



Pandemic Pop and Other Viral Sensations

Loren Cheri Shokes^{*†}

Narrating finding ephemeral solace in the carnal embrace of an innominate face, British crooner Sam Smith’s sultry tenor seamlessly oscillates with American Normani’s vocal prowess on 2019’s viral sensation *Dancing With A Stranger*. With its infectious instrumentation coalescing with its euphonic chorus as the vocalists achingly beseech for a cursory reprieve of their acute loneliness, the R&B-pop fusion topped music charts on both sides of the Atlantic, thereby earning the coveted, albeit unofficial, title of 2019’s song of the summer. The slightly veiled euphemisms that permeate the ballad require no explication and quickly resonated with listeners as they thronged to bustling nightclubs to indulge in its intrinsic edict. Unbeknownst to the revelers, within fifteen months, another infectious, viral sensation would prompt heads of state on both sides of the Atlantic to supplicate individuals to both literally and figuratively eschew dancing with strangers and instead espouse a phrase propagated just a few years earlier by Normani’s former quintet – work from home.

First identified as an epidemiological threat in late 2019, severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), known more commonly by its colloquial moniker “Coronavirus,” is a highly contagious¹ respiratory illness that causes the potentially deadly disease Covid-19. Bringing a synchronized interruption to global economic activity that has not been seen since the Great Depression,² this highly transmittable illness quickly disabused investors’ bullish expectations with fears of a “protracted malaise that has some flavour of a depression,”³ driving global stocks plunging into bear-market territory even before the World Health Organization declared it a pandemic. Harnessing omnipotent powers not drawn upon since World War II in their

* Loren Cheri Shokes received her J.D. from Harvard Law School (2017), her B.A., *summa cum laude*, from the University of California, Los Angeles (2013), and is the author of *Life After Death: How to Protect Artists’ Post-Mortem Rights*, 9 Harv. J. Sports & Ent. L. 27 and Note, *Financing Music Labels in the Digital Era of Music: Live Concerts and Streaming Platforms*, 7 Harv. J. Sports & Ent. L. 134. This Article was produced by the author solely in an individual capacity, and nothing contained herein shall be attributed or imputed to any other person or entity with which the author may be affiliated.

† The author would like to dedicate this Article to her grandparents: Samuel Dewitt Speed, Jr., Lillie Laverne Cooper Speed, Vodrey Harleston Shokes, and Virgie Evans Shokes.

¹ Lisa Lockerd Maragakis, *Coronavirus Disease 2019 vs. the Flu*, JOHNS HOPKINS MEDICINE (September 25, 2020), <https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu> (explaining that Covid-19 is more contagious than influenza).

² Rich Miller & Reade Pickert, *Top Economists See Echoes of Depression in U.S. Sudden Stop*, BLOOMBERG (Mar. 22, 2020, 7:00 AM) <https://www.bloomberg.com/news/articles/2020-03-22/top-economists-see-some-echoes-of-depression-in-u-s-sudden-stop>.

³ *Id.*

endeavor to subjugate a “faceless, . . . raceless, sexless, nondenominational, and bipartisan”⁴ foe, by March 2020, governments around the world mandated the indefinite closure of venues envisaged for the public to constellate, including the once seething discotheques, as gatherings of as few as two individuals were banned.⁵ Rather than dancing with strangers into a new roaring twenties, the start of 2020 marshaled in the social distancing era of “remaining out of congregate settings, avoiding mass gatherings, and maintaining distance (approximately 6 feet or 2 meters) from others when possible.”⁶

This is the first in a series of articles that will analyze and discuss the Coronavirus pandemic’s pervasive influence on the entertainment and sports industries. In this edition, I will examine how, concomitant with the obstacles and disruptions this pandemic has brought to practically all facets of daily life, this virus has upended virtually every aspect of the music industry, from the high profile (and highly profitable) music festivals to the event staff, tour managers, and countless others now facing an indefinite unemployment period.

DANCE MACABRE

“No man ever steps in the same river twice, for it’s not the same river and he’s not the same man.” – Heraclitus

From the Black Death that wiped out nearly half of Europe’s population,⁷ to the plagues brought by European explorers that killed upwards of 90% of the Western Hemisphere’s pre-Columbian indigenous population,⁸ to the HIV/AIDS outbreak in the late 20th century, the human population has overcome a host of devastating pandemics over the millennia.⁹ Roused by the portentous anguish wrought by such omnipresent pestilence and compelled to assuage the public’s fears by offering a form of spiritual vaccine, artists, composers, and other musicians turned suffering into highly regarded works of art. The nursery rhyme *Ring Around The Rosie*, frequently sung and danced to by toddlers, is a coded reference to bubonic plague;¹⁰ virtuoso organist and composer

⁴ Matthew McConaughey (@McConaughey), TWITTER (Mar. 17, 2020, 5:26 PM), <https://twitter.com/McConaughey/status/1240026783975530501>.

⁵ *Coronavirus: Germany Tightens Curbs and Bans Meetings of More than Two*, BBC (Mar. 22, 2020), <https://www.bbc.com/news/world-europe-51999080>.

⁶ *Public Health Guidance for Potential COVID-19 Exposure Associated with International or Domestic Travel*, CENTERS FOR DISEASE CONTROL AND PREVENTION (Sept. 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/php/risk-assessment.html>.

⁷ Mary Bowerman, *Yes, the Plague Exists, and It’s Not the Only Old-Time Disease Still Lurking*, USA TODAY, <https://www.usatoday.com/story/news/nation-now/2017/06/28/plague-exists-and-its-not-only-old-time-disease-still-lurking/435142001/> (last updated Jun. 30, 2017).

⁸ Alexander Koch et al., *European Colonization of the Americas Killed 10 Percent of World Population and Caused Global Cooling*, THE WORLD (Jan. 31, 2019, 11:15 AM), <https://www.pri.org/stories/2019-01-31/european-colonization-americas-killed-10-percent-world-population-and-caused>.

⁹ Owen Jarus, *20 of the Worst Epidemics and Pandemics in History*, LIVE SCIENCE (Mar. 20, 2020), <https://www.livescience.com/worst-epidemics-and-pandemics-in-history.html>.

¹⁰ See generally Sona Kerim, *Ring Around the Rosie — A Song for the Plague*, WEIRD HISTORY (Apr. 16, 2019), <https://medium.com/weird-history/ring-around-the-rosie-a-song-for-the-plague-4647a45b01b1> (explaining that “Ring around the rosie” describes the circular red rashes that develop on the skin in the disease’s early stages; “a pocket full of posies” describes the practice of carrying flowers and laying them around the infected person as a means of protection as many thought the disease was transmitted through foul odors); David Mikkelson, *Is ‘Ring Around the Rosie’ About the Black Plague?*, SNOPE (Nov. 17, 2000), <https://www.snopes.com/fact-check/ring->

Johann Sebastian Bach forthrightly confronted the devastation of pandemics, notably in his Cantata No. 25's lilting aria,¹¹ and in reaction to one of the more recent global health crises, the rock musical *Rent* depicts young artists' trials and tribulations in New York City under the auspices of the HIV/AIDS outbreak. Artists' reaction to the Coronavirus pandemic is no exception. From "pious spiritual treatments, raucous punk and metal raves, would-be "Weird AI" song parodies ("My Sharona" to "My Corona" is the go-to), [to] acoustic singer-songwriters,"¹² within days of being declared a global health crisis, musicians around the world began creating, producing, and posting their pestilential music renditions.

Skyrocketing to fame and quickly becoming a household name for his ability to remix homemade social media videos into meme-worthy chart toppers, one of the most illustrious producers to gain widespread notoriety since the Coronavirus outbreak began is Brandon Davidson, better known by the sobriquet DJ iMarkkeyz. Inspired by entertainer Cardi B's notorious Instagram video where she vociferates her vexation with the public's lackadaisical and insouciant attitude toward the parlous state of the pandemic, one of his most prolific songs to emerge thus far during the global health crisis is DJ iMarkkeyz's aptly named *Coronavirus Remix*. With the highly relatable epigrammatic proclamation, "Coronavirus, sh*t is real," continuously repeated with intermittently punctuated sounds of coughing and panting, *Coronavirus Remix* resonated with the billions of people sheltering in place on government-imposed lockdowns around the world grappling with their new normal. The viral hit rapidly ascended to the top of the international music charts and the hashtag #CardiBCoronavirusChallenge began trending with an accompanying TikTok dance challenge. As the Covid-19 era's first pandemic pop chart-topper, *Coronavirus Remix* was fraught with controversy effectuated by a mélange of legal questions as to its ownership and revenue sharing.

While many assume artists are au fait with whenever their name, image, likeness, or audio is legally used in commerce for goods or services, in actuality, the opposite is true. Although Cardi B's characteristic voice is used to market *Coronavirus Remix*, the entertainer's vocal contribution was made entirely unwittingly – not only did DJ iMarkkeyz and Cardi B never meet or collaborate, but Cardi B also never agreed to make the song. It was only created after DJ iMarkkeyz pulled Cardi B's vocals from Instagram after he had an inclination that "the line where she said Coronavirus...was a hype type of feeling."¹³ Once Cardi B learned of *Coronavirus Remix's* existence after it gained online traction, she obliquely acknowledged it by impassively telling her nearly 70 million Instagram followers, "Stream I guess." The entertainer abrogated her initially nonchalant stance though when the song gained international attention as clips of *Coronavirus Remix* being played in the few remaining open discotheques in Rio de Janeiro began circulating on social media. Cardi B's now ostensible dour outlook was evinced when *Coronavirus Remix*

[around-rosie/](#)) (stating that "ashes, ashes" has two meanings: the first is mimicking the sound of a sneeze and the second is about burning the deceased victims' bodies; and "we all fall down" is about the millions who succumbed to the plague and perished).

¹¹ This composition proclaims, "My leprosy, my boils can be healed by no herb nor plaster but the ointment from Gilead." JOHANN SEBASTIAN BACH, CANTATA BWV 25 (Teldec Classics International GmbH 1994) (1723).

¹² Carl Wilson, *The Race to Write the Coronavirus Anthem Is On*, SLATE (Mar. 24, 2020, 4:33 PM), <https://slate.com/culture/2020/03/best-coronavirus-songs-spotify-playlist-cardi-b-psychs.html>.

¹³ Shirley Ju, *As Cardi B's Coronavirus Rant Makes the Charts, Meet the DJ Who Created the Remix*, VARIETY (Mar. 26, 2020, 7:25 AM), <https://variety.com/2020/music/news/card-b-coronavirus-rant-remix-dj-imarkkeyz-interview-1203545575/>.

transpierced the top 100 songs on paid music platforms and she posted “[t]he fact this damn corona virus song is charting on iTunesHold on ..let [*sic*] me hit the DJ up and [my record label] Atlantic so I can’t get my damn coins.” While songs such as *Coronavirus Remix* that re-contextualize source material are becoming increasingly commonplace and trite, they often beget involute questions of legality.

Under U.S. law, originality and fixation in a tangible medium are sine qua non to be afforded copyright protection.¹⁴ Cardi B’s Instagram video satisfied each stipulation to be granted copyright protection as a sound recording.¹⁵ her prognostications for life with Coronavirus were original and recording her fit of pique fulfilled the “fixation” requirement. Furthermore, with respect to authorship and the rights afforded to copyright owners, federal law provides that copyright ownership automatically vests in the work’s author who is afforded an enumerated list of exclusive rights regarding that copyright including, *inter alia*, the right to reproduce the copyrighted work, prepare derivative works, and, in the case of a sound recording, publicly perform the work via digital audio transmission.¹⁶ Nonetheless, copyright ownership, and the exclusive rights afforded to owners, “may be transferred by any means of conveyance or by operation of law.”¹⁷ It is wonted practice for record labels to thus incorporate provisos in recording contracts covenanting that, as a quid pro quo for signing to the label and thereby gaining access to its immense resources (and financial aegis), any audio recording made by artists while they are signed to the label – whether voice notes, recorded phone conversations, vocal tracks laid in a music studio, or Instagram postings – are the label’s exclusive property, and the label is the sole owner. Surmising that Atlantic Records’ contract with Cardi B contains such a covenant, under U.S. copyright law, Atlantic Records is deemed the sole owner and therefore it, rather than Cardi B, has standing to negotiate any potential licensing agreement with third parties to use the audio. Moreover, as the copyright owner, Atlantic Records has the sole right to prepare derivative works based off of the sound recording and therefore could treat *Coronavirus Remix* “as a remix and claim 100 percent ownership of the master, and then pay [DJ iMarkkeyz] a royalty.” Indirectly validating the veracity of this premise, when Twitter users inquired as to whether the song’s proceeds were going to be donated to those most affected by the pandemic, Cardi B responded that her management team (meaning Atlantic Records) first needed to resolve lingering copyright issues and DJ iMarkkeyz confirmed “the label laid it down the line... We’re in the works of getting things situated financially as far as where proceeds are going. It’s confidential at the moment, but there’s a lot of great things to come with this.”¹⁸

As professional recording studios remain indefinitely shuttered and highly sophisticated at-home studio equipment is readily accessible and affordable to the masses,¹⁹ both professional and amateur song creators will inevitably encounter clearance issues similar to DJ iMarkkeyz as they

¹⁴ 17 U.S.C. §102(a).

¹⁵ “Sound recordings” are “works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work, regardless of the nature of the material objects, such as disks, tapes, or other phonorecords, in which they are embodied.” 17 U.S.C. §101.

¹⁶ 17 U.S.C. §106.

¹⁷ See 17 U.S.C. §201(d).

¹⁸ Ju, *supra* note 13.

¹⁹ Jane Wakefield, *Coronavirus: What is the sound of music during a pandemic?*, BBC (Apr. 24, 2020), <https://www.bbc.com/news/technology-52295734> (substantiating the notion that “long gone are the days when you needed a £500,000 investment to set up a recording studio.”).

entreat to sample and remix previously released songs as the foundation for their new oeuvre. It would behoove music creators to heed the outcomes of A Boogie Wit da Hoodie's *Look Back At It* and Lil Nas X's *Old Town Road* clearance tribulations, the former as a result of consciously sampling and the latter as a result of unconsciously sampling.

"Experience is simply the name we give our mistakes." – Oscar Wilde

Desirous to emulate *You Rock My World*'s melody²⁰ and *Remember the Time*'s riffs²¹ into his sophomore album's lead single, A Boogie Wit da Hoodie first had to receive Michael Jackson's estate and singer-songwriter Nora Payne's permission. Despite being notoriously recalcitrant with clearance requests, the King of Pop's estate incredulously approved A Boogie's use of both songs. Unexpectedly, securing Nora Payne's approbation proved to be a herculean feat that precipitated in delaying the single's release for over a year. As *You Rock My World*'s co-writer and author, Ms. Payne is regarded as the sound recording's co-owner by U.S. copyright law, thereby ensuring that receiving her imprimatur is a prerequisite for any third party to prepare a derivative work. While A Boogie was soliciting her approval, Ms. Payne went missing for three weeks and was deemed mentally unfit to grant A Boogie consent once she was safely found in a Chicago hospital. Only after her mother acceded on her daughter's behalf was A Boogie able to legally release *Look Back At It*. His perseverance was worthwhile as the single was certified platinum²² and garnered critical and commercial success.

Old Town Road's journey to becoming the longest running number one single in Billboard's history was not bereft of idiosyncrasies, including two unconventional clearance issues that culminated in Nine Inch Nails' front man Trent Reznor securing the first number one single of his multi-decade music career. Nineteen-year-old YoungKio, a proclaimed "type beat" producer²³ who leased his beats online without knowing purchasers' identities, stumbled upon Nine Inch Nails' instrumental *34 Ghost IV* while searching YouTube for songs to sample. Timorous that his emblematic sampling technique of taking a beat, chopping, and filtering it to transmogrify it into something different would "ruin" *34 Ghost IV*, YoungKio diverged from his prototypical practice and tried to maintain as much of the underlying beat's integrity as possible.²⁴ Presuming it would never sell, YoungKio nevertheless uploaded his *34 Ghost IV* rendition to his BeatStars website as

²⁰ Eddie Fu et al., *A Boogie Wit Da Hoodie's "Look Back At It" Was Delayed To Clear A Michael Jackson Sample*, GENIUS (Dec. 24, 2018), <https://genius.com/a/a-boogie-wit-da-hoodie-s-look-back-at-it-was-delayed-to-clear-a-michael-jackson-sample> (stating that *You Rock My World*'s melody when Michael Jackson sings "The way I walk, The way I talk, I cannot explain the things I feel for you, But girl, you know it's true" inspired *Look Back At It*'s melody when A Boogie Wit Da Hoodie sings "The way you walkin', the way you talkin', it's all because of me, And the way I'm all on you, girl, you know it's true.").

²¹ *Id.* (explaining that *Look Back At It*'s "Drrrat, da-da, da Drrrat, da-da-da, da" riff is a spinoff of *Remember The Time*'s "Grrrrrat, tat tat, tat, Grrrrrat, tat tat" riff).

²² *Gold & Platinum*, RIAA, https://www.riaa.com/gold-platinum/?tab_active=default-award&se=look+back+at+it#search_section (last visited Oct. 6, 2020).

²³ Elias Leight, *How "Type Beats" Have Changed Hip-Hop Production*, GENIUS (Mar. 9, 2018), <https://genius.com/a/how-type-beats-have-changed-hip-hop-production> (explaining that a "type beat" producer is a producer who explicitly mimics other artist's style).

²⁴ Eddie Fu, *How Lil Nas X's "Old Town Road" Landed Nine Inch Nails Their First No. 1 Hit On The Billboard Hot 100*, GENIUS (Apr. 9, 2019), <https://genius.com/a/how-lil-nas-xs-old-town-road-landed-nine-inch-nails-their-first-no-1-hit-on-the-billboard-hot-100>.

a “future type beat.”²⁵ Shortly thereafter, relatively unknown Tweetdecker²⁶ Lil Nas X paid \$30 for a lease enabling him to use the beat and sell a maximum of 3,000 copies. Nescient as to the beat’s Nine Inch Nails’ etymology,²⁷ Lil Nas X used it as fodder for his polemical,²⁸ groundbreaking chartbuster, *Old Town Road*. While YoungKio remained impervious as to the song’s meteoric rise for the first two months after its release, sales quickly outpaced the original lease’s 3,000-copy limit. After learning of the tune from an Instagram meme, YoungKio secured a more expansive licensing agreement with Lil Nas X that permitted *Old Town Road* to continue to sell without transgressing upon his rights. With that quandary settled, another highly portentous issue loomed that threatened to stop *Old Town Road*’s Cinderella run: the underlying Nine Inch Nails’ *34 Ghost IV* sample was never pre-cleared for use on *Old Town Road* by its copyright owner. Absent the requisite clearance, the owner of *34 Ghost IV*’s sound recording was entitled to not only sue for damages, but also demand a sweeping injunction to discontinue all infringing acts forthwith including, *inter alia*, halting further commercial distribution of *Old Town Road*, indefinitely striking it from all streaming platforms, and prohibiting radio plays.²⁹ Notably, although Nine Inch Nails released *34 Ghost IV* under a Creative Commons license permitting sharing and remixing, such use is explicitly limited to non-commercial purposes as long as the original rights holder is credited,³⁰ and altering, transforming, or building upon the work is permitted only if the resulting work is distributed under the same or a similar license.³¹ Because *Old Town Road* was available for commercial gain, Lil Nas X’s team could not use the Creative Commons license as a defense. Fortuitously for all parties involved (and admirers of the country song), Nine Inch Nails opted to not impede *Old Town Road*. As the industrial rock band’s founding member Trent Reznor told a “panicked” manager, “look, I’m fine with it. I get how stuff goes. They’re not saying they didn’t sample it. Just work it out, but don’t be a roadblock to this.”³² Rather than be a roadblock, the chaotic bricolage of *Old Town Road*’s origins was ultimately brought together in a unifying gesture: the ensuing agreement with Nine Inch Nails resulted in Reznor and band mate Atticus Ross receiving co-writing and co-producing credits,³³ Reznor netted his first Country Music Association nomination for songwriting, and Nine Inch Nails landed their first number one single as a band.³⁴

²⁵ Max Cea, *YoungKio, the Dutch Producer of Lil Nas X’s “Old Town Road,” Is Living His Dreams*, GQ (Apr. 23, 2019), <https://www.gq.com/story/youngkio-old-town-road-interview>.

²⁶ Brian Feldman, *Before ‘Old Town Road,’ Lil Nas X Was a Tweetdecker*, NEW YORK MAGAZINE (Apr. 5, 2019), <https://nymag.com/intelligencer/2019/04/lil-nas-x-was-a-popular-twitter-user-before-old-town-road.html>.

²⁷ Fu, *supra* note 24.

²⁸ Grant Rindner, “*Old Town Road*” *Producer Didn’t Know About The Song Until He Was Tagged In A Meme Using It*, GENIUS (Mar. 31, 2019), <https://genius.com/a/old-town-road-producer-didn-t-know-about-the-song-until-he-was-tagged-in-a-meme-using-it> (“YoungKio also weighed in on the debate over whether “*Old Town Road*” should be categorized as country. The track peaked at No. 19 on the Hot Country Songs chart before *Billboard* decided to remove it from the chart because it ‘does not embrace enough elements of today’s country music.’”); <https://www.rollingstone.com/music/music-features/lil-nas-x-old-town-road-810844/>

²⁹ See 17 U.S. Code § 506.

³⁰ Fu, *supra* note 24.

³¹ *Attribution-NonCommercial-ShareAlike 3.0 Unported*, CREATIVE COMMONS, <https://creativecommons.org/licenses/by-nc-sa/3.0/>.

³² Andy Cush, *Trent Reznor Finally Speaks on “Old Town Road,”* SPIN (Oct. 25, 2019, 5:09 PM), <https://www.spin.com/2019/10/nine-inch-nails-trent-reznor-old-town-road-quote-lil-nas-x/>.

³³ Fu, *supra* note 24.

³⁴ Before *Old Town Road*, “*The Day the World Went Away*” was Nine Inch Nails’ best performing single and peaked at number 17 on the music charts in 1999. See *id.*

As the pandemic fuels online and virtual collaboration between producers, artists, and other creative executives who are interdicted from playing in person to live audiences, queries as to the sustainability and profitability of earning a living as a musician in the digital and streaming era of music will abound.

SOUND RECORDING

“I’m a recording artist, a performing artist, and a producing artist. All those things have everything to do with the outcome of my shows. I get myself studying every part of the game and not everyone has the characteristic to do that. In my mind, you need all three to become an artist.” – PartyNextDoor

Roughly apportioned into four distinct eras – acoustic (1877 to 1925), electrical (1925 to 1945), magnetic (1945 to 1975), and digital (1975 to present)³⁵ – the history and maturation of sound recording has fashioned virtually every aspect of music from composition to consumption. The public unveiling of the phonograph in 1877³⁶ brought the philosophical discussion about the corporeality of capturing, preserving, and reproducing sound through a physical medium to reality. Able to only capture a narrow slice of the audible spectrum and record sound waves at a low fidelity and volume,³⁷ the sonic restrictions of early mechanical devices steered the acoustic era’s musical landscape as bands and musicians began favoring louder instruments such as the trumpet, lower-registering brass instruments in lieu of string instruments, substituting blocks of wood for bass drums, and performers physically postured themselves to abut the recording device while playing as boisterously as possible to balance the sound.³⁸ Western Electric’s amalgamated system of electrical microphones, electronic signal amplifiers, and electromechanical recorders ushered in the electrical era, which saw enhancements in recording sound’s fidelity, a palpably broadened reproducible frequency range, and the emergence of audio engineers, whose job is capturing richer, fuller, intricate, and balanced recording through an interconnected web of microphones, compressors, mixers, filters, and multi-channel electronic amplifiers.³⁹ As with the acoustic age, technological advances in the electrical age shepherded both the performance and creation of music – the advent of electrical microphones brought about the “crooner” performance style;⁴⁰ the ability to electronically amplify musical instruments made it feasible for more subdued instruments, particularly in the string family, to compete with the naturally stentorian horn and wind instruments; electrical amplification served as the foundation for the incipience of broadcast

³⁵ See Dave Baker, *The Lowdown on Recorded Sound Through The Ages*, Recording Radio Film Connection & Casa Schools, <https://www.rfedu.com/blog/2018/07/02/history-recorded-sound/>.

³⁶ See *History of the Cylinder Phonograph*, LIBR. OF CONG., <https://www.loc.gov/collections/edison-company-motion-pictures-and-sound-recordings/articles-and-essays/history-of-edison-sound-recordings/history-of-the-cylinder-phonograph/>.

³⁷ See generally Victoria Dawson, *The Epic Failure of Thomas Edison’s Talking Doll*, SMITHSONIAN MAGAZINE (June 1, 2015), <https://www.smithsonianmag.com/smithsonian-institution/epic-failure-thomas-edisons-talking-doll-180955442/>.

³⁸ Roger Beardsley & Daniel Leech-Wilkinson, *A Brief History of Recording to Ca. 1950*, AHRC RESEARCH CENTRE FOR THE HISTORY AND ANALYSIS OF RECORDED MUSIC, https://www.charm.rhul.ac.uk/history/p20_4_1.html (last visited Aug. 8, 2020).

³⁹ Wikimedia, *The Difference Between A Producer and an Audio Engineer*, YOUTUBE (Oct. 10, 2013), <https://www.youtube.com/watch?v=IDBaTI32bMM>.

⁴⁰ See generally *Tech that Transformed Music – the Microphone*, UTOPIA GENESIS FOUNDATION (June 25, 2019), <https://utopiagenesis.medium.com/tech-that-transformed-music-the-microphone-536a4ba2cd9a>.

radio; musicians began experimenting with electronic music instruments, including the first analogue polyphonic synthesizer; and films were now being made with sound. Revolutionarily,

not long after the first hit jazz records came out, the style was being copied by bands in many different places. For the first time, musicians were learning music off of records and spreading a style without any firsthand contact with its original performers... This was a profound and permanent change from the record industry's first decades: from now on, obscure regional styles would sporadically pop up on records and suddenly be popular across the country, or even across the world.⁴¹

World War II marshaled in the magnetic era when the Allies discovered magnetic tape technology, which at the time was restricted domestically in Germany, after hearing no discernable polarity in audio quality between the Germans' pre-recorded and live broadcasts.⁴² As Americans continued to dilate upon the German recording technology substratum, magnetic recording swiftly became the metric for the U.S. broadcasting industry and led to the contrivance of the first high fidelity stereo recordings for domestic use and the coinage of multi-track tape recording. Protracted high fidelity recordings became possible as magnetic technology gave audio engineers concordant exceptional plasticity that film gave to cinema editors — sounds captured on tape could now easily be sonically, manipulated, tailored, and coalesced in ways that were simply not possible with disc recordings.⁴³ While the compact cassette garnered widespread acclaim and is arguably the magnetic era's most eminent innovation, it was swiftly eclipsed by the digital's era's compact disc. Capable of transmitting the entire audible spectrum without distortion,⁴⁴ highly portable, and able to be played illimitably without the sound's quality or fidelity atrophying, CDs were the paramount fixture in the late 20th century audio market. Nonetheless, CDs reign was evanescent as its market dominance was defenestrated in less than a decade by the advent of the digital audio file (*e.g.*, MP3, WAV).⁴⁵ The emergence of digital signal compression algorithms, which truncate file sizes while simultaneously preserving their caliber, was the most important harbinger of ascending commercial innovations for digital audio files, such as Apple's iTunes store and iPod, to the pinnacle of both the music and tech worlds.⁴⁶ Antithetical to the three prior sound recording eras, each of which begot cyclopean profits for musicians, executives, record companies, and others involved with the music industry, the early years of the digital era not only extirpated the lush profits from CDs proliferation, but also saw public sentiment veer away from purchasing music.⁴⁷

⁴¹ *History of the Record Industry, 1920 – 1950s*, MEDIUM (June 8, 2014), <https://medium.com/@Vinylmint/history-of-the-record-industry-1920-1950s-6d491d7cb606>.

⁴² See generally *History of Magnetic Recording*, SOUND RECORDING HISTORY, <http://www.soundrecordinghistory.net/history-of-sound-recording/magnetic-recording-history/> (last visited Sept. 1, 2020).

⁴³ See generally *Technology that Transformed Music – Magnetic Tape*, UTOPIA GENESIS FOUNDATION (Feb. 4, 2019), <https://utopiagenesis.medium.com/technology-that-changed-music-magnetic-tape-13abfddb5fcb>.

⁴⁴ See Steve Knopper, *The End of Owning Music: How CDs and Downloads Died*, ROLLING STONE (June 14, 2018, 4:30 PM), <https://www.rollingstone.com/pro/news/the-end-of-owning-music-how-cds-and-downloads-died-628660/>.

⁴⁵ See generally Ryan Waniata, *The Life and Times of the Late, Great CD*, DIGITAL TRENDS (Feb. 7, 2018), <https://www.digitaltrends.com/features/the-history-of-the-cds-rise-and-fall/>.

⁴⁶ See *100 Million iPods Sold*, APPLE (Apr. 9, 2007), <https://www.apple.com/newsroom/2007/04/09100-Million-iPods-Sold/> (explaining that Apple sold 100 million iPods within its first five years on the market, “making the iPod the fastest selling music player in history”).

⁴⁷ See Derek Thompson, *The Death of Music Sales*, THE ATLANTIC (Jan. 25, 2015), <https://www.theatlantic.com/business/archive/2015/01/buying-music-is-so-over/384790/>.

In short, “all formats before the MP3 were designed specifically to plump up the profitability of the music business; the MP3 ripped it to shreds.”⁴⁸ With countless numbers of free file sharing websites emerging daily in the early aughts spurring the public’s aversion to paying for music in favor of distributing unlicensed audio and other media files, the “disease of free,” not the Coronavirus, was the first 21st century pandemic to infect the music industry, the side effects of which are still highly prevalent today and are further highlighted by Covid-19.

“Our democracy, our constitutional framework is really a kind of software for harnessing the creativity and political imagination for all of our people. The American democratic system was an early political version of Napster.” – Al Gore⁴⁹

Rather than foretell and embrace the digital revolution, record labels remained fixated on a tried and tested ossified narrative that divulged into a Sisyphean struggle, pitting record labels against the tech industry and souring public sentiment towards both the major labels and highly litigious bands.⁵⁰ Despite an unheralded launch in 1999, Napster’s imprint of “making music discovery instant – and payment optional”⁵¹ quickly became a cultural talking point as tens of millions of verified users actively frittered their time away on the site within the first two years of its debut.⁵² Triggering a steep diminution in the once bellowing album sales, the record industry’s reflexive, retaliatory, and indignant sue-first response towards Napster and the raft of apeer file-sharing websites only exacerbated antipathetic repercussions. The ultimate result: while Napster did not kill the music industry, it severely wounded it.⁵³ Discussing the political fallout of the recording industry’s reaction to Napster, Rolling Stone journalist Steve Knopper explained

when [the record industry] realised [Napster] was enabling mass piracy that could destroy their business, they dealt with file-sharing almost exclusively through lawsuits and copyright protection. This was a costly error. None of these defences [*sic*] worked and record executives spent four or five crucial years losing serious business to Napster before Steve Jobs came along with the iTunes Store. It’s my contention that record companies could have avoided much of this had they been smarter about dealing with Napster – if not licensing content to it directly, then doing a better job of creating a

⁴⁸ Eamonn Forde, *The MP3 At 25: How A Digital File Dynamited The Music Industry*, THE QUIETUS (July 14, 2020, 7:32 PM), <https://thequietus.com/articles/28561-mp3-vinyl-napster-music-industry>.

⁴⁹ MJ Lee, *Gore’s 5 best lines about the Internet*, POLITICO (Mar. 13, 2012, 1:41 PM), <https://www.politico.com/story/2012/03/gores-5-best-lines-about-the-internet-073942>.

⁵⁰ See David Silverman, *Why the Recording Industry Really Stopped Suing Its Customers*, HARVARD BUSINESS REVIEW (Dec. 22, 2008), <https://hbr.org/2008/12/why-the-riaa-stopped-suing>.

⁵¹ Eamonn Forde, *Oversharing: How Napster Nearly Killed the Music Industry*, THE GUARDIAN (May 31, 201, 5:00 PM), <https://www.theguardian.com/music/2019/may/31/napster-twenty-years-music-revolution>.

⁵² *Id.* (explaining that Napster’s verified users peaked at nearly 26,500,000 users in 2001).

⁵³ See Tom Barnes, *16 Years Ago Today, Napster Changed Music as We Knew It*, MIC (June 1, 2015), <https://www.mic.com/articles/119734/16-years-ago-today-napster-changed-music-as-we-knew-it>. See also <https://www.theguardian.com/music/2019/may/31/napster-twenty-years-music-revolution> (“It took until 2015 for the record industry to finally move into recovery – watching aghast as its value dropped every year from 2000 to a low of \$15bn in 2014.”).

competing, cost-effective service rather than just stonewalling and treating the Internet as a threat.⁵⁴

While record labels' relentless litigious stance prevailed to a certain degree (*e.g.*, Napster was ordered to pay millions in royalties; a court issued an injunction compelling Napster to temporarily shut down its servers; and, most notably, as a result of losing a barrage of lawsuits and paying hefty attorney's fees, Napster was forced into liquidation),⁵⁵ Napster's legacy continues to thrive through iTunes, Spotify, YouTube, social media, and other freemium platforms, all of which have an ascendancy over how music is consumed du jour. As Knopper clarified, more than anything, Napster unerringly deduced that music's future was digital, not within the confines of metal and plastic.⁵⁶

"I think too much of the music industry is for the lawyer and accountant mentality." – Chuck D

Analogous to how technological advances in the acoustic, electrical, and magnetic sound recording eras each respectively altered how music was created and consumed, below are five distinct ways the digital streaming era recast how music is written, the speed at which music is written, and consumer habits, all of which are largely due to streaming services' practice of creating purposeful financial blind spots.

1. Songs are becoming simpler. In prior decades, the average song's structure was intro, verse, chorus, verse, chorus, bridge, chorus, outro.⁵⁷ Hit tracks now are increasingly hewed to the type of cadre heard in American rapper Lil Uzi Vert's *The Way Life Goes* – immediately opening with the chorus' first beat, forgoing an instrumental intro, bridge or beat drop, and concluding with the chorus' last beat.⁵⁸ The rationale: placing the hook at the beginning, rather than a long introduction, instantly captures the listener's attention and entices them to continue listening until the chorus is repeated through the remaining time. While international music historically followed a hodgepodge of arrangement styles, streaming has further globalized music preferences such that international audiences are tending to prefer similar configuration patterns and foreign artists are acceding, as evidenced by Kazakh DJ Imanbek's remix of Guyanese artist SAINT JHN's *Roses*⁵⁹ and Spanish-Senegalese artist Leïti Sène's *Galarina*.⁶⁰
2. Customized streaming enfranchised the democratization of music. For decades, central to albums' ethos was hearing tracks played in their foreordained enumerated emplace – confected like films, albums had characters, settings, climaxes, and definite opening, middle, and concluding sequences. Artists are exorcising that intransigent model to oblige

⁵⁴ Stephen Dowling, *Napster Turns 20: How It Changed the Music Industry*, BBC (May 31, 2019), <https://www.bbc.com/culture/article/20190531-napster-turns-20-how-it-changed-the-music-industry>.

⁵⁵ *See id.*; *see* Forde, *supra* note 51.

⁵⁶ *See* Dowling, *supra* note 54.

⁵⁷ *Songwriting 101: Learn Common Song Structures*, MASTERCLASS, <https://www.masterclass.com/articles/songwriting-101-learn-common-song-structures#what-is-song-structure> (last updated Oct. 2, 2020).

⁵⁸ LIL UZI VERT, *The Way Life Goes*, on LUV IS RAGE 2 (Atlantic Records 2017).

⁵⁹ SAINT JHN, *Roses (Imanbek Remix)*, on WHILE THE WORLD WAS BURNING (Godd Complexx / Hitco 2020).

⁶⁰ LEÏTI SÈNE, *Galarina (feat. Aleesha & Bexnil)*, on JOËL (2019).

to listeners' demands to actively and affirmatively choose song order, lyrics (e.g., explicit or censored), and otherwise personalize albums and playlists. Kendrick Lamar confirmed that his Pulitzer Prize winning album *DAMN.* played in reverse chronological order "plays as a full story and even a better rhythm" and he avouched that such pliancy is "something that we definitely premeditate while we're in the studio."⁶¹ With entire tracks of just silence, alternative versions, and instrumentals, built-to-order albums such as Kanye West's *Life of Pablo* are purposefully structured to grant listeners creative control. As Kanye tweeted, "Life of Pablo is a living breathing changing creative expression. #contemporaryart."⁶²

3. Digitization has made songs more diverse. Before social media and the Internet, artists' entire catalogues were trammled to a particular genre of music that was targeted to a particular demographic. Many artists today actively dismiss the notion of labeling their music a particular genre and have found success publishing "genre-bending" tracks that merge traditional elements of country, R&B, pop, and hip-hop; Billie Eilish incessantly rebukes being labeled a "pop" star⁶³ and when Bad Bunny was asked about representing "urban" music at the Latin Grammy Awards, he proclaimed "it's an honor for me to represent urban music, reggaeton, trap, and hip-hop."⁶⁴
4. Quotidian collaboration amongst creatives. To satiate the public's heightened demand for entertainers to supply new works at an alacrity which has never been equaled, the creative process has progressively balkanized amongst songwriters, producers, engineers, musicians, and singers, where each will independently prepare their own few seconds of a song and then affix it together into one cohesive track. Such is clearly evident on Cardi B's thirteen track debut album *Invasion of Privacy*, which boasts 104 writing credits, and her single "Be Careful" has only two verses but seventeen distinct writer credits.⁶⁵
5. Songs are becoming shorter.⁶⁶ As streaming services pay an average of .0006 to .0064 cents per song streamed,⁶⁷ artists are incentivized to release more and more singles that are shorter and shorter. In 2000, when CDs were still *dernier cri*, the average song's length on

⁶¹ Ashley Iasimone, *Kendrick Lamar's 'DAMN.' Was Meant to Be Played in Reverse, Too*, BILLBOARD (Aug. 24, 2017), <https://www.billboard.com/articles/columns/hip-hop/7941917/kendrick-lamar-damn-played-backwards-reverse-order>.

⁶² See Sean Fitz-Gerald, *Kanye West: Yes, I'm Still Tweaking The Life of Pablo; 'Wolves' Changes Tonight*, VULTURE (Mar. 15, 2016), <https://www.vulture.com/2016/03/kanye-west-the-life-of-pablo-changes.html>.

⁶³ Libby Torres, *Billie Eilish Calls Out the Double Standard in Music That Labels White Women As Pop and Black Artists As Rap and R&B*, INSIDER (June 4, 2020, 5:34 PM), <https://www.insider.com/billie-eilish-music-double-standard-rap-pop-2020-6> (Billie Eilish exclaiming "where am I pop? What part of my music sounds like pop?").

⁶⁴ Liz Calvario, *Bad Bunny Closes the Latin GRAMMY Awards With Serene Reggaeton Performance*, YAHOO! MONEY (Nov. 14, 2019), <https://money.yahoo.com/bad-bunny-closes-latin-grammy-041327998.html>.

⁶⁵ *7 Ways That Song Streaming Is Changing the Music Industry*, OUTPUT, <https://output.com/blog/7-songs-that-improve-streaming-has-changed-song-structures>.

⁶⁶ See generally *The Billboard 100: How US Number One Singles Are Getting Shorter, Fewer, and More Explicit*, NME (Apr. 18, 2017), <https://www.nme.com/blogs/nme-blogs/billboard-100-shorter-explicit-2054269>.

⁶⁷ Daniel Sanchez, *What Streaming Music Services Pay (Updated for 2018)*, DIGITAL MUSIC NEWS (Jan. 16, 2018), <https://www.digitalmusicnews.com/2018/12/25/streaming-music-services-pay-2019/>.

Billboard's Top 100 was approximately four minutes.⁶⁸ By 2008, when iTunes was nearing the apogee of its popularity, the average length was truncated by thirty seconds, and this trend to syncopate singles has continued over the next decade such that the average song length on Lil Pump's self-titled 2017 album is less than two-and-a-half minutes, and his hit single "Gucci Gang" clocks in at barely 2 minutes. With streaming paying such minuscule royalties per play, musicians have fewer financial reasons to release longer tracks.

"Music and the music business are two different things." – Erykah Badu

Shrouded by obscurantist accounting policies and royalty formulas so byzantine that it takes months of assiduous review for even streaming company C-suite executives to comprehend,⁶⁹ deciphering not only how much revenue is generated per stream but also how it is divvied among the streaming platform, musicians, record labels, and producers is a nettling and nebulous practice. Despite their notoriously reticent stance on divulging their financial dossier, it is widely known that streaming services employ royalty sharing axioms that ebb and flow contingent upon a song's popularity and the volume of subscribers an artist is able to generate⁷⁰ so that a song streamed on one platform will be worth more than if that same song is streamed on a competitor's streaming site. To determine how much a particular artist's song is worth, streaming services use a pro rata payment model where "rights-holders are paid according to market share; how their streams stack up against the most popular songs in a given time period,"⁷¹ meaning that artists with the most listeners reap more money per song streamed than artists with fewer average listeners. This payment model incentivizes artists to aggrandize their streaming numbers, and even the streaming services themselves have been dispraised for falsifying listening numbers for particular artists⁷² to bolster their royalty payouts at the expense of other performers' royalty profits. Without a regulatory body to enforce streaming services to be transparent in their royalty rates or impose mandatory minimums, freemium channels have capacitated a "royalty black box"⁷³ wherein payouts widely vary both between and within streaming platforms as a result of, *inter alia*, crossed wires, bad metadata, and a labyrinth of ramified equations to tally payments.

When CDs were at the zenith of their puissance, artists theoretically could relatively easily calculate their earnings – a CD generally sold at a flat rate regardless of the point of sale, the retailer would take approximately thirty percent of the suggested retail price, the publishing company, composition copyright holder, and producers would then take their respective percentages, and the remaining twelve to twenty percent went to the artist.⁷⁴ When the public had

⁶⁸ See generally Zachary Mack, *How Streaming Affects the Lengths of Songs*, THE VERGE (May 28, 2019, 4:31 PM), <https://www.theverge.com/2019/5/28/18642978/music-streaming-spotify-song-length-distribution-production-switched-on-pop-vergecast-interview>.

⁶⁹ Steve Knopper, *The New Economics of the Music Industry*, ROLLING STONE (Oct. 25, 2011, 8:35 PM), <https://www.rollingstone.com/music/music-news/the-new-economics-of-the-music-industry-234924/>.

⁷⁰ *Id.*

⁷¹ Paula Mejia, *The Success Of Streaming Has Been Great For Some, But Is There A Better Way?*, NPR (July 22, 2019, 6:00 AM), <https://www.npr.org/2019/07/22/743775196/the-success-of-streaming-has-been-great-for-some-but-is-there-a-better-way>.

⁷² *Id.* (stating that Norwegian newspaper Dagens Naeringsliv accused Tidal of exaggerating hundreds of millions of streaming plays for Kanye West's *The Life of Pablo* and Beyoncé's *Lemonade*.)

⁷³ *Id.*

⁷⁴ See Knopper, *supra* note 69.

to purchase physical objects to listen to music prior to the digital age, record companies ingeniously increased their earning percentage by routinely including covenants in recording contracts that artists would reimburse the label from their gross royalty payments for a host of auxiliary expenses incurred to physically make CDs and cassettes such as “packaging fees.”⁷⁵ Much like streaming services “royalty black box” perturbs labels and artists alike, such stratagem to mulct artists’ profits created a huge point of contention between performers and their labels. At the time, though, artists were compelled to accede to these deprecatory terms as signing to a label was the singular means to “make it big.” However, the advent of digital music files, YouTube, and social media largely disenthralled artists from the confines of signing to a label so that they controlled their finances whilst maintaining creative autonomy. Rather than cogitate on the incessant dissensions over clandestine streaming payment schemes or whether or not they should sign with a record label, “artists are far more likely to throw up their hands and say, ‘[w]ho gives a crap? Let’s just make a pile from touring.’”⁷⁶

LIVE MUSIC GOLDEN AGE

“There’s money to be made [in song writing] and things like that. But really, when you talk about the real money, you talk about touring. No question.” – Kid Rock

Paradoxically, the plethora of outlets offering cheap and/or free access to music has heightened the public’s demand for high-priced live music experiences. As tours become grander, stages become more ornate, and artists are more likely to offer personalized fan experiences, it is not the result of a fecund imagination that concert tickets and accompanying merchandise prices have burgeoned over the past few decades. In this “pic or it didn’t happen” era, shows do not begin with the curtain rising; rather, that moment is reserved for when the first Instagram-worthy picture is captured. Entertainment architects have adapted to the current landscape by delivering lavish “Instagram-ready, fan-appeasing spectacles” – U2’s sprawling \$30 million,⁷⁷ 190-ton, 165-foot “Claw” stage from its 360° Tour is now the Loveland Living Planet Aquarium’s permanent outdoor plaza’s centerpiece;⁷⁸ Lady Gaga’s 2013 Born This Way Ball concert circuit had a looming five-story Gothic castle; and Taylor Swift’s all-stadium *Reputation* tour needed 52 semi trucks and 30 flatbed trucks simply to haul all of the gear.⁷⁹ Through the recording industry’s own admission, the landscape has changed from that in the eighties and nineties where bands made a significant portion of earnings from CD sales and touring was primarily viewed as a means to promote new albums to now where an immersive, interactive, and fan-centric tour is the primary profit center for artists and fans will pay top dollar for a memorable experience.⁸⁰ A core mission

⁷⁵ *Id.*

⁷⁶ See Knopper, *supra* note 69.

⁷⁷ Amy X. Wang, *Why Your Favorite Concerts Are Bigger – and More Expensive – Than Ever*, ROLLING STONE (July 20, 2018, 2:13 PM), <https://www.rollingstone.com/pro/features/why-your-favorite-concerts-are-bigger-and-more-expensive-than-ever-699722/>.

⁷⁸ *Setting the stage: U2’s ‘The Claw’ gets an encore at Loveland Living Planet Aquarium*, DESERT NEWS (Oct. 1, 2019, 5:22 PM), <https://www.deseret.com/utah/2019/10/1/20893594/setting-the-stage-u2s-the-claw-gets-an-encore-at-loveland-living-planet-aquarium>.

⁷⁹ See Wang, *supra* note 77.

⁸⁰ *Id.*

of today's bands is maximizing their exposure, growing their fan base, and enticing the public to spend money on events that allow artists to make their art into a profitable business.⁸¹

Significantly outpacing inflation, the average ticket price to the one hundred most popular North American tours in the last twenty years has nearly quadrupled “from \$25.81 in 1996 to \$91.86” in 2019.⁸² To help recoup their losses from piracy and streaming dilapidating music sales, artists and musicians have increasingly relied on the public purchasing tickets to their live performances. Even artists who benefit the most from streaming's pro rata royalty payment formulation can earn more from performing a couple live shows than from a year of album streams.⁸³ As performers have gradually become more vocal over the last decade about the business aspect of the music industry and have shown how even chart topping musicians can remain millions of dollars in debt to their labels, the public has become crescively sophisticated as to how to better financially support musicians. Ticketmaster and AEG's AXS have proven that fans will “pay almost any price for their favorite acts, especially stars who only come around every few years”⁸⁴ and purchase merchandise. After years of desecrating and grousing about scalpers instantaneously syphoning originally inexpensive tickets⁸⁵ after becoming available and reselling them for exorbitant personal gains without the concert organizer or performers reaping any of the additional capital, concert organizers realized that they were undervaluing live shows, and in turn undervaluing and underpaying performers.⁸⁶ To thwart price gouging scalpers and ensure performers are adequately compensated, in addition to raising upfront prices outright, Ticketmaster and other primary ticket sellers have applied a host of Promethean tactics to outmaneuver scalpers, such as inconspicuously elevating and depressing prices at any time depending upon current sale volume and seat location availability in the venue and creating special purchasing windows exclusively for “verified fans.”⁸⁷ Moreover, in the “era of the \$200 tour t-shirt,” concertgoers are not just paying more for live show tickets – from headliners to those listed at the bottom of a music festival's cue, performers are capitalizing on Kanye West's blueprint of expunging the notion of a conceptual distinction between an artist's music and their merchandise.⁸⁸ Music festival and tour merchandise is no longer strictly viewed as an indispensable revenue source as entertainers zealously vie to best their peers with the most eccentric, coveted, and, importantly, profitable merchandise. Harkening this business maxim, Justin Bieber's 2016 Purpose world tour's “Bigger Than Satan... Bieber” t-shirt fulfilled each of these three criteria: (i) it is a faux-vintage re-purposed Marilyn Manson tour shirt,

⁸¹ *Id.*

⁸² Lucas Shaw, *Concerts Are More Expensive Than Ever, and Fans Keep Paying Up*, BLOOMBERG (Sept. 10, 2019, 5:00 AM), <https://www.bloomberg.com/news/articles/2019-09-10/concerts-are-more-expensive-than-ever-and-fans-keep-paying-up> (explaining that for some artists ticket prices have increased ten-fold since 2002).

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ John J. Moser, *Musicians Can Reduce Ticket Scalping. So Why Don't They Do It More Often?*, THE MORNING CALL (Jan. 29, 2018 7:55 PM), <https://www.mcall.com/entertainment/lehigh-valley-music/mc-ent-concert-tickets-robots-allentown-20180125-story.html> (noting that it took seconds for scalpers to purchase all tickets, except for the \$400 VIP seats, for a Saturday evening Britney Spears' concert to in turn sell the originally \$99 to \$150 tickets for upwards of \$1,000).

⁸⁶ *Id.* (explaining that some artists, particularly those that are not headliners, are less likely to try to stop scalpers from purchasing tickets or put up any form of impediment to purchasing tickets to their shows).

⁸⁷ *Id.*

⁸⁸ Miles Raymer, *Welcome to the Era of the \$200 Tour T-Shirt*, ESQUIRE (July 28, 2016), <https://www.esquire.com/style/a47149/music-merch-popularity/>.

with the only modification being the addition of Justin's surname; (ii) it sold out in every size except extra-large the week it was released; (iii) and it retailed at Barneys for \$195.⁸⁹

In the streaming age “when a hit can catch fire almost instantly around the world but royalty income can still be minuscule”⁹⁰ from chart-toppers to those in the genesis of establishing their core fellowship, countless performers have conditioned their financial stability by abiding to Chance the Rapper's business paradigm in recent years. With a net worth of over \$30 million despite never selling a physical album, refusing to sign to a label, and only releasing his works on streaming platforms in spite of their ensconced payout models, Chance the Rapper contributed his financial acumen to enticing his audience to purchase tickets to his live shows through reputable ticket promoters rather than the secondary market and equally, if not more, importantly, he understands the types of products his fan base wants and is willing to purchase. Chance's mindfulness and cognizance that his prosperity is wholly dependent upon growing and maintaining a large concert-going following is evidenced by the encomiums he bestows his loyal fans; as he explained, “I make my money off of touring and merchandise. And I'm lucky I have really loyal fans that understand how it works and support.”⁹¹

While this lodestar had proven fructuous for touring artists in recent years,⁹² Covid-19 and the accompanying communal gathering circumscriptions have disquieted this otherwise reliable business blueprint, and with concert venues mandated to shutter with no discernable reopening date, the question that begs to be answered is whether this is a permanent or temporary rift, and even if it is only transient, how long can performers and others in the concert business endure?

BLACK SABBATH

“I think that if we don't get these politicians to come together we face the most predictable economic crisis in history.” – Erskine Bowles

Saturday, March 21, 2020, is a day that will live in infamy in the live music industry. After months of punctilious planning for what was ideated to be the 2020 music-touring season's inaugural weekend, the live music industry was in a state of unparalleled ferment. Rather than welcome the

⁸⁹ In an interview with Consequence of Sound, Marilyn Manson expounded upon how he was the monetary beneficiary of Justin Bieber's “Bigger Than Satan...Bieber” tour merchandise. The goth rocker claims that he “took all of the proceeds from those shirts” because Justin Bieber's team readily admitted that they never sought to receive his approval or license the phrase. See Alex Young, *Justin Bieber Told Marilyn Manson “I Made You Relevant Again” With Repurposed T-Shirt*, CONSEQUENCE OF SOUND (Sept. 13, 2017, 1:36 PM), <https://consequenceofsound.net/2017/09/justin-bieber-told-marilyn-manson-i-made-you-relevant-again-with-repurposed-t-shirt/>.

⁹⁰ Ben Sisario & Melena Ryzik, *Concert Giants Live Nation and AEG Suspend Tours as Virus Spreads*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/12/arts/music/coachella-concerts-coronavirus.html>.

⁹¹ Zach Baron, *How Chance the Rapper's Life Became Perfect*, GQ (Aug. 24, 2016), <https://www.gq.com/story/how-chance-the-rappers-life-became-perfect>.

⁹² Jem Aswad, *Concert Industry Could Lose Up to \$9 Billion in Ticket Sales This Year, Study Shows*, VARIETY (Apr. 3, 2020, 1:10 PM), <https://variety.com/2020/music/news/coronavirus-concert-industry-lose-9-billion-2020-1234570682/> (“For the past 15 years, the concert business has been the primary financial engine of the music industry. As CD sales plummeted in the first years of this century and the bottom fell out of the recorded-music business in the wake of Napster and illegal downloading, artists came to accept their recordings as a loss leader, a sort of sampler to entice fans to their concerts and merchandise, which, along with sponsorships and synch opportunities, gradually became the primary revenue streams to enable them to make a livelihood and a living.”).

first cluster of concertgoers to kickoff the spring 2020 music tour schedule, that was the initial weekend statewide government mandated moratoriums on public gatherings took effect in the United States,⁹³ compelling live music venues to shut down. Presaging an unnerving sense of the privations that lay ahead, that weekend New York Governor Andrew Cuomo implemented New York State On PAUSE (Policies Assure Uniform Safety for Everyone) (“PAUSE”),⁹⁴ an executive order⁹⁵ impelling all non-essential businesses to cease all in-office operations and for all New Yorkers to only venture outside for essential grocery store trips, emergencies, and socially distanced outdoor exercise. By government writ, the city that never sleeps was commanded to take an indefinite rest. While an unprecedented and drastic measure, PAUSE was not an anomaly; shortly thereafter, numerous other states and local municipalities levied similar mandates.⁹⁶ Although many businesses in various states in the preceding weeks had begun to strongly encourage their non-essential work force to work from home for the foreseeable future,⁹⁷ adumbrating the public’s heightened wariness of gatherings in enclosed spaces with large groups, this was the first time since the Coronavirus was declared a worldwide pandemic that United States elected officials affirmatively interceded in private businesses’ conduct due to the public health concerns.

Fielding a global public health Dunkirk, government responses (and lack thereof) to the Coronavirus metamorphosed a health care imbroglio into a financial crisis, the economic ripple effects of which are incalculable. When the Coronavirus was still regarded as being largely confined to China, performers had a sanguine outlook for the 2020 live music business, and concert promoters augured 2020 to be another “banner” year – the gross figure amassed by the one hundred highest grossing concerts in 2020’s first quarter, spanning November 21, 2019 through February 19, 2020, was 10.92% higher when collated to the same time period the prior year, and ticket sales were 4.5% higher in 2020 as compared to 2019.⁹⁸ Had this growth remained constant through the year, analysts predict that the live music box office alone would have exceeded \$12.2 billion.⁹⁹ When factoring in merchandise, food, transportation, lodging, and other ancillary expenses, revenues were estimated to exceed \$20 billion. These calculations, however, only include reported revenue; live music events that fall outside of reporting agencies’ auspices, such as private shows, casino and resort entertainment gigs, and rodeos, undoubtedly would have generated additional millions of dollars.

⁹³ Denis Slattery et al., *Gov. Cuomo Places New York on ‘Pause’ as Coronavirus Cases Soar Above 8,500*, N.Y. DAILY NEWS (Mar. 20, 2020, 7:29 PM), <https://www.nydailynews.com/coronavirus/ny-coronavirus-20200320-hiya77j3w5brjbt7lbrvcmeve-story.html>.

⁹⁴ *N.Y. Governor Cuomo Announces Statewide Mandate that Employees of Non-Essential Businesses Cannot Report In Person to the Workplace, and that Individuals Remain Indoors to the Greatest Extent Possible*, SULLIVAN & CROMWELL LLP (July 1, 2020), <https://www.sullcrom.com/blogs-ny-governor-cuomo-pause-new-york>.

⁹⁵ EXECUTIVE ORDER NO. 202.8, STATE OF NEW YORK EXECUTIVE CHAMBER (March 20, 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf.

⁹⁶ *Coronavirus: One In Five Americans Ordered To Stay At Home*, BBC (Mar. 21, 2020), <https://www.bbc.com/news/world-us-canada-51980681>.

⁹⁷ Shannon Bond, *Amazon, Facebook, Google, Microsoft Tell Seattle Workers To Stay Home*, NPR (Mar. 5, 2020, 12:45 PM), <https://www.npr.org/2020/03/05/812173963/coronavirus-amazon-facebook-google-microsoft-urge-seattle-workers-to-stay-home>.

⁹⁸ Aswad, *supra* note 92.

⁹⁹ *Pollstar Projects 2020 Total Box Office Would Have Hit \$12.2 Billion*, POLLSTAR (Apr. 3, 2020, 6:55 AM), <https://www.pollstar.com/article/pollstar-projects-2020-total-box-office-would-have-hit-122-billion-144197>.

Nonetheless, the live music industry was exhibiting signs of dysphoria in the weeks and days leading up to PAUSE. Compounded by a growing sentiment of incertitude and dubiety in governments, doctors, and public health officials as they spouted conflicting, inconsistent, and often befuddling information about what, and what not, to do to avoid contracting the novel Coronavirus, many concertgoers were precarious of being in confined spaces with thousands of strangers for hours to listen to live performances. With the supply-and-demand curve falling out of equilibrium as demand dwindled apace, to the lament of countless behind the scenes workers responsible for arranging and hosting live music events, the docket of upcoming shows throughout early spring 2020 was essentially scrapped in a matter of ten days:¹⁰⁰

- March 4, 2020: Miami officials cancelled Ultra Music Festivals' flagship festival
- March 5, 2020: Milan's President of the Council of Ministers decreed Louis Tomlinson's show cancelled; Tomorrowland Winter's organizers cancelled the French electronic dance music festival
- March 6, 2020: SXSW film and music festival in Austin, Texas was cancelled, prompting the mayor to declare a local disaster, citing an anticipated \$356 million revenue loss for the city
- March 7, 2020: Ciara postponed her upcoming performances under the advice of her doctors as she was pregnant with her third child
- March 8, 2020: Richard Marx postponed his first European tour in nearly a decade
- March 9, 2020: Madonna's Madame X Tour was brusquely halted; Pearl Jam's North American tour was postponed; Marc Anthony cancelled his upcoming shows; the American Society of Composers, Authors and Publishers cancelled their 15th annual ASCAP Experience music concert; Ultra Abu Dhabi was cancelled; Mariah Carey postponed her upcoming slate of performances; Yungblud cancelled the Asian leg of his tour
- March 10, 2020: Miley Cyrus cancelled her World Tour Bushfire Relief Concert, which was scheduled to have Lil Nas X, the Veronicas, and Seb Fontaine perform; Pentatonix's world tour was cancelled; Carlos Santana's Miraculous 2020 world tour was postponed; Disclosure postponed their U.S. DJ tour
- March 11, 2020: Knoxville, Tennessee's Big Ears Festival was cancelled
- March 12, 2020: Billie Eilish, Cher, Kenny Chesney, Ms. Lauryn Hill, Blake Shelton, Michael Bubl , Lionel Richie, Tove Lo, The Who, and the Los Angeles Philharmonic postponed their upcoming shows; Harlem's Apollo Theatre cancelled all public programs; Broadway announced that it was postponing all shows as of 5 pm ET; Lollapalooza Argentina's organizers announced the festival's postponement
- March 13: Kelly Clarkson and the Jonas Brothers cancelled their respective Las Vegas residencies; Alice Cooper postponed his headlining tour; J. Cole's Dreamville Festival was rescheduled; Celine Dion postponed her upcoming shows¹⁰¹

¹⁰⁰ Samantha Hissong, *How Coronavirus Is Destroying the Livelihood of Music's Behind-the-Scenes Workforce*, ROLLING STONE (Mar. 16, 2020, 10:45 AM), <https://www.rollingstone.com/pro/features/coronavirus-canceled-tours-behind-the-scenes-967499/> (explaining how one tour manager had multiple upcoming individual shows and tours cancelled within twelve hours, another tour manager had four weeks of public appearances and promotional trips cancelled, and an audio engineer received a single text message that "'wiped out \$11,000 in gigs.'").

¹⁰¹ *Here Are All the Major Music Events Canceled Due to Coronavirus*, BILLBOARD (Aug. 24, 2020), <https://www.billboard.com/articles/business/touring/9323647/concerts-canceled-coronavirus-list>.

As the future of live music events lay in abeyance with no indication of when the status quo would resume, two of the most significant cancellations for the live music industry were announced on the same day: by public health authorities' orders, concert promoter Goldenvoice first announced on March 10, 2020 that both The Coachella Valley Music and Arts Festival,¹⁰² which was expected to host over 150 acts, draw an average daily in-person attendance of nearly 130,000 people, and a total attendance of over one-quarter million people during the festival's two three-day weekends,¹⁰³ and Stagecoach, its country music festival counterpart, were postponed until October.¹⁰⁴ Then, with Coronavirus' rapid spread showing no signs of abatement, on June 11, 2020, both festivals were officially cancelled until at least 2021.¹⁰⁵ The postponement and subsequent cancellation of these two touring season behemoths is more than just umbrage of permuting dates; it represents an immeasurable economic and cultural loss.

*"[Coachella] always introduces the best of the year for the rest of the year."*¹⁰⁶ – Katy Perry

In addition to its potentially career-making clout for musicians, Coachella offers the same potential of alchemizing retailers from unknown to legendary. Its twenty year evolution from a simple art and music gathering with a modest attendance of a few thousand people to a marketing and cultural dreadnought boasting a live stream audience of over 82 million viewers¹⁰⁷ in over 200 countries¹⁰⁸ has made Coachella "to fashion and beauty brands what the Super Bowl is to other consumer product categories."¹⁰⁹ Alongside performances from top-selling artists are onsite pop-up shops, interactive brand experiences, and sponsored tents, and outside the festival grounds are influencer-driven events intended to engage both in-person attendees and those watching around the world. As evidenced by the 83 million Coachella-related interactions on Instagram for the 2015 festival installment, mobilizing "a strong digital content strategy can mean the difference between 'not only reaching the thousands of people who came to the event, but also the hundreds of thousands of people who follow the people who came to the event. Now, the ROI on events is not just who attended or how many eyeballs were on the product, but what online content was driven.'"¹¹⁰

¹⁰² "In 2017, Coachella became the highest grossing recurring festival of all time, boasting a total income of £88.7 million." Olive Pomestey, *How sponsorship swallowed Coachella*, GQ (Apr. 11, 2019), <https://www.gq-magazine.co.uk/article/coachella-2019-influencers-business>.

¹⁰³ Rande Dawn, *What is Coachella? Everything You Need To Know About the Massive Music Fest*, TODAY (Feb. 4, 2020, 12:02 PM), <https://www.today.com/popculture/what-coachella-everything-you-need-know-about-massive-music-fest-t172929>.

¹⁰⁴ Coachella (@Coachella), TWITTER (Mar. 10, 2020, 7:04 PM), <https://twitter.com/coachella/status/1237514789762416640>.

¹⁰⁵ Coachella (@Coachella), TWITTER (June 11, 2020, 7:04 PM), <https://twitter.com/coachella/status/1271202837486170112>.

¹⁰⁶ Jonathan Ringen, *Coachella's Career-Making Magic: It Takes Artists From Cool to A-List*, BILLBOARD (Mar. 30, 2015), <https://www.billboard.com/articles/news/6516519/coachella-career-boosts>.

¹⁰⁷ Katie Kilkenny, *Coachella's 2019 Livestream Audience Jumps 90 Percent in First Weekend*, THE HOLLYWOOD REPORTER (Apr. 19, 2019, 10:59 AM), <https://www.hollywoodreporter.com/news/coachella-livestream-audience-jumps-90-percent-first-weekend-1203367>.

¹⁰⁸ Sisario & Ryzik, *supra* note 90.

¹⁰⁹ Helena Pike, *At Festivals, Fashion Taps the 'Currency of Cool,'* THE BUSINESS OF FASHION (Apr. 13, 2016, 5:27 PM), <https://www.businessoffashion.com/articles/intelligence/at-festivals-fashion-taps-the-currency-of-cool-coachella-alice-and-olivia-calvin-klein-tag-heuer-h-and-m>.

¹¹⁰ *Id.* (quoting digital marketing and events agency No Subject's chief executive Jaclyn Johnson).

A quintessential difference separating Coachella from other music festivals is its embracement of corporate sponsorships. While the UK's Glastonbury Festival of Contemporary Performing Arts has a comparable in-person attendance size to Coachella, its organizers have taken a non-commercial sponsorship approach throughout its nearly fifty-year history and the festival does not advertise, display, or otherwise recognize corporate partners on its website or social media platforms, and even within the festival grounds there is no merchandise display or other public exposure of its corporate partners.¹¹¹ On the other hand, with corporate sponsors displayed aplenty throughout the 78-acre festival grounds,¹¹² Coachella's organizers have cultivated a highly successful symbiotic partnership with corporations wherein sponsors curate experiences to augment the Coachella experience and amplify brand awareness. With entire marketing concepts, brand lines, and communication strategies reliant upon creating a positive and memorable live, in-person experience, the devastating economic consequences of the festival's unprecedented postponement exactly one month before the highly anticipated opening day, and subsequent cancellation, cannot be understated.

A VERY MAJEURE FORCE

“There is only one kind of shock worse than the totally unexpected: the expected for which one has refused to prepare.” – Mary Renault

The preternatural, abrupt, and inescapable upheaval to businesses, public gatherings, and virtually all aspects of daily life fomented by the novel severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2) has also presented an array of novel severe acute legal questions and challenges. As the \$54 billion global music industry¹¹³ continues hemorrhaging money as the pandemic perdures, music industry executives and their legal advisors are increasingly drawing on legal dogma to help cauterize the wound.

All contracts are not created equal. While the Coronavirus' continued proliferation and subsequent international and domestic travel circumscriptions may trigger an initial knee-jerk response to immediately declare a previously scheduled public event postponed or cancelled, rather than accede to that embryonic Pavlovian reaction, all involved parties should incontinently evaluate their rights and obligations under the applicable material agreements. Many famous and infamous (i.e., Fyre Festival¹¹⁴) music festivals were cancelled for a myriad of reasons¹¹⁵ in the years prior to the Coronavirus pandemic but all had financial repercussions for those involved. Adjudging who, and how much, will be paid amongst artists, ticketholders, staffers, vendors, and the festival

¹¹¹ *Glastonbury Music Fest's Non-Sponsorship Approach To Sponsorship*, IEG SPONSORSHIP REPORT (May 9, 2011), <http://www.sponsorship.com/iegsp/2011/05/09/Glastonbury-Music-Fest-s-Non-Sponsorship-Approach.aspx>.

¹¹² Todd Spangler, *YouTube to Live-Stream Coachella Music Fest for Free for 5th Year Running*, VARIETY (Mar. 31, 2015, 1:44 PM), <https://variety.com/2015/digital/news/youtube-to-live-stream-coachella-music-fest-for-free-for-5th-year-running-1201463642/>.

¹¹³ Amy Watson, *Global Music Industry Revenue 2012-2023*, STATISTA (Dec. 3, 2019), <https://www.statista.com/statistics/259979/global-music-industry-revenue/>.

¹¹⁴ Tom Huddleston Jr., *Fyre Festival: How A 25-Year-Old Scammed Investors Out of \$26 Million*, CNBC (last updated Aug. 22, 2019, 2:40 PM), <https://www.cnn.com/2019/08/18/how-fyre-festivals-organizer-scammed-investors-out-of-26-million.html>.

¹¹⁵ Ellise Shafer, *All the Music Festivals That Have Been Canceled in 2019*, BILLBOARD (Aug. 1, 2019), <https://www.billboard.com/articles/news/festivals/8525781/every-music-festival-canceled-2019-woodstock-50> (explaining that over a dozen major music festivals were cancelled in 2019, including Woodstock 50).

organizers is contingent upon a multitude of factors including the underlying reason for the festival’s abrogation and whether there is insurance coverage. Nonetheless, the paramount factor to accurately assay the deal specifics is answering the question “what does the agreement say?”¹¹⁶

First and foremost, the parties should review whether their material agreements contain a force majeure clause. Meaning “superior force,” the term “force majeure” is derived from French civil law but has no single definition or a settled or inherent meaning;¹¹⁷ it is a case-by-case contract-specific affirmative defense wherein the burden of proof rests on the party asserting that they are absolved from fulfilling the covenants they previously agreed to perform as a result of insuperable circumstances beyond their control that neither party reasonably anticipated or controlled that have made performing their contractual duties illegal or impossible.¹¹⁸ Not intended to serve as a buffer against normal contractual risks,¹¹⁹ force majeure provisions typically have an elongated, enumerated, and exhaustive “parade of horrors,”¹²⁰ varying in detail and scope,¹²¹ that courts generally narrowly interpret¹²² due to judicial recognition that the law of contracts’ main function is allocating risks that may affect performance and only in the most compelling situations should the parties escape such allocation.¹²³ Although the threshold procedural question of how much deference should be allotted to the underlying contract’s terms and conditions varies between jurisdictions,¹²⁴ essentially all courts and arbitrating bodies’ analysis generally involves a fact-intensive inquiry¹²⁵ of the following elements:¹²⁶

1. Does the event qualify as force majeure under the agreement?¹²⁷

¹¹⁶ See Marc Hogan, *What Happens When a Music Festival Is Canceled Due to Coronavirus?*, PITCHFORK (Mar. 11, 2020), <https://pitchfork.com/thepitch/what-happens-when-a-music-festival-is-canceled-due-to-coronavirus/>.

¹¹⁷ Amanda Cowell & Daisy Wetherill, *How To Predict the Unpredictable: Force Majeure Clauses in Changing Political Landscapes*, WHITE & CASE LLP (Apr. 1, 2019), <https://www.whitecase.com/publications/article/how-predict-unpredictable-force-majeure-clauses-changing-political-landscapes>.

¹¹⁸ See *Ner Tamid Congregation of N. Town v. Krivoruchko*, 638 F. Supp. 2d 913, 931 (N.D. Ill. 2009), as amended (July 9, 2009).

¹¹⁹ *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 951 N.Y.S.2d 84 (Sup. Ct.), aff’d, 68 A.D.3d 562, 891 N.Y.S.2d 63 (2009).

¹²⁰ Edmund M. O’Toole et al., *Five Interesting Force Majeure Cases from Around the Country*, VENABLE LLP (Apr. 17, 2020), <https://www.venable.com/insights/publications/2020/04/five-interesting-force-majeure-cases-from>.

¹²¹ Judith A. Archer et al., *COVID-19: Force Majeure, Material Adverse Change Clauses and Related Common Law Contract Defenses Under New York Law*, NORTON ROSE FULBRIGHT (Apr. 2020), <https://www.nortonrosefulbright.com/en-ug/knowledge/publications/c15c2f10/covid-19-force-majeure-material-adverse-change-clauses-and-related-common-law-contract-defenses>.

¹²² “[W]hen the parties have themselves defined the contours of force majeure in their agreement, those contours dictate the application, effect, and scope of force majeure.” *Constellation Energy Servs. of New York, Inc.*, 146 A.D.3d at 558 (quoting *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 88 A.D.3d 1224, 1225 (3d Dep’t 2011)).

¹²³ See Wallach, *The Excuse Defense in the Law of Contracts: Judicial Frustration of the U.C.C. Attempt to Liberalize the Law of Commercial Impracticability*, 55 *Notre Dame Law* 203, 207 (1979); see *Kel Kim Corp. v. Cent. Mkts., Inc.*, 70 N.Y.2d 900, 902 (1987).

¹²⁴ Christopher J. Cox & Joseph T. Spoerl, *A U.S. Litigator’s Perspective on Force Majeure*, HOGAN LOVELLS (Mar. 20, 2020), https://www.hoganlovells.com/~media/hogan-lovells/pdf/2020-pdfs/2020_03_20_force_majeure_clauses_and_covid-19.pdf.

¹²⁵ *Kel Kim Corp. v. Cent. Markets, Inc.* 70 N.Y.2d at 902; see also *Allegiance Hillview, L.P. v. Range Texas Prod., LLC*, 347 S.W.3d 855, 865 (Tex. App.—Fort Worth 2011, no pet.).

¹²⁶ There is no universally accepted definition of what is required to invoke force majeure.

¹²⁷ See, e.g., RICHARD A. LORD, 30 *WILLISTON ON CONTRACTS* § 77:31 (4th Ed.) (“What types of events constitute force majeure depend on the specific language included in the clause itself.”); *Kel Kim Corp. v. Cent.*

2. Even if the force majeure event was included within the agreement’s itemized “parade of horrors,” was the risk of nonperformance foreseeable and was it able to be mitigated?¹²⁸
3. Was performance of the agreement actually impossible¹²⁹ and not simply more onerous or economically burdensome to fulfill?¹³⁰

With respect to the first element, the mere fact that the World Health Organization and other recognized public health entities declared the Coronavirus a global pandemic is not *prima facie* evidence that there is a force majeure such that parties are released from their contractual duties; instead, the question of whether force majeure encompasses a pandemic turns on the actual contract’s provisions and applicable law. Even if the agreement’s force majeure clause specifically references “pandemics,” “epidemics,” “disease outbreak,” or “public health crisis,” there is a dearth of U.S. case law involving health crises analogous to Coronavirus, and in the few cases that analyzed if a particular disease outbreak constituted a force majeure event, courts maintained their focus on the clause’s actual language and whether the health crisis was unforeseeable and rendered performance actually impossible.¹³¹ Therefore, the threshold query is: at the time of execution, did the parties intend for the plain language of the force majeure provision to encompass the event that the asserting party claims caused its non-performance?¹³² In the event that the drafters did not explicitly include the terms “pandemic,” “epidemic,” or other infectious disease outbreaks in the force majeure provision, contracting parties may satisfy the first element by turning to boilerplate catch-all force majeure language to excuse performance in the event of unforeseeable crises outside the parties’ control, which may be broadly written as “acts of God”¹³³ and “events not

Mkts., Inc., 70 N.Y.2d 900, 902 (1987) (holding that the force majeure defense is narrow and excuses nonperformance “only if the force majeure clause specifically includes the event that actually prevents a party’s performance”).

¹²⁸ See LORD, *supra* note 127, § 77:31 (noting that a party seeking the benefits of a force majeure clause must show that performance is impossible “in spite of skill, diligence, and good faith” to continue to perform).

¹²⁹ *Classic Maritime Inc. v. Limbungan Makmur SDN BHD*, 646 F. Supp. 2d 364, 366-67 (S.D.N.Y. 2009)

(explaining that because the defendant could not prove that “but for” the alleged force majeure event that it would have performed its contractual obligations, it was not entitled to non-performance and avoid liability).

¹³⁰ See *In re Cablevision Consumer Litig.*, 864 F. Supp. 2d 258, 264 (E.D.N.Y. 2012) (noting that, under New York law, force majeure clauses are “construed narrowly and will generally only excuse a party’s nonperformance that has been rendered impossible by an unforeseen event”); see LORD, *supra* note 127, § 77:31 (“Nonperformance dictated by economic hardship is not enough to fall within a force majeure provision.”)

¹³¹ See *Rembrandt Enterprises v. Dahmes Stainless*, No. 15-cv-4248, 2017 WL 3929308, at *2, *12 (N.D. Iowa Sept. 7, 2017) (“In the spring of 2015, an epidemic of Avian Flu hit the Midwestern United States. The outbreak was notorious and engendered a large amount of media coverage and government intervention;” a poultry farmer sued to cancel an order for a commercial dryer under the agreement’s force majeure clause after they were forced to move their operations due to the pandemic. The court denied the farmer’s request, finding that the avian flu did not alter the supplier’s ability to build and deliver the dryer.).

¹³² Cox & Spoerl, *supra* note 124.

¹³³ Historically, an “act of God” was generally defined by courts to include illness (see, e.g., *Herter v. Mullen*, 159 N.Y. 28, 37 (1899) (“The disability of a party to do the particular thing, or to perform the contract by reason of sickness is held to be a disability by the act of God.”); *Love v. Barnesville Mfg. Co.*, 19 Del. 152, 50 A. 536, 537 (Del. Super. Ct. 1901) (“The defendant would not be liable for damages caused solely by the act of God, such as an epidemic of sickness in the defendant’s factory.”). Over the decades, though, this term’s definition has been statutorily broadened to mean all “natural phenomenon of an exceptional, inevitable, and irresistible character, the effects of which could not have been prevented or avoided by the exercise of due care or foresight.” (42 USCA § 9601(1)).

within the parties' reasonable control" or narrowly phrased as "any other like events,"¹³⁴ as well as seek to have their case argued before courts that are more likely to liberalize their force majeure analysis to account for market realities such as labor and shortage supplies caused by the pandemic and regard government instituted lockdowns and other restrictions implemented to slow the virus as triggering events.

Even if the asserting party surmounts the first element, they must also generally prove that the disputed event was unforeseeable and that the party's non-performance could not be mitigated. With respect to whether the Coronavirus pandemic was unforeseeable, meaning that a reasonable person could not have foreseen the event when entering into the contract in like circumstances,¹³⁵ courts may be less inclined to weigh in a claimant's favor given that there have been other worldwide pandemics and epidemics in recent history (*e.g.*, the 2009 H1N1 pandemic¹³⁶ and the 2014 Ebola outbreak¹³⁷), which would render the current pandemic outside force majeure's purview.¹³⁸ On the other hand, parties could argue that it is gratuitous to collate the Coronavirus with other recent pandemics and epidemics given the scale and pace at which it swept the globe and that its essentially epoch-making impact alone renders it an unforeseeable worldwide phenomenon.¹³⁹ Crucially, non-performance dictated by economic downturn and hardship, up to the point of insolvency and bankruptcy and even when the product of an otherwise triggering event, are not enough to excuse performance¹⁴⁰ as judiciary bodies in virtually all jurisdictions

¹³⁴ While more broadly drafted "catch-all" provisions may on their face appear to assist the invoking party's claim, many courts will narrowly construe such language and look to the specific force majeure events described in the contract to determine whether the parties, at the time they signed the agreement, intended for the force majeure clause to apply to events connected to the Coronavirus. *See* Archer et al., *supra* note 121; *Kel Kim Corp. v. Cent. Markets, Inc.*, 70 N.Y.2d at 902; *see also* *Allegiance Hillview, L.P. v. Range Texas Prod., LLC*, 347 S.W.3d 855, 865 (Tex. App.—Fort Worth 2011, no pet.).

¹³⁵ Thomas O'Leary et al., *Force Majeure: An Overview of Common Law and Civil Law Approaches, A Brief Look At Recent Domestic and US Case Law and Where We Are Headed*, DENTONS (Aug. 17, 2020), <https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2020/august/17/force-majeure-an-overview-of-common-law-and-civil-law-approaches>.

¹³⁶ Margaret Chan, *World Now At The Start of 2009 Influenza Pandemic*, WORLD HEALTH ORGANIZATION (June 11, 2009), https://www.who.int/mediacentre/news/statements/2009/h1n1_pandemic_phase6_20090611/en/.

¹³⁷ *Six Months After the Ebola Outbreak Was Declared: What Happens When a Deadly Virus Hits the Destitute?*, WORLD HEALTH ORGANIZATION <https://www.who.int/csr/disease/ebola/ebola-6-months/en/> (last visited Oct. 19, 2020) (stating that on August 8, 2014, the World Health Organization declared the Ebola epidemic a "public health emergency of international concern.").

¹³⁸ Andrew C. Smith et al., *Tour de Force: What Constitutes an "Act of God," and Other Developments in Force Majeure Law*, PILLSBURY WINTHROP SHAW PITTMAN LLP (June 15, 2020), <https://www.pillsburylaw.com/en/news-and-insights/tour-de-force-what-constitutes-act-of-god-force-majeure-law.html>.

¹³⁹ Music festival organizers may argue that the Coronavirus is distinguishable from other disease outbreaks because over 200 countries have reported Coronavirus cases (Henrik Pettersson et al., *Tracking Coronavirus' Global Spread*, CNN, <https://www.cnn.com/interactive/2020/health/coronavirus-maps-and-cases/> (last updated Oct. 19, 2020, 11:45 AM)) and the Coronavirus pandemic is only the sixth time the World Health Organization has declared a disease outbreak to be a Public Health Emergency of International Concern, (Erin Schumaker, *Coronavirus Declared Global Health Emergency By WHO After 1st Person-To-Person US Case Reported*, ABC NEWS (Jan. 30, 2020, 9:33 PM), <https://abcnews.go.com/Health/world-health-organization-decide-coronavirus-global-health-emergency/story?id=68639487>), both of which weigh in favor of adjudicating this pandemic to be a force majeure event. *See* Smith et al., *supra* note 138.

¹⁴⁰ *See e.g. OWBR LLC v. Clear Channel Commc'ns, Inc.*, 266 F.Supp.2d 1214, 1223 (D. Haw. 2003) ("[F]orce majeure clause[s] do[] not excuse performance for economic inadvisability, even when the economic conditions are the product of a force majeure event."); *Travel Wizard v. Clipper Cruise Lines*, No. 06 Civ. 2074 (GEL), 2007 WL

roundly observe that “the risk of changing economic conditions or a decline in a contracting party’s finances is part and parcel of virtually every contract.”¹⁴¹ With respect to mitigation, even if a force majeure clause is silent as to the measures a party must take to mitigate losses or if the clause does not expressly impose an obligation to mitigate,¹⁴² in practice, the invoking party generally must undergo a fact-specific inquiry to prove that a force majeure event actually prevented a party from fulfilling its contractual duties and that it could not mitigate the effects.¹⁴³ This means that a court is less likely to find that a party’s non-performance was attributable to a force majeure event if they failed to pursue available alternative modes of fulfilling their obligations.¹⁴⁴

After satisfying the first two criteria, the invoking party must typically also prove that “but for” the force majeure event, it was able and willing to perform its contractual obligations and duties.¹⁴⁵ Failure to affirmatively answer this question generally precludes claimants from relying upon the force majeure defense to excuse their contractual responsibilities. Reverting to the agreement’s language, force majeure clauses often require performance of contractual obligations to be “prevented,” “impeded,” “hindered,” or “delayed.” Depending upon the jurisdiction and applicable law, courts tend to regard the term “prevent” as denoting that the obstacle to perform is insurmountable (*e.g.*, it is no longer physically feasible or legally permissible to perform the agreement) while the terms “impede,” “hinder,” and “delay” may be more loosely construed such that the affected party does not have to prove impossibility of performance.¹⁴⁶ Absent an express reference to “epidemics” or “pandemics,” if courts do not yield to the notion that the Coronavirus pandemic is itself a force majeure event because it did not alone make fulfilling contractual duties essentially impossible, if the contract contains a force majeure provision that includes “government actions” amongst its “parade of horrors,” the invoking party may argue that but for the quarantines, travel restrictions, or other local and federal government interferences to normal business operations, it would have honored its contractual duties, thereby satisfying the third element.

Frequently, notifying affected parties pursuant to the agreement’s specifications is a prerequisite to invoke a force majeure defense and failure to do so may result in a waiver of the clause.¹⁴⁷

29232 (S.D.N.Y. Jan. 3, 2007) (the economic downturn following the September 11th terrorist attacks did not suffice on its own to trigger force majeure clause).

¹⁴¹ *Route 6 Outparcels, LLC v. Ruby Tuesday, Inc.*, 27 Misc. 3d 1222(A) (N.Y. Sup. Ct. Albany Cty. 2010), *aff’d*, 88 A.D.3d 1224 (N.Y. App. Div. 3d Dep’t 2011); *Urban Archaeology Ltd. v. 207 E. 57th St. LLC*, 68 A.D.3d 562, 562 (N.Y. App. Div. 1st Dep’t 2009) (rejecting the defendants use of the doctrine of impossibility to excuse performance because “economic downturn could have been foreseen or guarded against in the [contract]”); *but see In re Old Carco*, 452 B.R. 100, 119–20 (Bankr. S.D.N.Y. 2011) (finding that the party’s obligations were excused after the 2008 financial crisis pursuant to the agreement’s force majeure clause that explicitly listed “change to economic conditions” as a force majeure event).

¹⁴² Illinois implies a duty on the claimant to attempt to resolve the event causing the delay or performance inability prior to invoking a force majeure clause. Such duty is “related to the duty of good faith [and] is read into all express contracts unless waived.” *Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 859 (N.D. Ill. 1990) (citing *Dezsofi v. Jacoby*, 178 Misc. 851, 853, 36 N.Y.S.2d 672, 674 (S.Ct.1942)).

¹⁴³ O’Leary et al., *supra* note 135.

¹⁴⁴ Tom Cummins et al., *Force Majeure Under Common Law*, Ashurst LLP (Mar. 17, 2020), <https://www.ashurst.com/en/news-and-insights/legal-updates/quickguide---force-majeure-under-common-law/>.

¹⁴⁵ See Cox & Spoerl, *supra* note 124.

¹⁴⁶ See *id.*

¹⁴⁷ See *id.*; Archer et al., *supra* note 121.

Moreover, if the agreement sets forth an allotted time frame within which a party must respond to such notice, failure to do so may constitute acceptance of the counterparty's force majeure claim.

“Either I’ve been missing something or nothing has been going on.” – Karen Elizabeth Gordon

Although force majeure is increasingly becoming a common boilerplate clause, its inclusion is not required to create a valid contract.¹⁴⁸ As company executives and their lawyers unabashedly scour their material agreements to dredge up what may and may not excuse non-performance as they perpend the consequences of cancellation or postponement, the absence of a force majeure provision or other direct guidance within the four corners of the contract does not forestall parties from availing themselves of legal and equitable doctrines to release them from their contractual obligations without breaching their agreements.¹⁴⁹ The doctrine of impossibility excuses nonperformance when an unforeseeable event destroys the contract's subject matter and there is no applicable force majeure provision and no mutually understood contractual purpose;¹⁵⁰ the doctrine of frustration of purpose, most commonly applied in the event of the death or incapacity of a person necessary to the agreement or the destruction or ruination of an item required to perform the contract,¹⁵¹ is available when there has been an unforeseeable¹⁵² “change in circumstances”¹⁵³ so substantial as to frustrate the contract's basis “that, as both parties understood, without it, the transaction would have made little sense;”¹⁵⁴ the defense of commercial impracticability's treatment and availability significantly differs between states, with some viewing it as a standalone defense and others placing it under the auspices of the doctrine of impossibility, but regardless of form, many U.S. states that recognize this defense have adopted similar language to that in Section 261 of the Restatement (Second) of Contracts, which provides that nonperformance is excused when “a party's performance is made impracticable without [their] fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made,”¹⁵⁵ and numerous states have also adopted the Uniform Commercial Code (“UCC”) which provides that impracticability is a defense where contractual performance has

¹⁴⁸ “The basic elements required for the agreement to be a legally enforceable contract are: mutual assent, expressed by a valid offer and acceptance; adequate consideration; capacity; and legality.” *Contract*, LEGAL INFORMATION INSTITUTE, <https://www.law.cornell.edu/wex/contract> (last visited Oct. 10, 2020).

¹⁴⁹ Emily Chase-Sosnoff, *COVID-19 and Force Majeure Claims in Performance of Contracts*, FORDHARRISON LLP, https://www.fordharrison.com/files/50367_covid-19_and_force_majeure_clauses_in_contracts.pdf.

¹⁵⁰ Cox & Spoerl, *supra* note 124; Archer et al., *supra* note 121.

¹⁵¹ *Bayou Place Ltd. P'ship v. Aleppo's Grill, Inc.*, 2020 WL 1235010, at *8 (D. Md. Mar. 13, 2020)

¹⁵² *Warner v. Kaplan*, 71 A.D.3d 1, 6 (N.Y. App. Div. 1st Dep't 2009) (stating that frustration of purpose “is not available where the event which prevented performance was foreseeable and provision could have been made for its occurrence”).

¹⁵³ *PPF Safeguard, LLC v. BCR Safeguard Holding, LLC*, 85 A.D.3d 506, 508 (N.Y. App. Div. 1st Dep't 2011) (citing Restatement (Second) of Contracts § 265 (1981)). The Restatement (Second) of Contracts § 265 explains that “[w]here, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.” Furthermore, the Restatement's commentary provides that Section 265 requires that (1) the purpose that is frustrated was a “principal purpose” in making the contract, such that without it the transaction “would make little sense”; (2) the frustration is substantial; and (3) the non-occurrence of the frustrating event was a basic assumption on which the contract was made. Restatement (Second) of Contracts § 265, cmt. a.

¹⁵⁴ *Crown IT Servs., Inc. v. Koval-Olsen*, 11 A.D.3d 263, 265 (N.Y. App. Div. 1st Dep't 2004) (citing Restatement (Second) of Contracts § 265 (1981)).

¹⁵⁵ Restatement (Second) of Contracts § 261.

“been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made.”¹⁵⁶ At their root, these principles are meant to allocate which party should bear the financial cost of the contract’s disruption, and, as with force majeure, courts routinely reject economic hardship as the basis for these three common law defenses as economic loss and hardship are viewed as foreseeable.

“One day there will be no borders, no boundaries, no flags and no countries and the only passport will be the heart.” – Carlos Santana

In today’s hyper interconnected world, where a South Korean boy-band’s “Army” of super-fans is able to launch a military-grade coordinated effort from the confines of their homes to successfully digitally disrupt a sitting U.S. president’s reelection campaign plans,¹⁵⁷ it would be remiss to only review music contracts from a U.S. perspective. The concept of a “superior force” is recognized in both civil law jurisdictions, where “codified principles serve as the primary source of law,” and common law legal jurisdictions, where judicial decisions are the primary legal source.¹⁵⁸ In civil law jurisdictions, which are typically located in South America, continental Europe, and parts of Asia including China, “[a] consequence of having force majeure codified in a civil code is that the relevant government can, through legislation, deem an event to constitute force majeure”¹⁵⁹ regardless of whether the contract contains a force majeure provision. For example, the Dutch Civil Code provides that statutory force majeure may apply where performance is impossible and the nonperforming party shows that “its failure to perform cannot be attributed to it, by showing that the failure is neither its fault nor for its account pursuant to the law, a legal act or the relevant standards,”¹⁶⁰ and in Germany, where the concept of force majeure is explained in various sections of the civil code, the precise meaning is dependent upon the legislative context.¹⁶¹

After the Chinese government effectively brought factory and business operations to a near stand-still by implementing city-wide lockdowns and effectively curtailed the physical movement of millions of people within China to slow the virus’ spread in early 2020,¹⁶² the China Council for the Promotion of International Trade (“CCPIT”), a quasi-governmental agency supported by Beijing’s Commerce Ministry, issued almost 5,000 force majeure “certificates” within the first

¹⁵⁶ U.C.C. § 2-615(a); *see also, e.g.*, Cal. Com. Code § 2615 (codifying language of U.C.C. § 2-615).

¹⁵⁷ Julia Hollingsworth, K-Pop Fans Are Being Credited With Helping Disrupt Trump’s Rally. Here’s Why That Shouldn’t Be A Surprise, CNN, <https://www.cnn.com/2020/06/22/asia/k-pop-fandom-activism-intl-hnk/index.html> (last updated June 22, 2020, 5:49 AM) (explaining that South Korean boy band BTS’ legion of fans, affectionately known as the BTS ARMY (Adorable Representative MC for Youth), are credited with reserving thousands of tickets to a presidential reelection rally in Tulsa, Oklahoma without planning to actually attend. While the campaign boasted receiving over a million ticket requests, the Tulsa fire department reported fewer than 6,200 attendees on the day of the event, well below the arenas 19,000 person capacity).

¹⁵⁸ Kenneth A. Adams & Jan Asmus Bischoff, *Common-Law Drafting in Civil-Law Jurisdictions*, BUSINESS LAW TODAY (Dec. 20, 2019), <https://businesslawtoday.org/2019/12/common-law-drafting-civil-law-jurisdictions/>.

¹⁵⁹ *Will Coronavirus Be A Force Majeure Event? It Depends On Your Governing Law*, OSBORNE CLARKE (Mar. 12, 2020), <https://www.osborneclarke.com/insights/will-coronavirus-force-majeure-event-depends-governing-law/> [hereinafter *Osborne Clarke*].

¹⁶⁰ *See id*; *International Overview of Force Majeure Amid Covid-19*, KARANOVIC & PARTNERS (May 2020), <https://www.karanovicpartners.com/wp-content/uploads/2020/05/Force-Majeure-Global-Overview.pdf>.

¹⁶¹ *See Osborne Clarke, supra* note 159.

¹⁶² *China Coronavirus: Lockdown Measures Rise Across Hubei Province*, BBC (Jan. 23, 2020), <https://www.bbc.com/news/world-asia-china-51217455>.

three months of 2020 worth upwards of 373.7 billion Chinese Yuan (\$53.79 billion)¹⁶³ to businesses that provided documentation asserting that the Coronavirus stymied them from fulfilling their contractual duties.¹⁶⁴ Although the Chinese government’s issuance of force majeure “certificates” will assist in disputes between domestic Chinese entities with claims against one another,¹⁶⁵ English law governs the majority of cross border-agreements.¹⁶⁶ If litigation ensues against a foreign entity wherein the CCPIT force majeure “certificate” holder raises the defense that issuance of such a “certificate” conclusively proves that there is a valid force majeure, mechanically fettering a judiciary body to a foreign quasi-governmental entity’s declaration that a singular event unequivocally is a force majeure and disavowing the internationally accepted concept that force majeure is “aimed at dealing with events such as unforeseen operational outages, rather than changes in broader economic circumstances,”¹⁶⁷ would set a dangerous contractual precedent. As international courts and arbitrators are not bound, or even required to defer, to the CCPIT force majeure “certificates,” major companies have already rejected these “certificates” from Chinese entities attempting to escape and excuse themselves from agreements¹⁶⁸ and have reprobated the notion that they are a resolute confirmation that the Coronavirus is a force majeure event that automatically suspends or terminates agreements. Moreover, if a lawsuit is filed, dependent upon the agreement’s explicit language, the same force majeure event under the same law could give rise to vastly disparate outcomes depending upon where adjudicated. For example, French courts look to the contract’s purpose and the event’s practical effect, while in Germany, if performance is impossible, an excused party cannot claim counter-performance from the other party and may be liable for damages if it is responsible for the event that created the impossibility or commercial unfeasibility.¹⁶⁹

“We need a resolution, we have so much confusion.” – Aaliyah

As what constitutes a force majeure event is often a product of contractual negotiations in common law countries, so too are the consequences. In practice, the objective of invoking a force majeure provision is to return parties to their pre-contract position, with the exception of being compensated for any work performed up to the time of the force majeure event as well as reimbursement for previously incurred expenses.¹⁷⁰ Commonly chaffered repercussions of a successfully activated

¹⁶³ Huileng Tan, China Invokes ‘Force Majeure’ To Protect Businesses – But The Companies May Be In For A ‘Rude Awakening,’ CNBC <https://www.cnbc.com/2020/03/06/coronavirus-impact-china-invokes-force-majeure-to-protect-businesses.html> (last updated Mar. 6, 2020, 5:53 AM).

¹⁶⁴ Lawrence P. Rochefort, *The Coronavirus and Force Majeure Clauses in Contracts*, ACKERMAN LLP (Apr. 6, 2020), <https://www.akerman.com/en/perspectives/the-coronavirus-and-force-majeure-clauses-in-contracts.html>.

¹⁶⁵ Cornelius Grossmann & Stephen d’Errico, *COVID-19: Four Key Considerations For Legal Positions On Force Majeure*, ERNST & YOUNG GLOBAL LIMITED (May 7, 2020), https://www.ey.com/en_us/covid-19/covid-19-four-key-considerations-for-legal-positions-on-force-majeure.

¹⁶⁶ Unlike civil jurisdictions, under English law force majeure is not defined either in statute or under case law, it will not be implied if the contract does not contain such a provision, and whether a force majeure clause is triggered entirely depends upon the terms as written. See Osborne Clarke, *supra* note 159.

¹⁶⁷ Bate Felix & Jessica Jaganathan, *France’s Total Rejects Force Majeure Notice From Chinese LNG Buyer*, REUTERS (Feb. 6, 2020, 9:03 AM), <https://www.reuters.com/article/us-china-health-total/frances-total-rejects-force-majeure-notice-from-chinese-lng-buyer-idUSKBN2001XQ> (quoting Haynes and Boone, LLP partner Rob Patterson).

¹⁶⁸ *Id.* (explaining that French oil giant Total rejected a force majeure notice from a Chinese liquefied natural gas buyer).

¹⁶⁹ See Osborne Clarke, *supra* note 159.

¹⁷⁰ See Hogan, *supra* note 116.

force majeure clause include: suspending contractual obligations; excuse from liability for non-performance or delay; contract termination; time extensions; renegotiation of certain terms or certain contract remediation; and other governance measures.¹⁷¹ As most concert and music festival work takes place at the actual time of the performance, if the show cannot go on in light of a force majeure event such as the Coronavirus pandemic, most artists, house crews, and other parties to the relevant agreements will not be paid except for work or expenses they incurred prior to the postponement or cancellation, and they will not be compensated for pre-scheduled performances that do not occur. Additionally, concertgoers must also turn to the contractual fine print to discern whether they may be reimbursed for the cost of their tickets; some festivals, such as SXSW, which has a long-standing no-refund policy, and Ultra Music Festival, offered festivalgoers badges and credits to future events in lieu of a refund,¹⁷² while others continue to weigh their options.

For the organizers, slated performers, and ticketholders of music concerts and festivals cancelled or postponed due to the Coronavirus pandemic, given the disparate interpretations of contractual terms and lack of apropos precedent, there is no encyclical answer to whether a force majeure provision or legal doctrine will excuse performance, whether insurance will apply, or whether ticketholders are entitled to refunds. Nonetheless, it would be incumbent on all affected to consider the following:

1. Before declaring a force majeure event, is notice required, and, if so, in what form?
2. Was Coronavirus and its spread known when the agreement was formed?
3. Is delayed or substitute performance permissible?
4. Do the parties need to negotiate the terms of any delay or rescheduling?
5. Does the agreement provide for liquidated damages or require the nonperforming party to reimburse the other parties for costs associated with the cancellation?
6. Is performance truly unfeasible or illegal, rather than simply inconvenient or more costly?¹⁷³

“Always plan ahead. It wasn’t raining when Noah built the Ark.” – Richard C. Cushing

In addition to force majeure provisions and common law defenses, one further means of recourse for parties disproportionately impacted by the Coronavirus pandemic is insurance. Nonetheless, akin to the effete outcomes of certain force majeure clauses, not all insurance policies are created equal. As insurance holders ruminate over (and thereafter rue) the multitude of adroitly crafted carve outs from their ostensibly stout insurance policies, the aphorism that “[i]nsurance companies are not in the business of paying insurance” remains resolutely steadfast.

Although not readily apparent that property insurance may cover the Coronavirus’ interruption to regular business operations (such insurance is typically intended to cover business interruption

¹⁷¹ Anthony Borgese et al., *COVID-19: Force Majeure And Frustration Of Your Contracts*, MINTERELLISON (Mar. 24, 2020), <https://www.minterellison.com/articles/covid-19-force-majeure-and-frustration-contract>.

¹⁷² See Hogan, *supra* note 116.

¹⁷³ See Julie Bédard et al., *Coronavirus/COVID-19: Implications of Event Postponement and Cancellation*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP (Apr. 3, 2020), <https://www.skadden.com/insights/publications/2020/04/covid19-implications-of-event-postponement>.

losses from fires, floods, earthquakes, and other forms of direct physical destruction), if physical access to a business is prohibited or severely limited by government mandated writ, such as a travel ban or crowd size limit, the insured has a stronger claim. Nonetheless, even a seemingly robust property insurance policy may not be sufficient; in light of prior pandemics, such as 2014's Ebola outbreak, standard property insurance generally includes an endorsement excluding business interruption due to pathogens, epidemics, and pandemics. Nonetheless, specialty insurance developed in response to this carve out to cover this particular type of event. For instance, during the height of Ebola's spread, a group of specialty brokers partnered with the Ark Specialty Program of Lloyd's of London to offer an avant-garde "Pandemic Disease Business Interruption Insurance" to cover lost income resulting from "non-physical damage" events, such as government ordered closures of healthcare facilities, and lost revenue due to mandated quarantines.¹⁷⁴ As with force majeure contract provisions, it is vital to review the terms and conditions of any insurance policy, even those that cover pandemics, as many often only cover particular types of pathogens and exclude others (*e.g.*, only bacterial, and not viral, outbreaks are covered).¹⁷⁵

While many festivals and individual performers are covered by event cancellation insurance policies, coverage for communicable disease is often an additional add-on that many insurance holders heretofore did not purchase and insurance providers ceased offering (or explicitly excluded Coronavirus from their coverage) shortly after the initial Coronavirus outbreak in China.¹⁷⁶ In a particularly unfortunate set of circumstances, SXSW's founders revealed that their financial perils would likely worsen as their insurance policy does not cover communicable disease outbreaks and is not triggered in the event of the city declaring a local state of disaster.¹⁷⁷ Unable to rely on insurance, this means that even if performers are covered by force majeure, SXSW's organizers may incur high out-of-pocket expenses for any marketing expenditures and other miscellaneous fees incurred prior to the event's cancellation. As with promoters' event insurance cancellation policies, infectious disease coverage is a supplemental option in artists' event cancellation insurance. Even if artists availed themselves of that additional coverage, to stem any doubt about the truism of the business of insurance companies, unless artists themselves contract the disease and are unfit to perform as a result, very little protection is available.¹⁷⁸ As this essentially means that artists and promoters will be liable for any losses if an event is cancelled due to Coronavirus, postponing events may prove to be a preferable alternative that provides some flexibility on expense sheets, as it means that artists and promoters may not have to return all ticket fees posthaste as refunds, and they may later recoup lost profits once it is safe to resume touring.

¹⁷⁴ Theresa C. Carnegie et al., *Business Interruption Insurance for Ebola – Managing Risk for Hospitals and Healthcare Providers*, MINTZ, LEVIN, COHN, FERRIS, GLOVSKY AND POPEO, P.C. (Oct. 20, 2014), <https://www.mintz.com/insights-center/viewpoints/2146/2014-10-business-interruption-insurance-ebola-managing-risk>; Cox & Spoerl, *supra* note 124.

¹⁷⁵ Cox & Spoerl, *supra* note 124.

¹⁷⁶ Amy X. Wang, *Does Music Touring Insurance Cover Coronavirus? It's Complicated*, ROLLING STONE (Mar. 12, 2020, 4:18 PM), <https://www.rollingstone.com/pro/news/music-concerts-tour-insurance-coronavirus-965288/>.

¹⁷⁷ <https://www.austinchronicle.com/daily/news/2020-03-06/sxsw-cancellation-not-covered-by-insurance/>.

¹⁷⁸ *Id.*

A HARD DAY'S NIGHT

“You take my life when you take the means whereby I live.” – William Shakespeare

The vertiginous cancellation of the entire 2020 spring and summer music festival season within a matter of weeks fostered less of a trickle-down and more of a roaring cascade of crippling economic devastation not only for those directly involved in the music industry but also for countless others. While obvious that the lodging and airline industries suffered financial blowbacks when patrons cancelled their accommodations and flights upon learning of the music festivals cancellations, less apparent are the intra- and interstate economic effects festival cancellations had on a sweeping range of corollary industries.¹⁷⁹ Specifically with respect to intrastate industries, from local boîtes, clothing boutiques, cleaning companies, and non-festival entertainment businesses that have become increasingly dependent upon the influx of tourists during festival season to move from the red to the black, to ride-sharing businesses such as Lyft and Uber that often expand the number of drivers during the festival season to transport patrons to and from airports, train stations, and bus depots and throughout the town, local cities and counties' economies have begun to increasingly rely upon the inrush of capital from music festivals as ticket prices and crowd sizes have expanded. In 2016, of the nearly three-fourths of a billion dollars Stagecoach and Coachella injected into the global economy, over \$400 million directly benefitted businesses in the Coachella Valley and over \$105 million directly benefitted businesses specifically located in Indio, California where Coachella is held.¹⁸⁰ Additionally, just from ticket revenue alone, the city of Indio received approximately five percent of its general fund from ticket taxes.¹⁸¹ The effect on interstate businesses also cannot be downplayed as thousands of people, from the independent contractors who work on the music festival touring circuit to the truck drivers delivering the equipment, tents, and other accouterments to set up the opulent festival grounds, cross numerous state borders as they travel throughout the continental U.S. to run the festivals. The loss of music festivals also impacts interstate commerce for those who never venture from their own locales, such as graphic designers who ship the goods they dedicated months crafting into what they hope will be sell-out items to various festivals in different states.

The further deluge of cancellations of the last the remaining major spring and summer festivals between March 24, 2020 and March 31, 2020, including Firefly, Summerfest, New York's Governors Ball, and Boston Calling, shattered any hope of salvaging 2020's primary music festival season. In an attempt to mitigate the scourge of unemployment for those in the music touring industry, some festivals ambitiously, and arguably prematurely, announced their anticipated return for the early autumn and winter months. Unfortunately, instead of engendering a panacea for the economic hardship for the music festival touring industry, a surfeit of music festivals concentrated over the course of a few weeks would create bedlam. Having all of the festivals originally slated for the autumn and winter months occur contemporaneously with the postponed spring and summer festivals would besiege the finite number of companies and contractors that have the

¹⁷⁹ See generally Andrew R. Chow, 'How Can We Survive Summer?' *Coachella Valley Workers Reel From Festival's Postponement*, TIME (Mar. 17, 2020, 3:30 PM), <https://time.com/5803879/coachella-workers-coronavirus-impact/>.

¹⁸⁰ Anna Rumer, *Coachella festival, Stagecoach Generate \$704M in 2016*, THE DESERT SUN (last updated Mar. 22, 2016, 7:45 PM), <https://www.desertsun.com/story/news/local/indio/2016/03/22/goldenvoice-concerts-coachella-economic-impact/82141410/>.

¹⁸¹ *Id.*

expertise, training, and experience to safely and effectively erect, operate, and disassemble baroque festival grounds. As one freelance worker explained, rescheduling a cumulus of festivals over the course of a few weeks will not germinate the same volume of work if the festivals had occurred when they were originally calendarized;¹⁸² rather than be made whole financially, such workers whose métier is servicing music festivals will be forced to cull between attending the rescheduled spring and summer festivals or honoring their previous commitments to work for the festivals originally scheduled for the fall. If all such workers ultimately elect to work the same handful of festivals that proffer the greatest potential brand exposure, the remaining festivals will be understaffed and shorthanded, which could potentially compromise the health and safety of both the workers and patrons.

As the Coronavirus continues to ravage the live music industry well into the autumn touring season, there are renewed fears of a cancellation ripple effect. As one financial and business risk advisor explained, “[i]f artists start running out of dates this year to rearrange shows, it will drive further losses into next year. Competition for available venue dates will escalate within the industry and end up cannibalizing sales opportunities for artists later this year and in 2021.”¹⁸³ When added together, cancellation figures, legal costs, and arrangement fees just for the lost 2020 events are anticipated to well exceed \$5 billion,¹⁸⁴ and with no discernable timeline for when the pandemic will pan out, revenue losses will continue to spike.

*“The best laid schemes o’ Mice an’ Men, Gang aft a’gley, An’ lea’e us nought but grief an’ pain,
For promis’d joy! (The best laid schemes of Mice and Men oft go awry, And leave us nothing but
grief and pain, For promised joy!)” – Robert Burns*

Rather than (or in addition to) rescheduling, some festival organizers have endeavored to salvage some of the in-person allure by hosting virtual mini-festivals. While too early to discern if patrons will embrace the virtual format, such events are largely futile for advertisers and marketers as it is impossible to replicate the in-person “Coachella Effect” through a brightly lit computer screen. Virtual festivals and concerts revolve around the notion of an experience for the masses but curated for the individual,¹⁸⁵ which is diametric to the Coachella Effect’s fundamental premise of an experience for the individual that is curated for the masses. Effective festival marketing campaigns depend upon subconscious psychological cues to give the impression of a personalized experience, such as implying that there is an ethos in certain purchases, engendering a conviction that investing and using a certain product will exalt one’s lifestyle choice, appealing to egos, and, critically, propelling a fear of missing out (“FOMO”).¹⁸⁶ Hinged upon the collective worldwide public’s reaction and willingness to invest in certain artists and products seen both within the confines of, and contiguous to, the actual festival grounds, the “Coachella Effect” has shaped entire marketing concepts, brands, and even albums as New Zealand singer-songwriter Lorde’s entire last album

¹⁸² See Chow, *supra* note 179.

¹⁸³ Mark Beech, *BTS, Green Day Cancellations Highlight \$5 Billion Coronavirus Threat To Music*, FORBES (Mar. 5, 2020, 11:58 AM), <https://www.forbes.com/sites/markbeech/2020/03/05/bts-green-day-cancellations-highlight-5-billion-coronavirus-threat-to-music/#672da57520cb>.

¹⁸⁴ *Id.*

¹⁸⁵ See Spencer Allison, *Virtual Music Festivals: Experiences For The Masses, Curated For The Individual*, OPUS (Sept. 3, 2020), <https://www.opusagency.com/2020/09/virtual-music-festivals/>.

¹⁸⁶ Wil Fulton, *14 Ways Advertisers Influence Your Everyday Decisions*, THRILLIST (Apr. 12, 2015, 11:30 PM), <https://www.thrillist.com/culture/ways-advertisers-can-persuade-you-into-buying-things-advertising-tips-and-tricks>.

was predicated upon the public’s reaction to its launch at Coachella. Showing that something is exclusive, in demand, only available for a limited time, and people like you and those who you desire to emulate are also purchasing the product are the pillars of FOMO marketing in the attention economy.¹⁸⁷ With a messaging framed to entice, it is not by serendipity that music festival sponsors have finessed “the art of influencing the influencers.”¹⁸⁸ Technology has also played a key role in effective marketing campaigns. Particularly through geo-fencing (generating a virtual perimeter of an actual geographic area that triggers a response when an Internet-enabled mobile device enters or exits the boundaries), brands can create personalized alerts, offers, and exclusive access based upon the festivalgoer’s physical location. Such branding strategies are designed to begin even before festivalgoers reach the actual grounds – in partnership with singer-songwriter Khalid, BMW created the hashtag #RoadToCoachella to entice and engage road tripping fans to go to a pop-up experience installation at its Palm Springs dealership, and model Kaia Gerber partnered with Yves Saint Laurent for a beauty station pop up, located miles away from Indio, California where Coachella is held, with an American gas station aesthetic to entice road trippers to venture away from the festival grounds to try the company’s latest exclusive products.¹⁸⁹ These marketing paradigms are heavily reliant on a physically present public and cannot readily be transferred to virtual festival formats with socially distanced audiences logging in from around the world. While festivalgoers are forced to shelter in place, advertisers and artists are utilizing both established and novel online platforms to at least partially recreate the Coachella Effect in the hope that, once public gatherings are again safe, audiences will continue to follow and invest both on- and offline. While this has proven successful in reaching widespread audiences for headliner artists such as Travis Scott, who had a record-breaking 12 million fans tune in to his Fortnite video game virtual concert,¹⁹⁰ it is too early to tell if virtual viewership will transfer to real world dollars.

“If you can’t use me, can you tell me some good news?” – J.J. Cale

Unlike artists and music producers who can use digital workarounds to continue to create new music, connect with fans in real time, and earn a similar income as they had prior to the pandemic, the thousands of employees and independent contractors who organize, prepare, and host live music events have no such means of recourse.¹⁹¹ With concert venues indefinitely closed, freelance workers and independent contractors¹⁹² (e.g., lighting and instrument technicians, soundboard operators, set builders, etc.) have arguably suffered the largest financial blowback as their jobs are largely nonexistent without public events. Already beset by the onslaught of live music cancellations around the globe with no discernable means of recovering lost revenue, further

¹⁸⁷ Emil Kristensen, *FOMO Marketing: How to Use Fear of Missing Out to Drive More Sales*, SLEEKNOTE (Feb. 21, 2019), <https://sleeknote.com/blog/fomo-marketing>.

¹⁸⁸ Pomety, *supra* note 102.

¹⁸⁹ Tina Mulqueen, *Brands Paid Hefty Prices To Send Micro-Influencers Dancing In The Desert At Coachella*, FORBES (Apr. 16, 2019, 3:58 PM), <https://www.forbes.com/sites/tinamulqueen/2019/04/16/brands-paid-hefty-prices-to-send-micro-influencers-dancing-in-the-desert-at-coachella/#26e51f342bf3>.

¹⁹⁰ Todd Spangler, *Travis Scott Destroys ‘Fortnite’ All-Time Record With 12.3 Million Live Viewers*, VARIETY (Apr. 24, 2020, 6:01 AM) <https://variety.com/2020/digital/news/travis-scott-fortnite-record-viewers-live-1234589033/>.

¹⁹¹ U.S. DEPT. OF LABOR, FLSA2019-6, (Apr. 29, 2019), https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/2019_04_29_06_FLSA.pdf.

¹⁹² Richard Tuschman, *They’re Not Independent Contractors If the Court Says They’re Employees*, FORBES (July 17, 2013, 5:42 PM), <https://www.forbes.com/sites/richardtuschman/2013/07/17/theyre-not-independent-contractors-if-the-court-says-theyre-employees/#1bf3132a126d>. (Discussing *Scantland v. Jeffrey Knight, Inc.*, 721 F.3d 1308 (2013) regarding misclassifying individuals as independent contractors and not employees).

aggravating the dire economic situation befalling freelance workers in the live music industry was the dearth of state and federal government protections for gig economy workers. Prior to March 27, 2020, independent contractors, gig workers, and self-employed individuals were ineligible to collect unemployment and did not receive employment benefits such as sick leave, retirement benefits, disability income, and health insurance.¹⁹³ Rather, such benefits were exclusively available to workers who earned a state-by-state defined minimum in W-2 wages¹⁹⁴ to the exclusion of individuals who made a living through a 1099 income (e.g., freelancers, independent contractors, gig workers). As one production manager explained the bleak situation to Rolling Stone, “[freelance workers] aren’t unionized, like a lot of musicians and local stagehands...most of us don’t have great health insurance, and we don’t have access to unemployment insurance or anything like that.”¹⁹⁵

Further complicating matters, the effects of the Tax Cuts and Jobs Act’s (“TCJA”)¹⁹⁶ refashioning of the 1986 Internal Revenue Code presented an additional economic hurdle for many independent contractors. After parsing through the morass of special industry carve-outs in the largest overhaul of the U.S. tax code in three decades, the TCJA profoundly altered the nature of tax deductions by effectively repealing personal and dependent exemptions and replacing them with a nearly doubled standard deduction. For background, while a tax credit lowers a filer’s tax liability dollar-for-dollar, a tax deduction reduces a filer’s taxable income. Taxpayers typically select either the standard deduction or itemized deductions, but regardless of that choice, they may still take advantage of above-the-line deductions to reach their adjusted gross income. While the exact amount for each taxpayer is dependent upon their age and filing status, the standard deduction is a flat rate that non-itemizers may automatically subtract from their adjusted gross income to arrive at their taxable income.¹⁹⁷ On the other hand, filers who do not take the standard deduction subtract the total amount of their itemized qualified expenses from their adjusted gross income to determine their taxable income. A personal choice, filers who opt to itemize their expenses typically do so because their total itemized expenses are greater than the standard deduction, which minimizes their overall taxable income. Common itemized deductions typically include charitable contributions, home mortgage interest, medical expenses, and, importantly, state and local taxes (“SALT”). Prior to 2018, less than one-third of taxpayers on average itemized deductions,¹⁹⁸ but of those who did, nearly all selected the SALT deduction.¹⁹⁹ Although filers had to select whether to deduct individual income taxes or instead, sales taxes, there was no limit on how much SALT taxpayers could deduct, an amount that could easily reach tens of thousands of dollars; for instance, Californians who itemized deductions claimed an average of \$20,451 in SALT in 2017 and New

¹⁹³ I.R.S Publication 15-B (2020), <https://www.irs.gov/pub/irs-pdf/p15b.pdf>.

¹⁹⁴ Christy Bieber, *How the CARES Act Could Affect Your Jobless Benefits*, THE MOTLEY FOOL (Apr. 13, 2020, 1:05 PM), <https://www.fool.com/personal-finance/2020/04/13/how-the-cares-act-could-affect-jobless-benefits.aspx>.

¹⁹⁵ Hissong, *supra* note 100.

¹⁹⁶ Tax Cuts and Jobs Act, Pub. L. No. 115-97, 131 Stat. 2054 (2017).

¹⁹⁷ Amanda Dixon, *What Is the Standard Deduction?*, SMART ASSET (Jan. 24, 2020), <https://smartasset.com/taxes/standard-deduction>.

¹⁹⁸ See Kathy Pickering, *How Did Tax Reform Change Itemized Deductions?*, H&R BLOCK (Oct. 10, 2018), <https://www.hrblock.com/tax-center/irs/tax-reform/3-changes-itemized-deductions-tax-reform-bill/>.

¹⁹⁹ Kathryn Vasel, *Making Sense of the New Cap on State Tax Deductions*, CNN (Dec. 20, 2017, 2:24 PM), <https://money.cnn.com/2017/12/20/pf/salt-deductions-new-tax-plan/index.html> (stating that over 95% of taxpayers who itemize their deductions claimed the SALT deduction in 2014).

Yorkers who itemized wrote off an average of \$23,804 in SALT.²⁰⁰ However, beginning with the 2018 tax year when the TCJA went into effect, tens of millions of previous itemizers elected instead to take the standard deduction as many of the once popular exemptions were stripped away or otherwise severely curtailed. One of the most controversial aspects of the TCJA is the \$10,000 SALT cap. Previously unlimited, the SALT deduction was the driving factor for itemizers, particularly those in California, New York, and other high-tax and high-income states, to not take the standard deduction. Although filers had to select whether to deduct income or sales tax, excluding filers in the seven states with no individual income tax,²⁰¹ most itemizers deducted income taxes. Furthermore, property taxes were also entirely deductible. While some aspects of the new tax reform partially offset the loss of personal exemptions and the SALT deduction cap, such as nearly doubling the standard deduction and implementing tax credits for families with children, the SALT cap hobbled millions of taxpayers, particularly in coastal states. For instance, a middle class family that itemized their deductions in 2017 mostly because of the unlimited SALT deduction would potentially pay a higher tax bill regardless of whether they took the standard deduction or itemized under TCJA.²⁰² TCJA also penalizes married couples as the SALT limit is the same for both singles and married couples. This means that two unmarried tax filers can each individually receive a \$10,000 SALT deduction, but they would forfeit \$10,000 in deductions if they wed.²⁰³ Moreover, TCJA also impaired homeowners with limited fungible cash; as one tax expert explained, “if you’ve been living on the edge and someone yanks away your ability to fully deduct your property taxes, that could mean that if you are used to deducting \$20,000 and can only take \$10,000, that is [more than \$800] a month you are losing in deductions.”²⁰⁴ As the \$10,000 SALT cap is not slated to sunset until December 31, 2025,²⁰⁵ compounded with the fact that non-traditional workers are not entitled to employment benefits and are statistically less likely to have insurance compared to W-2 wage earners,²⁰⁶ TCJA is particularly frustrating for independent contractors as they can deduct and write off fewer expenses than ever before.

“Unemployment is of vital importance, particularly to the unemployed.” – Edward Heath

Lacking an industry-wide safety net for global catastrophes that upend their work, non-essential, non-traditional workers unable to perform their jobs remotely from home due to the Coronavirus were out of work entirely and encouraged to apply for unemployment benefits. Below are a few

²⁰⁰ Darla Mercado, *About 30 Million People Lost These Tax Breaks When They Filed Last Year*, CNBC (Apr. 9, 2020, 1:37 PM), <https://www.cnbc.com/2020/04/09/about-30-million-people-lost-these-tax-breaks-in-2018.html>.

²⁰¹ Vasel, *supra* note 199.

²⁰² *Id.*

²⁰³ Although the TCJA reduced the rate of certain itemized deductions, it nearly doubled the standard deduction for married couples filing jointly from \$12,700 to \$24,000. See *How TCJA Changes to Personal Exemptions, Standard Deductions and the Child Credit Could Impact Your Tax Liability*, KRAFTCPAS PLLC (Jan. 22, 2018), <https://www.kraftcpas.com/articles/tcja-changes-personal-exemptions-standard-deductions-child-credit-impact-tax-liability/>.

²⁰⁴ *Id.*

²⁰⁵ Kathy Pickering, *How the Tax Cuts and Jobs Act Impacts U.S. Tax Returns*, H&R BLOCK (Oct. 24, 2018), <https://www.hrblock.com/tax-center/irs/tax-reform/tax-cuts-and-jobs-act>.

²⁰⁶ Ryan Nunn & Jimmy O’Donnell, *Unpredictable and Uninsured: The Challenging Labor Market Experiences of Nontraditional Workers*, BROOKINGS (May 7, 2020), <https://www.brookings.edu/blog/up-front/2020/05/07/unpredictable-and-uninsured-the-challenging-labor-market-experiences-of-nontraditional-workers/>.

of the lesser-known positions that have been affected in the wake of widespread music tour and festival cancellations:

1. Songwriters – A decrease in live shows also impacts songwriters’ profits as a “decrease in shows unquestionably equates to a decrease in potential gains via live performance royalties.”²⁰⁷
2. Travel companies – The people and organizations that handle all travel logistics, from deciding which airlines to which hotels can accommodate performers and their cortège, earn upwards of eighty percent of their annual income between early spring and late summer during music festival season.
3. Concert venues’ house crew – The bartenders, box-office personnel, coat checkers, security guards, merchandise tellers, concession stand workers, and all others who work for the venues that host live shows are out of work. Notably, many music venues’ house crews are not salaried workers and largely rely on tips.²⁰⁸

*“It is strange how new and unexpected conditions bring out unguessed ability to meet them.” –
Edgar Rice Burroughs*

However, much to gig economy workers’ solace, on March 27, 2020 the \$2.2 trillion bipartisan Coronavirus Aid, Relief, and Economic Security (CARES) Act (“CARES Act”)²⁰⁹ was enacted into law.²¹⁰ The largest economic stimulus package in U.S. history²¹¹ and of unparalleled scope,²¹² the CARES Act has been instrumental in palliating a complete economic free fall for millions of independent contractors and gig economy workers. In addition to providing a lifeline to small businesses through the \$659 billion Paycheck Protection Program,²¹³ the CARES Act established the following three programs to alleviate the economic hardship harbored by those rendered unemployed or underemployed due to the pandemic:

²⁰⁷ John Ochoa, *How The Global Coronavirus Pandemic Is Directly Impacting Songwriters, Musicians And Artists*, RECORDING ACADEMY (Mar. 13, 2020, 3:35 PM), <https://www.grammy.com/advocacy/news/how-global-coronavirus-pandemic-directly-impacting-songwriters-musicians-and-artists>.

²⁰⁸ Hissong, *supra* note 100.

²⁰⁹ The CARES Act is the third phase of Congress’ Coronavirus response. The first two phases are the \$8.3 billion Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 and the \$104 billion Families First Coronavirus Response Act, respectively.

²¹⁰ “The CARES Act follows the passage of Phase I relief (the Coronavirus Preparedness and Response Supplemental Appropriations Act), which provided \$8.3 billion of support, largely for COVID-19 vaccine research and development, and Phase II (the Families First Coronavirus Response Act), which boosted aid by \$192 billion for free COVID-19 testing, state unemployment insurance, expanded paid sick leave, and food assistance.” <https://www.jpmorgan.com/insights/research/cares-act>.

²¹¹ See Michael Collins & Deirdre Shesgreen, *The \$2 Trillion Stimulus is the Biggest in History. How Does It Compare to 9/11, Financial Crisis Bills?*, USA TODAY, <https://www.usatoday.com/story/news/politics/2020/03/25/coronavirus-emergency-bill-how-does-it-compare-9-11-financial-crisis/5010452002/> (last updated Mar. 25, 2020, 3:39 PM).

²¹² Kate Larsen et al., *It’s Not Easy Being Green: Stimulus Spending in the World’s Major Economies*, RHODIUM GROUP (Sept. 2, 2020), <https://rhg.com/wp-content/uploads/2020/09/Its-Not-Easy-Being-Green-Stimulus-Spending-in-the-Worlds-Major-Economies.pdf>.

²¹³ DEP’T. OF THE TREASURY, THE CARES ACT PROVIDES ASSISTANCE TO SMALL BUSINESSES, <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses> (last visited Oct. 10, 2020); U.S. Small Business Administration, Paycheck Protection Program <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program> (last visited Oct. 10, 2020).

1. Pandemic Unemployment Assistance (“PUA”). Prior to the CARES Act, unemployment benefits were only available to workers who earned a state-by-state defined minimum in W-2 wages, thereby excluding all individuals who made a living through a 1099 income (e.g., freelancers, independent contractors, gig workers). The PUA program expands unemployment benefits by subsuming such individuals²¹⁴ and grants them traditional unemployment benefits that W-2 wage earners receive.
2. Federal Pandemic Unemployment Compensation (“FPUC”). Through July 31, 2020 (and July 25, 2020 in some states),²¹⁵ the FPUC program provided an automatic \$600 weekly federal benefit in addition to regular state unemployment compensation for all workers who qualified for unemployment, including self-employed workers and others who became eligible via the CARES Act.
3. Pandemic Emergency Unemployment Compensation (“PEUC”). Although unemployment benefits generally expire between 12 and 26 weeks depending upon the state,²¹⁶ the PEUC program provides up to an extra 13 weeks of supplementary payments beyond the maximum unemployment for individuals who have exhausted their regular unemployment benefits. The total amount is equal to the total amount received before the benefits ran out, and, prior the FPUC’s expiration, eligible individuals also received the additional weekly \$600 stipend.

Moreover, in addition to these direct federal benefits, the federal government has indirectly incentivized states to provide other forms of benefits for the unemployed and underemployed.²¹⁷ For instance, although not required by the CARES Act, the federal government cajoled states to waive the typical one-week waiting period before individuals are eligible to receive unemployment benefits by funding all of the benefits paid during that time. Nonetheless, as the Coronavirus pandemic will eventually end,²¹⁸ so too will these expansive benefits. As the FPUC expired at the end of July, without a further act of Congress, the PEUC and PUA benefits will also expire on December 31, 2020.

²¹⁴ The PUA does not extend benefits to undocumented workers or to those with no record of income. Catherine Brock, *4 Ways the CARES Act Improves Unemployment Benefits*, THE MOTLEY FOOL (Apr. 27, 2020, 10:47 AM), <https://www.fool.com/investing/2020/04/27/4-ways-the-cares-act-improves-unemployment-benefit.aspx>.

²¹⁵ DEP’T. OF LABOR, EMPLOYMENT AND TRAINING ADMINISTRATION ADVISORY SYSTEM (Apr. 4, 2020), https://wdr.doleta.gov/directives/attach/UIPL/UIPL_15-20.pdf.

²¹⁶ *Unemployment Benefits Comparison by State*, FILEUNEMPLOYMENT.ORG, <https://fileunemployment.org/unemployment-benefits/unemployment-benefits-comparison-by-state> (last updated Aug. 4, 2020).

²¹⁷ See Laura K. Latham et al., *Understanding the Unemployment Insurance Provisions in the CARES Act*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Apr. 20, 2020), <https://www.pillsburylaw.com/en/news-and-insights/unemployment-insurance-cares-act-covid-19.html>.

²¹⁸ Betsy McKay, *Dr. Fauci Says ‘There Will Be an End’ to Covid-19*, WALL ST. J. (Sept. 16, 2020, 10:24 PM), <https://www.wsj.com/articles/fauci-says-there-will-be-an-end-to-covid-19-11600309449> (quoting Dr. Anthony Fauci, the director of the National Institute of Allergy and Infectious Diseases (“NIAID”), who explained in an interview with the Wall Street Journal’s CEO Council, “‘There will be an end to [the Coronavirus pandemic], and we will be able to get back to normal.’”).

UNCERTAINTY IS THE ONLY CERTAINTY

“Just as despair can come to one only from other human beings, hope, too, can be given to one only by other human beings.” – Elie Wiesel

The sibylline quote “history doesn’t repeat itself, but it often rhymes” by American humorist Samuel Langhorne Clemens, better known by his nom de plume Mark Twain, is apt to describe both the parallels and lack of homology between prior tribulations that beleaguered the music industry and the Coronavirus pandemic. From vinyl to cassettes to CDs to MP3s to streaming, each successive wave of technological progress has ushered in a “new normal” for the consumption and financing of music by permanently recasting content distribution, revenue streams, and customer access. These recurrent tempestuous transmutations to established business models have, in virtually all instances, further impelled the dichotomy between consumers and the music industry’s interests. In diametric opposition to the general public’s embrace of technological innovations that catalyze the democratization of music, the pre-Coronavirus music industry did not conceal its pious enmity towards the facilitation of a royalty per listen rather than payment per purchase economic model. However, with the Coronavirus’ emergence and subsequent proscription on public gatherings, the ideological chasm between the general public and music industry may be waning.

Much like artists who lived through prior pandemics throughout the millennia, modern musicians have sedulously endeavored to spread “pandemic pop” to the largest audience possible via the most widely accessible technological platforms. Today, those platforms include TikTok, virtual meet-and-greets, and augmented reality, all of which encourage the type of payment model that the pre-Coronavirus music industry zealously opposed. Nonetheless, in the worldwide endeavor to “flatten the curve” by discouraging large gatherings and encouraging social distancing, these mediums are mutually beneficial to the music industry and consumers – musicians can continue to safely create and distribute new content to satiate their disparately located fans’ demand for new entertainment as they shelter in place. Nonetheless, the pandemic will eventually relent, the live music industry will recrudescence, and pre-social distancing norms will be restored. Until that time though, the lingering question remains: to what extent are the adaptations ushered in as a consequence of the Coronavirus pandemic transient or permanent?