

# Same Song, Different Verse: Evolution of the Entertainment and Music Industry in the COVID Era

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This paper was presented at the [2022 International Summit](#) of the  
Music & Entertainment Industry Educators Association  
May 16-17, 2022

<https://doi.org/10.25101/22.27>

View the Summit presentation at:  
<https://youtu.be/bQNV0XXdjfk>

## Abstract

This paper examines the evolution of the following entertainment and music industry themes that emerged in 2020 and have lasting effects today with respect to our important entertainment and music business: 1) force majeure and related clauses in contracts have proven to be critical and are now highly scrutinized by attorneys and agents; 2) the plain language of insurance policies is of utmost importance when determining adequacy of coverage, and policies are now more restrictive and expensive; 3) livestreaming started as a method of survival for artists during the pandemic but has become its own standalone sector that carries new significance; and 4) new social media platforms are more relevant to our industry than ever before, chief among those being TikTok.

Keywords: COVID-19, pandemic, force majeure, contract law, insurance, insurance disputes, litigation, alternative dispute resolution, livestreaming, concerts, touring, live events, social media, TikTok, Clubhouse, corporate collaboration

## Introduction

At the time of this writing, two years and almost four months have passed since the beginning of the COVID-19 pandemic in the United States. During the pandemic, our entertainment and music industry has evolved from shutting down venues and canceling all in-person shows to requiring proof of negative COVID tests and vaccine cards to some entertainers and business owners being back to “business as usual,” all while operating in our new “normal.” Since the summer of 2021, we have seen many artists and their teams return to life as we once knew it, at least for the most part. This paper analyzes the evolution of the entertainment and music industry in the COVID-19 era while focusing on four important themes: 1) contracts, 2) insurance, 3) livestreaming, and 4) social media.

## Contracts

While our industry struggled to wrap its mind around the realities faced in 2020, artists involved in anticipated tours immediately dusted off their contracts (or their agents and lawyers did so) to determine the parties’ rights and obligations. Prior to the pandemic, many agents and lawyers glossed over the so-called “boilerplate” sections toward the end of performance contracts. However, since the pandemic, a great deal of effort has been put into ensuring that clients have a way “out” of the contract in the event of a cancellation for reasons beyond the parties’ control.

Force majeure and related clauses are utilized to deal with unforeseen circumstances (i.e., things that no one expects to happen...until they happen). Since 2020, attorneys drafting contracts are paying special attention to whether a force majeure clause makes sense to be included in the contract, and if so, the precise language that should be included within such clause. For example, if an artist is signing a contract for an event that is happening later in the year, the artist’s

attorney or agent should protect against the artist having to return a deposit to the purchaser in the event of cancellation for reasons beyond the control of the artist. On the other hand, the purchaser should take the opposite approach and ensure that the contract calls for return of any deposits in the event of a cancellation for reasons beyond the control of the purchaser. Force majeure and related clauses should be specifically tailored to fit the needs of the individual parties. To avoid the need for dispute resolution, parties on both sides now understand the importance of carefully drafting the contract to ensure that goals are achieved while thinking through every possible scenario.

Relatively few force majeure clauses drafted prior to COVID-19 specifically list “pandemics” or “epidemics” as a force majeure event. For this reason, many litigating parties have had to rely on “catch-all” provisions, such as “or other similar causes beyond the parties’ control.” A recent Second Circuit decision signals that New York courts may interpret catch-all provisions broadly to excuse nonperformance as a result of the COVID-19 pandemic.

In *JN Contemporary Art LLC v. Phillips Auctioneers LLC*, Phillips was an auction company that agreed to auction a piece of art at its event scheduled for May 2020. The parties’ agreement contained a force majeure clause stating that, “In the event that the auction is postponed for circumstances beyond our or your reasonable control, including, without limitation, as a result of natural disaster, fire, flood, general strike, war, armed conflict, terrorist attack or nuclear or chemical contamination, we [i.e., Phillips] may terminate this Agreement with immediate effect.” According to the Court, the COVID-19 pandemic was the same type of event as those listed in the plain language of the clause, and therefore, Phillips’ nonperformance was excused. The Court’s decision suggests that force majeure clauses that omit “pandemics” and “epidemics” may nonetheless apply to COVID-19 where such clauses list other social disruptive events such as natural disaster or terrorist attacks alongside sufficient catch-all language.

Moving forward, we will continue to see not only emphasis placed on contract language regarding cancellations but also language related to dispute resolution. Over the past two years, we have seen that litigated contract disputes can take years to resolve, resulting in an openness to requiring mediation or other types of alternative dispute resolution.

## Insurance

Another area that has always been important, especially with live touring, but achieved a new level of significance during the pandemic, is insurance. Business managers and owners have routinely monitored their insurance policies but are now consciously taking extra precautions to ensure that they are adequately protected. Commercial property

and business interruption insurance policies, along with production and event cancellation insurance, are customary policies for entertainment industry stakeholders, but throughout the past two years, we have seen such policies change their terms.

The actual language of an insurance policy is the primary focus in any insurance dispute. Various types of exclusions typically exist for any given policy, and those exclusions are clearly defined within the language of the policy. Since 2020, courts have been flooded with insurance-related lawsuits that involve policyholders arguing that losses related to COVID-19 should be covered by the particular policy. Because litigation can take years to complete, many of these insurance-related cases remain undecided. However, one key takeaway is that many insurance companies are now expressly excluding COVID-19 losses from coverage within the language of new policies. Ideally, a music venue, promoter, or other stakeholder would be able to secure communicable disease coverage; however, this type of coverage can now be extremely difficult to get and very expensive.

As expected, protecting against event cancellation has become harder than ever. Insurance companies suffered enormous losses in 2020 due to shutdowns. As a result, rates increased in 2021 as availability declined. For 2022, event cancellation coverage premiums have been estimated to increase by at least 20 percent. Umbrella and excess liability insurance premiums, along with property insurance premiums, are estimated to have similar increases. More than ever, promoters and venue owners are expected to have substantial COVID-19 policies to show insurers that venues are safe.

Now and in the future, stakeholders must prudently review the language of their policies to fully understand what is covered. Just as we must think through every possible scenario when drafting a performance contract, the same should be true when securing insurance coverage.

## Livestreaming

In addition to tightening up their post-pandemic contracts and insurance coverage, artists who survived the pandemic by relying upon livestreaming as a way to connect with fans have come to realize that livestreaming has become its own standalone sector of the industry. The year 2020 was projected to produce the first \$12 billion year in touring revenue worldwide but ended up generating \$1.2 billion, resulting in a 90 percent loss. Amidst grieving the loss, artists and stakeholders had no choice but to pivot to livestreaming as a way to make up for lost income.

Our industry quickly saw that livestreaming has a broader reach than any in-person show because in-person shows have capacity limits and geographical constraints. Adele’s “One Night Only” event in Los Angeles in late 2021 was

livestreamed on platforms such as Hulu and YouTube TV and amassed more than 10 million viewers. Kanye West and other artists have developed exclusive brand partnerships centered around a livestream performance opportunity. West had a special studio performance that was streamed exclusively on Amazon-specific platforms, such as Amazon Prime Video, Amazon Music App, and Amazon Twitch channel.

While livestreaming shows has been around for many years, as our industry evolved throughout the pandemic and in-person shows reopened, artists continue to use livestreaming as an ancillary tool to allow fans access to their shows. For example, Dead & Company announced that they are kicking off a U.S. tour this summer and have partnered with [nugs.net](https://nugs.net), a well-established live music streaming service, to bring fans live streams of every 2022 summer tour performance. A front-row seat via livestream can be purchased at [nugs.net](https://nugs.net) for \$29.99 for HD quality and \$44.99 for 4K.

With music festivals back in full swing, Hulu will serve as the official streaming platform for C3 Presents' three largest festivals in 2022: Bonnaroo, Lollapalooza, and Austin City Limits. Charlie Walker from C3 Presents stated, "The demand for live music is at an all-time high and the live experience has never been more connected to digital. By expanding our partnership with Hulu, even more fans will be able to tune into each of these incredible festival experiences in real-time and enjoy live performances from their favorite artists with the fans on-site."

Our industry recognizes that livestreaming will never be a replacement for in-person touring; however, it can and will continue to be its own standalone sector and a useful tool for creating partnerships and connecting with fans.

## Social Media

As our entertainment and music industry stayed at home during the peak of the pandemic, our habits and daily routines changed. What started as social distancing and working from home resulted in an increased craving for connection. Social media became a critical component of our lives. Not only did social media usage and patterns increase and change during the pandemic, the type of content being shared also changed, which led to the emergence of new types of platforms.

The platform that many of us came to know all too well during the pandemic was Zoom. Other platforms that rose in popularity during the pandemic included Facebook Rooms, YouTube Shorts, Google Hangouts, WhatsApp, Clubhouse, and TikTok.

After a successful launch in 2020, Clubhouse lost steam and its users lost interest. However, audio-only features remain a focus for companies like Facebook and Twitter as

audio is another way to diversify the type of content that reaches fans.

For the music business, TikTok has hands-down been the most significant newer platform. TikTok arrived in the U.S. in 2018 and became an essential promotional tool for artists and labels in 2020. A unique theme that makes TikTok particularly important for our industry is that songs that trend on TikTok often chart on the *Billboard Hot 100*. TikTok usage also drives streams as 67 percent of TikTok users are more likely to seek out songs on DSPs after initially hearing them on TikTok. Catalog music has also resurged as a result of TikTok. For example, Fleetwood Mac's "Dreams" re-entered *Billboard Hot 100* after a 43-year absence, and Celine Dion's "It's All Coming Back To Me Now" came out 25 years ago but set streaming records in early 2022 on Spotify and YouTube after lip-syncing videos trended on TikTok. TikTok was the number one most downloaded app in 2021 and has more Gen-Z users than Instagram. In September 2021, TikTok surpassed 1 billion active monthly users and shows no signs of slowing down any time soon.

Consumer behavior data shows that TikTok users are more likely to spend money on music. For example, 40 percent of active TikTok users pay a monthly subscription for music, compared to 25 percent of the general population. Further, 17 percent of TikTok users buy artist merchandise monthly, compared to 9 percent of the general population.

In August 2021, Atlantic Records artist Gayle released a song called "ABCDEFU." The song did not take off until months later when the sign language sub-community of TikTok began creating UGC (user generated content) focused on the song, resulting in the song sitting at number one on the *Billboard Global 200* chart for eleven weeks. Nina Webb, the head of marketing at Atlantic, credits the sign language community for the song's success.

With social media continuing to drive many aspects of our entertainment and music industry, stakeholders will continue using these platforms to increase fan engagement while bearing in mind that artists must find a healthy balance between making music and cultivating their online presence.

## Conclusion

The entertainment and music industry has certainly evolved in the areas of contracts, insurance, livestreaming, and social media over the past two years following the COVID-19 outbreak. We have seen stakeholders focus on the language of contracts and insurance policies like never before and businesses and brands look to livestreaming and social media as ways to connect deeply with fans. Through the uncharted times that have unfolded and evolved, the entertainment and music industry continues to rise to the occasion and develop creative business solutions to existing processes in the protection of long-standing relationships.

Our industry has always relied upon imagination, inspiration, and interconnectivity, so it comes as no surprise that our creators and stakeholders remain committed to working together tirelessly and passionately in 2022. After all, we have seen the shift our industry has made over the past two years and move forward with a sense of comfort in knowing we are all part of the same song, only on a different verse.

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