

Making It as a Band May Be Tough, but Breaking Up Is Hard to Do



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Once upon a time, for a band to make it in the music business, they had to play the game: (1) Find a manager or booking agent to get gigs, (2) build a fan base by playing in the right bars or clubs, (3) work every possible angle to get their music into the hands of an entertainment attorney with contacts at major record labels, (4) perform showcases for interested labels, and (5) if there's interest (the exception, not the rule), have their attorney negotiate a recording contract.

Now, because of CD Baby, iTunes, Kickstarter, Bandcamp and other accessible, non-record label outlets, up-and-coming bands don't have to play that game to get their music to the masses. In many ways, that's a good thing. Emerging artists like Downtown, Vespers, Rodrigo Y Gabriela, Kitaro, Tito and Tarantula and Sufjan Stevens have been able to reach audiences without the need for going through the exhausting, expensive and largely unsuccessful attempts to court big labels.

The game has changed, and the playing field is slightly more level. But while it's much easier to release music without big-label assistance, the need to protect musicians and their work remains the same.

Generally, the band that does land that coveted meeting with a record label quickly recognizes that this is serious business, and even the uninitiated seek legal counsel before signing recording agreements. Besides negotiating contract terms, their

entertainment attorney will also help create a structure -- usually a corporation or partnership -- under which the band members will do business both with the outside world and with each other.

Unfortunately, fledgling bands don't often think about consulting an attorney. After all, in the excitement of actually recording and releasing music, who wants to think about sharing credit, splitting revenue, and what will happen if the band breaks up? Well, lawyers, that's who. An entertainment lawyer can create an inter-band agreement that makes it less likely for a serious dispute to develop if things go south. Without an agreement, you could be in for a long and messy fight.

There have been a significant number of disputes over the years over who can record or perform under the band name when the band is no longer together in its original form and both the original band members and the departing member(s) all want to use the band's name. Bands like the Drifters, the Five Platters, Deep Purple, Patti LaBelle & the Bluebelles, the Beach Boys, Pantera, Pink Floyd and Live all have had to deal with the issue.

In the absence of an agreement, trademark laws will determine who can record or perform under the band's name if the original members leave. The name of the band is typically considered to be a trademark -- a name under which goods are sold or services are provided -- and federal trademark laws can apply whether the trademark is registered or not. To determine who has the right to the name, courts will consider whether consumer confusion exists and will look at several different factors, including the strength of the original trademark, the degree of similarity between the two marks, the competitive likeness of the product or service, and many other aspects.

Sound complicated? It can be. Take for example a band with five original members -- we'll call them the Widgets. Everything's going great for the Widgets until the bass player decides she wants to leave.

Is there a likelihood of confusing the consumer if the bass player uses the band name while the other four band members are also using the name? Yes. "The Widgets" is a strong mark for the name of a band; the degree of similarity is 100 per cent; the products and services -- in this case, music -- are directly competitive and purchasers of music know what they are buying. So the original members of the band have a good case to keep anyone not in the band from performing and recording as the Widgets.

But what if the bass player takes the drummer with her? Or the drummer and the lead guitarist? Now it's three out of five -- does the fact that the majority of the band members have defected mean they can use the name that the other original members are still using? Does it matter who the defectors are, i.e., the front person, the lead guitarist, the drummer ... because the consuming public is more likely to associate the Widgets with the singer and lead guitarist than the drummer? (Drummers never get the respect they deserve).

Sure, the weight of authority suggests that defecting members of a band typically are precluded from using the band's name. There are exceptions, but the point is: Why take the risk?

So go forth, make music; make it big. But, a fair warning to bands who are using popular online platforms to release and promote their music without the input of attorneys, business managers or others who very typically understand the relevant legal and financial issues much better than the band members themselves who are focused on their art.

Set the stage and establish the rules before the band gets traction, not after success is achieved. It's the best way to avoid a big, messy breakup.

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