, and if so, who is responsible for coordinating this and how is the additional revenue divided between artist, venue and promoter?*

>>USA Immigration Issues

Most foreign visa applicants who wish to travel to the USA in connection with concert performances apply for “O” or “P” visas. These are visas for temporary (nonimmigrant) workers. “O-1B” visas are the designations given by the USCIS for persons of extraordinary ability in the arts, and “O-2” visas are the designations for their professional assistants who are “essential” to the completion of the O-1B’s production. “P” visas apply generally to athletes and artists who come to the USA as part of groups and educational programs. A “P-1B” visa is for a member of an internationally recognized entertainment group. Detailed information about USA visa requirements is at the USCIS website, <http://www.uscis.gov>.

As of October 2009, the United States Customs and Immigration Service (USCIS) has instituted more restrictive readings of O and P visa approval regulations. As a result of the USCIS clarifying the requirements for agents filing as petitioners for O and P visa applications, potential artists’ sponsors are being scrutinized more carefully. The O and P applications need to provide detailed tour itineraries and extensive documentation in advance; the time required for processing these complicated applications has lengthened; and it is nearly impossible for an artist to achieve USCIS visa approval without hiring professional advisors to assist in the application process. Jeffrey Fuhrman of IMG Artists notes that some artist management firms have instituted a service charge to their clients due to the cost in resources and time spent on securing visas.

In general, concerts are now booked with less advance notice than they previously were. The contraction of the scheduling timetable, combined with the longer time now required for visa approval, puts pressure on artists and their representatives to be able to make decisions and move quickly in response to concert date offers, and makes it much less feasible to travel to the USA for “one off” performances. In certain cases internationally recognized artists have had to cancel shows because visa rulings could not be obtained quickly enough. Speech Debelle, winner of the UK Mercury Prize, is one such example. Further, the length of the O and P visas which are granted tend to be much shorter, as expiration dates requiring the artist to depart the USA are now much

closer to the last date of the tour.

The visa situation may improve. On July 20th, 2010, representatives of the American Federation of Musicians of the United States and Canada (“AFM”, the musicians’ union) and other stakeholders met with USCIS officials to discuss ongoing problems with the processing of O and P visas, a matter that particularly affects the union’s Canadian members^[14]. The USCIS promised that the time to process regularly-filed artist visa applications will not surpass 14 days, and stated that revisions are being made to the policy and training programs for the two service centers that process O and P visas for artists traveling to the USA to perform. These revisions should decrease the number of requests for evidence and erroneous visa denials, although according to attorney Christina Galvan of immigration law firm Bagia & Associates in Philadelphia, it is too early to tell yet what the upshot of the July meeting will be^[15].

Some artists may be tempted to avoid the visa application process entirely, and declare themselves as tourists when they are inspected by USCIS agents at their arrival airport. However, the USCIS border agents are trained observers, unlikely to be fooled by three or four similarly dressed “tourists” standing in line together, all toting luggage bearing a remarkable resemblance to musical instrument cases. Entertainment lawyers and managers should carefully counsel their clients about the risks involved in attempting such a gambit.

In conclusion, the 21st century international touring artist will be well served to employ expert counsel with experience in USA immigration policy and practice.

>>Tax Issues

In 2007, the tax authority of the USA (the Internal Revenue Service, or “IRS”) stepped up its efforts to collect taxes from foreign athletes and entertainers working in the USA. The IRS’s initial focus is on those engaged in tennis, golf, and music, on the assumption that these individuals and those who arrange their appearances and manage their financial affairs are often “high income individuals”^[16].

The tax code requires withholding on most types of gross income of nonresident aliens at the rate of 30%. However, for nonresident alien athletes and entertainers performing independent personal services (i.e., as independent contractors), a provision has been made to request a reduced rate of withholding through a Central Withholding Agreement (“CWA”). CWAs are agreements entered into by the athlete or entertainer, a designated withholding agent, and the IRS. The CWA designates a single withholding agent to withhold and deposit an agreed upon amount, and relieves all other withholding agents from withholding on the specified events for the specified period of time covered in the CWA. Companies such as RZO Productions Inc. in New York act as withholding agents on behalf of their clients and negotiate CWAs with the IRS. The CWA lets the IRS evaluate the income and estimated expense budget, and related documents, to determine a net income of the personal services provided. This results in the withholding being computed based on the graduated tax rates used on the tax return and applied to the net income determined in the budget analysis, rather than on the musician’s gross income. The CWA therefore provides for withholding that more closely relates to the nonresident alien musician’s ultimate tax liability, thus not tying up his funds until a tax return is filed. Bill Zysblat, a partner at RZO Productions, notes that CWAs have been around for decades; he presumes that tens of thousands of USA companies have served as designated withholding agents over the years[17]. Musicians touring the USA as independent contractors would be well advised to enter into CWAs.

Nonresident alien entertainers or athletes requesting a CWA must have filed and paid or made payment arrangements for all previous USA taxes. They must submit a form which includes numerous items such as copies of all contracts that the aliens or their agents and representatives have entered into regarding the time period and performances or events to be covered by the agreement. The following are required: an itinerary; copies of documents regarding all income streams; a proposed budget; and the contact information and Employer Identification Number (EIN) of the agent who will be the central withholding agent for the aliens and who will enter into a contract with the IRS.

CWAs apply only to individual performers; a group may have multiple entertainers

who are eligible for a CWA, in which case each member must make an individual application. The IRS asks that the applicant apply for a CWA 45 days before the start of a tour or event to have adequate time to process all of the information documents and obtain all required signatures on a CWA. Applications submitted less than 45 days before the start of a tour will be considered on a case-by-case basis “as time permits at the discretion of the IRS.”

Foreign musical performers from most countries are initially double-taxed, that is, taxed both in the USA and in their home country on income generated in the USA. However, many countries allow their citizens to take a tax credit against any income tax they pay in the USA. Zysblat notes that every musician RZO Productions represents enters into a CWA, and that while some smaller artists surely come into the USA and “escape under the radar,” his company notifies the IRS in each case, regardless of the client’s size.

Given the IRS’s increased scrutiny of touring musicians, the bottom line is that advance tax planning and the counsel of expert tax advice are vital to manage cash flow, which in turn insures the financial success of a major tour.

>>The Future of Touring in the USA

When considering the future of touring in the USA, in addition to the factors mentioned above (making ticket prices more consistent and affordable, and using new tools to improve scheduling and expand sales), several other factors seem notable. Given the high costs of touring, artists and their representatives will likely look to shave their costs, find more ways to generate income from touring, or both. For example, costs could be lowered by condensing the touring timetable, pooling resources with other acts, or lowering expenditures on lodging and fuel. More artists may try to generate income by selling live recordings of their concerts to audience members exiting shows, selling other merchandise at shows, and creating other items that can be monetized, such as tour films, memorabilia, and fan interaction opportunities. Artists will continue to seek corporate sponsorships, and some will choose to enter into multiple rights deals with diverse kinds of companies^[18]. Perhaps more governments, like those of

Australia, Sweden and the UK, will provide support to their homegrown artists who aim to tour abroad by organizing showcase events, providing assistance with visa applications, or subsidizing international tours. Surely digital tools recently and not yet developed will increase the ways in which foreign artists can connect with and perform to audiences in the USA.

It seems likely - and is our fervent hope - that in the long run “greening” the tour industry in the USA will be viewed as vital. Such efforts may generate cost savings for touring artists, and in any event, will probably prove increasingly fashionable and ultimately unavoidable over time.

Furhman of IMG Artists points out that the shrinking timetable for scheduling concerts makes it more difficult for international artists to hold out and commit to visit the USA. In the near future, the shortened booking schedules will likely continue, putting the onus on the artist desiring to tour the USA to keep his schedule open. In general, touring acts would also be well-advised to keep their passports current and their supporting personnel rehearsed and ready to travel on pre-negotiated terms. More than ever, touring artists will need the assistance of an organized and professional team of lawyers, accountants, agents and managers. Artists looking to “crack the USA market” will need to be prepared to invest some of their money in professional fees, government application fees, and associated expenses incurred while meeting immigration and tax requirements.

- [1] Telephone Interview by Priscilla Mattison with Gary Bongiovanni, President & Editor-in-Chief, Pollstar (July 18, 2010).
- [2] Statistics for the touring business usually refer to North America, which includes the USA, Canada, and Mexico, rather than to the USA alone. According to Bongiovanni, Pollstar's North America figures include about 5% for Canada. The percentage allocable to Mexico is not precisely known.
- [3] Live Nation Entertainment, Investor & Analyst Day, at slide 59 (July 15, 2010) <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NTM4Nzh8Q2hpbGRJRDR0tMXxUeXBIPtM=&t=1>.
- [4] Ray Waddell, *The Road Less Traveled*, Billboard, August 7, 2010, at 22.
- [5] Id.
- [6] Telephone Interview by Priscilla Mattison with Walt Reeder, Jr., CEO and President of Big Bloc Entertainment, Inc. (August 17, 2010).
- [7] Gary Bongiovanni, *Mid Year Business Analysis*, Pollstar (July 9, 2010) <<http://www.pollstarpro.com/specialfeatures2010/2010MidYearBusinessAnalysis.PDF>>.
- [8] Lady Gaga's "Monster Ball" Tour to Gross Nearly \$200 Million Worldwide, Billboard (August 18, 2010) <<http://www.billboard.com/#/features/lady-gaga-s-monster-ball-to-gross-nearly-1004109755.story?tag=hpfeed>>.
- [9] E-mail Interview by Bernard Resnick with Troy Carter, Founder, Chairman, and CEO of Coalition Media, LLC (August 13, 2010).
- [10] John Jurgensen, *The End of the Road?*, Wall St. J. (July 9, 2010) <<http://online.wsj.com/article/SB1000142405274870363640457535335111409566.html>>.
- [11] Bongiovanni, *supra*, note 7.
- [12] Investor & Analyst Day, *supra* note 3, at slide 117.
- [13] Thanks to Jeffrey Fuhrman of IMG Artists for pointing out the currency exchange and venue issues. Telephone Interview by Priscilla Mattison with Jeffrey Fuhrman, President and Chief Operating Officer, IMG Artists (August 20, 2010).
- [14] USCIS Promises Improvements to the Visa Process (visited August 22, 2010) <<http://www.afm.org/news/uscis-promises-improvements-to-the-visa-process>>.
- [15] Telephone Interview by Priscilla Mattison with Christina Galvan, Esq., Associate Attorney, Bagia & Associates (August 24, 2010).
- [16] For official information about USA taxes, see www.irs.gov. A detailed discussion of taxes on international touring acts can be found in Ray Waddell, *Piece of Your Action*, Billboard, July 17, 2010, at 12.

[17] E-mail Interview by Priscilla Mattison with Bill Zysblat, Partner, RZO Productions Inc. (August 20, 2010).

[18] For a comprehensive analysis of multiple rights deals, see IAEL's 2009 publication, "Multiple Rights Deals In The Music Industry."