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MUSIC

For Concerts During Covid, Unprecedented Legal Questions

Some musical performances are gearing up again, but promoters face uncertainty over liability and insurance that could make organizing a tour much trickier

By [Neil Shah](#)

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As the music business starts to experiment with in-person concerts, it's facing a vexing question: If fans catch Covid-19 while seeing their favorite act at a socially distanced show, who's legally liable?

FALL ENTERTAINMENT PREVIEW

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A smattering of smaller concerts are happening again after months of silence. Rock veterans Dinosaur Jr. will play a socially distanced show at a farm in Morris, Conn., on Friday. Patrons will encounter a battery of pre-entry safety measures like temperature checks and questionnaires. The Beach Boys, country artist Chase Rice, indie stalwarts Yo La Tengo and rap star DaBaby have also performed recently.

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Who do you think is responsible for the safety of fans at concerts? Join the conversation below.

The uptick in shows is a drop in the bucket: Concert giants Live Nation Entertainment and AEG Presents alone normally put on some 50,000 shows a year. But they're treading cautiously now. Festivals and bigger arena and stadium shows aren't expected to return until 2021.

Still, some artists, often older ones, are performing limited-capacity, outdoor shows hosted by smaller promoters in places where Covid-19 doesn't seem like an all-encompassing threat. In several cases—take electronic-dance music duo The Chainsmokers' performance at a charity concert on Long Island, N.Y., or Smash Mouth's gig at the Sturgis Motorcycle Rally in South Dakota—the shows have prompted a public backlash. Videos have circulated of fans largely appearing to fail to socially distance or wear masks.



Andrew Taggart of EDM-pop duo The Chainsmokers, performing at a recent charity show that prompted backlash.

PHOTO: KEVIN MAZUR/GETTY IMAGES FOR SAFE SOUND

Now the already-struggling music industry is bracing for a new problem: Covid-19 lawsuits, particularly if U.S. lawmakers don't provide businesses with federal liability protection as part of the next coronavirus relief package. Without federal protection, live-music lawyers say, the concert business—which depends entirely on mass gatherings—

will be forced to navigate a state-by-state patchwork of standards, making routing tours harder and delaying the comeback of concerts.

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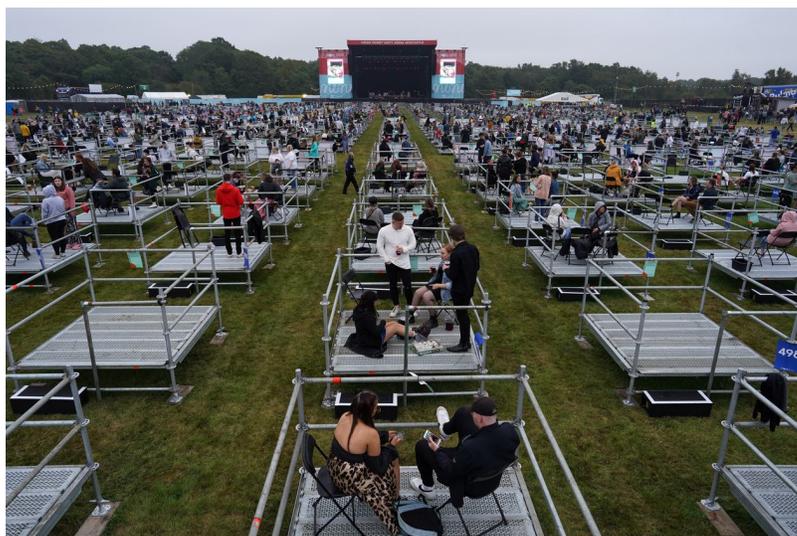
Here are four key questions about concerts, safety and legal liability in the Covid-19 era:

Who is responsible for fan safety at concerts during Covid?

After state and local health officials permit concerts in a given city, it's the job of concert promoters and venues to comply with their instructions, whether these are strict rules or just recommendations, which potentially have less legal weight, industry lawyers say. Fans bear responsibility too, since they're patrons, not employees. The minute you enter a live-music event, you implicitly assume some risks, whether it's getting knocked down in a mosh pit or catching the flu at a stadium concert.

Expect bigger promoters like Live Nation and AEG Presents to play things conservatively. Smaller promoters—an outfit staging a rave, say—may struggle to balance safety and ticket sales. But it won't be easy for any promoter to regularly put on shows and avoid violating health rules, simply because it's hard to control every single aspect of a show and enforce social distancing at smaller shows in particular.

“There haven't been any lawsuits, but there are going to be,” says Peter Paterno, partner at King, Holmes, Paterno & Soriano, who represents major artists including Dr. Dre, Metallica and Tyler, the Creator.



Fans wait to see singer-songwriter Sam Fender perform in Newcastle upon Tyne, England.

PHOTO: IAN FORSYTH/GETTY IMAGES

Do promoters have insurance that protects them from such lawsuits right now?

Promoters buy various kinds of insurance, including event-cancellation policies (in case bad weather forces the cancellation of a festival). Commercial general liability insurance, or CGL, covers third-party lawsuits from fans arguing they suffered personal injury or lost property due to the promoter.

In theory, some promoters may have an existing CGL policy that covers Covid-related lawsuits. But policies can exclude coverage for contagious diseases, so Covid-19 may not be covered, legal experts say. Even if the promoter is covered, concertgoers could argue that Covid-appropriate safety measures weren't taken or enforced, potentially making the policy useless. Future CGL insurance, at least for now, is generally expected to exclude Covid-19.

Timothy Epstein runs the entertainment and sports practice at law firm Duggan Bertsch and represents promoters of festivals including Pitchfork, Riot Fest and Life Is Beautiful. Because there aren't many shows or lawsuits yet, he says, "there haven't been a lot of tests so far" that would show whether existing insurance policies help cover legal costs.

So how are promoters reducing their legal risks amid this uncertainty?

The live-music business is betting that it will get liability protection from the federal government before next year's concert season.

Proposed legislation from Senate Republicans protects companies from being held liable for coronavirus infections beginning in December 2019, unless they acted with willful misconduct or engaged in grossly negligent behavior.

"People make the choice to go to that show," says Shawn Trell, chief operating officer and general counsel of AEG Presents. As long as businesses have complied with rules and haven't been grossly negligent, "they ought to be protected," he says.

Still, there are concerns among some that a liability shield could encourage recklessness or hinder plaintiffs from going after bad actors. Industry lawyers don't anticipate an immediate resolution to the liability issue given disagreements between Democrats and Republicans over broader coronavirus relief.

For now, those lawyers are advising promoters to get fans to acknowledge health risks when buying tickets and promise not to hold the promoter responsible. In addition to liability waivers, there will be warning signs at concerts about entrance-eligibility requirements, much like how people are warned that they're being filmed or going to encounter strobe lights. How those protective measures might play in court is anyone's guess.



Guests watch The Griswolds onstage during a Fitz and the Tantrums drive-in show in Anaheim, Calif.

PHOTO: AMY SUSSMAN/GETTY IMAGES

If fans sue, how likely are they to win?

Because of the assumed risks of attending live events, the liability waivers and signage and the fact it's hard to know where and how one caught Covid-19, it will be challenging for plaintiffs to bring cases, lawyers say. Despite desperately needing ticket sales—Live Nation's revenue dropped 98% in the second quarter—the biggest concert promoters have proceeded slowly and emphasized safety.

“We won't be doing DJ sets in the Hamptons any time soon,” Live Nation CEO Michael Rapino said on a recent earnings call.

Meanwhile, digital-ticketing technology will enable Live Nation to “communicate safety information clearly and directly with all fans attending the show,” president Joe Berchtold says.

But fans don't need to win cases to extract major concessions. Promoters often seek dismissals of such cases outright. But given the lack of test cases for Covid-related claims, they may be more likely to settle to avoid prolonged litigation or a case going to a jury. Juries tend to favor plaintiffs in such cases over big companies, experts say.

In coming months, the concert business will be forced to weigh the costs and benefits of hosting shows: Is the ticket revenue worth the risk of—in addition to potentially hurting fans—expensive settlements?

“I'm glad I don't have to make the decision,” Mr. Paterno says.

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