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A “Journey” Through Band Agreements

By JORDAN WHITFORD*

INTRODUCTION

A “Journey” through band agreements reveals that it is not just about creating music. This paper will explain the ins and outs of band agreements, using the most recent lawsuit involving the band members of Journey along with other various disputes to demonstrate what issues can arise throughout a band’s lifespan.

HISTORY OF JOURNEY

JOURNEY ACCEPTED FAME, FORTUNE, AND BAND MEMBERS WITH “OPEN ARMS”

The musical band Journey was formed in San Francisco, California in 1973 under the management of Herbie Herbert.¹ Journey made their live debut at the Winterland Ballroom in San Francisco on New Year’s Eve.² Herbie Herbert already had in mind the type of band he wanted Journey to be. He wanted Journey to be able to play with Santana, play with Weather Report... but then on the very next night to play with Aerosmith and to play with Ted Nugent.³ It was obvious that the often complex Santana-type jazz fusion sound with doses of progressive rock had a massive impact on the early sound of Journey.⁴ Since the group's formation, the band has earned nineteen “Top 40” singles, has earned twenty-five Gold and Platinum

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¹ Nomota LLC, *Bio*, JOURNEY, <https://www.journeymusic.com/pages/bio> (last visited July 15, 2020).

² NEIL DANIELS, *DON’T STOP BELIEVIN’: THE UNTOLD STORY OF JOURNEY* 28 (2012).

³ *Id.*

⁴ *Id.*

albums, and has sold nearly 100 million albums globally.⁵ Their *Greatest Hits* album is certified fifteen times-Platinum, bringing Journey into the elite club of Diamond-certified award holders.⁶ The band continues to record and to tour into the 21st century, receiving the prestigious Billboard “Legends of Live” touring award for performing concerts for millions of fans worldwide.⁷ Their massive co-headlining tour with Def Leppard in 2018 was the band's most successful tour to date, landing them in the Top 10 year-end touring chart with more than one million tickets sold.⁸ In 2017, Journey was inducted into the Rock and Roll Hall of Fame.⁹ In March 2019, Journey released a live DVD/CD set from their concert at the Budokan in Tokyo, featuring the first-ever performance of the band's albums, *Escape* and *Frontiers*, in their entirety.¹⁰ Journey has received a star on the Hollywood Walk of Fame, was inducted into the Hollywood Bowl Hall of Fame, and is the subject of the award-winning documentary, “Don't Stop Believin': Everyman's Journey.”¹¹

SUMMARY OF LAWSUIT INITIATED BY JOURNEY BAND MEMBERS EXPLAINS
“WHO’S CRYING NOW”

Complaint Filed by Neal Schon and Jonathan Cain Against Ross Valory and Steven Smith

Guitarist Neal Schon (Schon) and Keyboardist Jonathan Cain (Cain) instituted this lawsuit on March 3, 2020, to remedy the harm brought by the unlawful scheme of Bassist Ross Valory (Valory) and Drummer Steve Smith (Smith) and to enjoin any conduct by Valory and Smith inconsistent with the lawful rights of Schon and Cain.¹²

Smith and Valory were fired in 1985 then rehired in 1995. According to the complaint, they have never made significant contributions to Journey but were compensated generously.¹³ Smith and Valory previously expressed a desire to retire, so they allegedly devised a scheme to set themselves up for retirement. They wanted to overtake Nightmare Productions, Inc. (Nightmare Productions) and gain the majority vote in order to be provided

⁵ NOMOTA LLC, *supra* note 1.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Compl., ¶ 51, *Schon v. Valory*, (Mar. 3, 2020) (No. C20-00407).

¹³ Compl. ¶ 35.

royalty payments and a share of touring revenue in perpetuity without actually touring.¹⁴

Nightmare Productions is the California corporation used by Journey that conducts the band's business and owned the Journey mark.¹⁵ Cain, Schon, Smith, Valory and two other individuals each own 1/6th of the shares of Nightmare Productions.¹⁶ The bylaws provide for a three-member Board of Directors. In 2019, the Board of Directors included Cain, Schon and Valory with Cain serving as President. In December 2019, Smith and Valory conspired to launch a *coup d'état (also known as an overthrow or takeover)* to oust Cain and Schon from control of Nightmare Productions.¹⁷

On January 31, 2020, an attorney named Daniel Schacht (Schacht) emailed a document entitled "Notice of Special Meeting of Shareholders of Nightmare Productions, Inc."¹⁸ The notice proposed amending the bylaws of Nightmare Productions to increase the number of Board of Directors to six instead of three. With this addition, Smith would be elected along with two other allies of Smith and Valory.¹⁹ The Board Notice also proposed that the Board of Directors vote to replace Cain with Smith as President.²⁰ Cain and Schon were "blindsided" because the Shareholder and Board Notices were purportedly issued and signed via electronic signature by Cain, but he did not approve nor sign the notice.²¹ On February 13, 2020, the shareholders meeting occurred despite Schon and Cain's objections.²² Smith, Valory and their allies together holding a majority of the shares of Nightmare Productions and acting in concert voted to increase the Board of Directors to six members and install Smith, Valory and their allies on the Board, giving Smith and Valory control of the Board.²³ Smith, Valory and their allies, now claiming to be the purported members of the Board of Directors, voted to remove Cain as President and replaced him with Smith.²⁴

As stated above, Smith and Valory sought control of Nightmare Productions in order to pay themselves a share of touring revenue in perpetuity under the guise of a licensing fee while they perform no work for the band.²⁵ However, Schon and Cain stated that the "scheme" to gain control

¹⁴ Compl. ¶ 5.

¹⁵ Compl. ¶ 28.

¹⁶ Compl. ¶ 37.

¹⁷ Compl. ¶ 4.

¹⁸ Compl. ¶ 39.

¹⁹ *Id.*

²⁰ Compl. ¶ 40.

²¹ Compl. ¶ 41.

²² Compl. ¶ 43.

²³ *Id.*

²⁴ Compl. ¶ 44.

²⁵ Compl. ¶ 5.

of the Journey name was ill-conceived.²⁶ They stated that Nightmare Productions does not control the Journey name but rather Cain and Schon, through an entity named Elmo Partners, holds all the rights to the Journey name, including Trademark registrations No's 3168509 and 3189220.²⁷ Smith and Valory have never had any legal rights to the Journey name or mark and are not authorized in any manner to use it in any capacity.²⁸ Following the February meeting, on March 3, 2020, Smith and Valory received a letter terminating their membership with Journey.²⁹

Cross Complaint Filed by Ross Valory Against Neal Schon and Jonathan Cain

April 6, 2020, Ross Valory filed a counter-claim against Neal Schon and Jonathan Cain, rebutting their allegations that he and Steve Smith tried to improperly gain control of the Journey trademark.³⁰ The countersuit alleges that a 1985 agreement that gave Cain, Schon and former singer Steve Perry (Perry) control of the mark, through the band's entity Elmo Partners, was actually terminated in 1994.

When the Elmo agreement was created, the language explaining the term of the license stated “[t]he term of this agreement shall commence as of January 15, 1985, and continue until the date upon which none of Stephen Ray Perry, Neal Joseph Schon, or Jonathan Cain is actively engaged in a professional musical career utilizing the name Journey.”³¹ From 1987-1994, neither Perry, Schon, nor Cain actively engaged in a professional musical career utilizing the name Journey because Schon and Cain briefly performed in a band called Bad English, after which Cain focused on a solo career and Schon went to perform in a band called Hardline.³² Therefore, on January 31, 1994, Herbie Herbert, on behalf of Nightmare Productions, sent notice to Schon, Cain, and Perry that the aforementioned 1985 license was terminated since neither Schon, Cain, nor Perry had actively engaged in a musical career utilizing the name Journey for the past seven years.³³ Accordingly, under Paragraph 2 of the 1985 document titled: “Trademark License Agreement”,

²⁶ Compl. ¶ 6.

²⁷ *Id.*

²⁸ Compl. ¶ 7.

²⁹ Compl. ¶ 8.

³⁰ Jon Blistein, *Journey Fire Ross Valory, Steve Smith for Allegedly Trying to Take Control of Band Name*, ROLLING STONE (Mar. 4, 2020), <https://www.rollingstone.com/music/music-news/journey-fire-ross-valory-steve-smith-lawsuit-962246/>.

³¹ Cross-complaint, ¶ 18, *Schon v. Valory*, (Mar. 3, 2020) (No. C20-00407).

³² Cross-cl. ¶ 19.

³³ Cross-cl. ¶ 21.

Nightmare Productions stated that it thereby "terminates the license granted thereunder."³⁴

From 2016-2019, Journey, consisting of Ross Valory, Neal Schon, Jonathan Cain, Arnel Pineda, and Steve Smith recorded and performed as Journey.³⁵ During this time and throughout the 2000's through the present, Nightmare Productions, the undisputed owner of the Journey mark, consisted of the following shareholders with equal voting rights: Ross Valory, Jonathan Cain, Walter Herbert, Neal Schon, Stephen Perry and Steve Smith.³⁶ In fact, when Steve Perry left the band in 1998, Perry, Schon, and Cain admitted in an agreement as Elmo Partners that: "Schon and Cain hereby acknowledge that Nightmare Productions, Inc. is the current owner of the [Journey mark] and that its approval may be necessary to use the name."³⁷ As this case moves forward, based upon Ross Valory's cross-complaint, there is evidence to show that Elmo Partners is no longer in existence and Nightmare Productions is the sole owner of the Journey name.

THE BAND AGREEMENT

CREATING A DETAILED BAND AGREEMENT AT THE BEGINNING OF THE BAND FORMATION PREVENTS LAWSUITS AND OTHER DISPUTES IN THE FUTURE

In order to avoid disputes later, a band needs a band agreement. With the advice of a music attorney, the right business entity can be chosen, and a music attorney can be utilized to obtain copyrights and trademarks for the band name.³⁸ One of the most important steps a band can take is forming the right business entity and drafting a band agreement for members of a band to sign. Doing so will allow the band to focus on their creativity and avoid arguments over profits, expenses, division of royalties, individual tasks of the band members, and in the event of a breakup or a band member leaving, who will have the right to use the band name.³⁹

Once a band becomes profitable and band members begin writing their own music, the band's founding member or all of the band members should request from the attorney a draft of an agreement to prevent disputes from arising, which could jeopardize the longevity of the band and potentially

³⁴ *Id.*

³⁵ Cross-cl. ¶ 29.

³⁶ *Id.*

³⁷ Cross-cl. ¶ 27.

³⁸ Sebastian Gibson, *Band Agreements, Band Entities, Band Trademarks and Copyrights*, HG.ORG, <https://www.hg.org/legal-articles/band-agreements-band-entities-band-trademarks-and-copyrights-41346>.

³⁹ *Id.*

invite litigation.⁴⁰ Laws that govern the various clauses in band agreements include: copyright laws regarding ownership of the music that the band creates; trademarks laws that govern ownership of the band's name, logo, and merchandise; and basic contract laws covering breaches of fiduciary duties and other liabilities.

THE PARTNERSHIP

BAND MEMBERS

Fans usually link the identity of a band to its lead singer and/or chief songwriter.⁴¹ As long as that person is present, fans are willing to accept a new drummer or new keyboardist, but once that key voice is gone, interest in the band is usually lost.⁴² However, it is not impossible for a band to survive the loss of a lead-singer-songwriter if they handle it properly.⁴³ The term "being a member of a band" is subject to several different legal interpretations, all of which must be explored and fully understood by counsel when representing a band as an entity, individual members of a band, or a prospective "band member".⁴⁴ On the one hand, it can mean that a person participates in and is an integral member of the business organization comprising the band, whether as a sole proprietor, a partner in the band, or a member of the LLC, either as a limited liability member or a managing member, or as a shareholder in the corporation formed to conduct business on behalf of the band members.⁴⁵ On the other hand, it can mean that a person is solely an employee of the sole proprietor, partnership, limited liability company or corporation comprising or owning the band.⁴⁶ In this case "band member" has no ownership or equity interest in the band.⁴⁷ The form utilized by the artist or band to contract with the band member for a "full-time" position is different from that used to employ a band member for a particular or short-term purpose.⁴⁸

An artist desiring to employ an individual as a band member will usually want the individual to become a full-time employee exclusive to the

⁴⁰ *Id.*

⁴¹ Geoffrey Himes, *Is a Band Without Its Original Members Still the Same Band?*, SMITHSONIAN MAGAZINE (June 29, 2015), <https://www.smithsonianmag.com/arts-culture/band-without-its-original-members-still-same-band-180955730/>.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Alan H. Kress & Daniel Cutler, 8 ENT. INDUSTRY CONT. ¶ 146.01 Employment of Band Members (Doug Nevin ed., LexisNexis 2020).

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

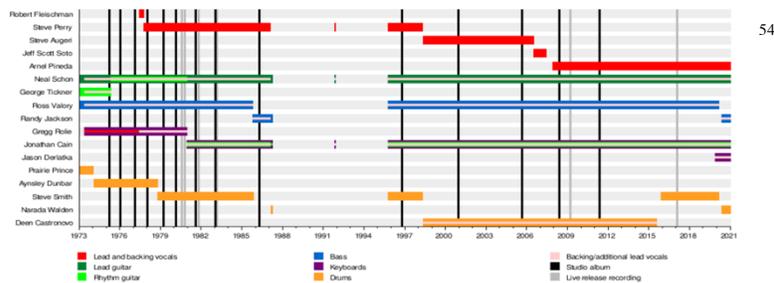
⁴⁸ KRESS, *supra* note 44.

band or at least subject to first call by the band.⁴⁹ It is also important to explicitly state and define an artist’s rights when solely being hired for songwriting collaboration. The court has held that recognizing songwriting collaboration does not in and of itself create partnership and that each collaborator is individually entitled to royalties.⁵⁰

The artist also will require that the band member sign an employment agreement to cover the various band activities including recording, live performances, merchandising, videos, and film.⁵¹ Since the band member will presumably record various records with the band, it is important that the terms of the employment agreement be consistent with the terms of the artist’s recording agreement.⁵²

JOURNEY HAS WELCOMED MANY TALENTED ARTISTS IN THE BAND HOPING ONE WILL “STAY AWHILE”

Journey has had their fair share of members who have come and gone since its formation in 1973. The original members of Journey included former Santana members Neal Schon and Gregg Rolie who became the band’s lead guitarist and keyboardist respectively. The band also included rhythm guitarist George Tickner, bassist Ross Valory, and drummer Prairie Prince.⁵³



This original lineup did not last long. George Tickner left before the release of their second album; Prairie Prince was quickly replaced by Aynsley Dunbar who was then replaced by Steve Smith shortly after. Gregg

⁴⁹ *Id.*

⁵⁰ *Love v. The Mail on Sunday*, 489 F. Supp. 2d 1100, 1106-07 (C.D. Cal. 2007).

⁵¹ *KRESS*, *supra* note 44.

⁵² *Id.*

⁵³ William Ruhlmann, *Journey: Artist Biography*, ALLMUSIC, <https://www.allmusic.com/artist/journey-mn0000291043/biography> (last visited July 15, 2020).

⁵⁴ *List of Journey Band Members: Timeline*, WIKIPEDIA.ORG (July 11, 2020), https://en.wikipedia.org/wiki/List_of_Journey_band_members.

Rolie was replaced by Jonathan Cain.⁵⁵ Then, by 1977, the group decided it needed a strong vocalist and hired Steve Perry.⁵⁶

As demonstrated by the chart above, by 1981, the band members included Neal Schon, Ross Valory, Steve Smith, Jonathan Cain, and Steve Perry.⁵⁷ This lineup was the most successful in the band's history. They solidified their place as one of the best rock bands in the business. The band made millions with the *Escape* and *Frontiers* albums and the tours following the albums. At the end of the *Frontiers* tour, the band took a well-needed break. During that time, Neal Schon and Steve Perry each did a solo album. When the group got back together to make a new album, Ross Valory and Steven Smith were no longer in the lineup and *Raised on Radio* (1986) was made by Neal Schon, Steve Perry, and Jonathan Cain, who added other musicians for a tour.⁵⁸ Following the *Raised on Radio* tour, Journey disbanded for the next ten years.⁵⁹

In 1996, Steve Perry, Neal Schon, Jonathan Cain, Ross Valory and Steve Smith staged a Journey reunion, recording *Trial by Fire* but Steve Perry opted out of the tour due to his hip injury.⁶⁰ However, Journey continued on in 2000 hiring a new lead singer, Steve Augeri and a new drummer, Deen Castronovo.⁶¹ In 2006, the group brought Jeff Scott Soto aboard as a replacement for Augeri, who developed a throat infection that prevented him from singing.⁶² However, Jeff Soto's time with the band was limited; in 2007, Journey announced that they were once again seeking a front man.⁶³ Arnel Pineda, a Filipino vocalist discovered after performances on YouTube, made his debut with the band in 2008.⁶⁴

In a 2013 news article, Jonathan Cain said it was not easy to find a replacement for Steve Perry. In the article he said, "We still have fans of our music showing up in the last year that don't know Steve Perry isn't in the band."⁶⁵ Cain recalled doing a concert in a U.S. city after Pineda joined Journey in December 2007. "It took them 30 minutes to finally wrap their

⁵⁵ RUHLMANN, *supra* note 53.

⁵⁶ *Id.*

⁵⁷ LIST OF JOURNEY BAND MEMBERS: TIMELINE, *supra* note 54.

⁵⁸ RUHLMANN, *supra* note 53.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² RUHLMANN, *supra* note 53.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Beth Harris, *Journey Talks Singer Arnel Pineda's Impact, September-Due PBS Doc*, BILLBOARD.COM (Aug. 6, 2013), <https://www.billboard.com/articles/news/5638291/journey-talks-singer-arnel-pinedas-impact-september-due-pbs-doc>.

heads around the fact that this guy could sing his butt off... [a]t the end of the show, they were all applauding Arnel's efforts."⁶⁶

As illustrated by the lawsuit documents, when Arnel Pineda was discovered and hired as the new lead singer of Journey in 2007, he was treated as the fifth member of the band although he was not made a member of the Board of Directors of Nightmare Productions. Also, in 2017, when Journey was inducted into the Rock & Roll Hall of Fame, Arnel Pineda was not included. The 32nd Annual Rock & Roll Hall of Fame was honoring the long-lasting rock group when it was in its glory years in the 1980s, when Steve Perry was its lead singer.⁶⁷ However, Arnel Pineda was still given recognition by former singer Steve Perry during his Hall of Fame acceptance speech. Currently, Journey includes original member Neal Schon, Jonathan Cain, and Arnel Pinea, with Randy Jackson returning to replace Ross Valory and Narada Walden to replace Steve Smith due to the recent lawsuit.⁶⁸

RANGING FROM SOLE PROPRIETORSHIPS TO A CORPORATION, A BUSINESS ENTITY IS A NECESSARY MECHANISM FOR MAKING EFFECTIVE BUSINESS DECISIONS.

Once an attorney determines that his client is committed to going forward with his or her musical career, the lawyer's function is to provide advice as to the best form of business organization that should be adopted for such use.⁶⁹ Typical language of a band partnership explains how the band partners might establish themselves as a Sole Proprietor, General Partnership, LLC or Corporation. The type of business entity the band chooses to establish is determined by the number of members, what protections the group desires, and the amount of authority certain members are allotted.

The first type of business organization is a sole proprietorship. One-person acts are usually sole proprietorships. The artist controls everything about the business and profits.⁷⁰ As a sole proprietor, the artist is personally liable for any debts and losses the business suffers, but also reaps the benefits of any profits.⁷¹ No formal creation is required, meaning the artist does not have to file any paperwork or pay a lawyer to become a sole proprietor of his

⁶⁶ *Id.*

⁶⁷ Ed Diokno, *Journey Inducted into Rock & Roll Hall of Fame, but Arnel Pineda Snubbed*, VIEWS FROM THE EDGE (Apr. 9, 2017), <https://dioknoed.blogspot.com/2017/04/journey-inducted-into-rock-roll-hall-of.html>.

⁶⁸ *Id.*

⁶⁹ Alan H. Kress & Daniel Cutler, 8 ENT. INDUSTRY CONT. ¶ 142.01 Organization of Recording Artists (Doug Nevin ed., LexisNexis 2020).

⁷⁰ Caroline Fox, *Finding the Right Business Structure for your Band*, FUTURE OF MUSIC COALITION (June 15, 2012), <http://futureofmusic.org/blog/2012/06/15/finding-right-business-structure-your-band>.

⁷¹ *Id.*

or her own music business.⁷² A sole proprietor may use a trade name or pseudonym while performing or conducting business, and in many states, sole proprietors acting under a pseudonym should file a “doing business as” statement with the state in order to allow others to know with whom they are dealing.⁷³ The first-step, if the artist is using a name other than his own, is to file a certificate under the state Assumed Business Name or Fictitious Business Name Statute.⁷⁴ Most states have statutory provisions governing the use of assumed names.⁷⁵ In general, these statutes require business entities, individuals, and partnerships doing business under an assumed name to make a public filing.⁷⁶ The document that is filed typically sets forth the assumed name, the true name, the state of formation and the principal place of business.⁷⁷

In representing an individual artist, the first question that the practitioner must determine is whether the artist will just perform, or perform and write songs, or perform, write songs and record, or any combination of them.⁷⁸ It is somewhat rare today to find a musical performing artist who plays a musical instrument and who records and performs by himself as a solo artist.⁷⁹ The days of the self-contained artist with guitar in hand or at a piano, for example, have been to a certain degree replaced by “individual” artists, who either perform with their own bands or with a variety of orchestras and musicians.⁸⁰ Artists such as Bruce Springsteen, Beyonce, Taylor Swift, Lady Gaga, Bob Dylan and Elton John employ the services of other musicians and vocalists to perform with them in their band.⁸¹ Nevertheless, if an individual artist relies on others in a band or orchestra to render services, the individual artist will generally be the only party on documents such as the artist’s recording contract, publishing contract, and contracts with promoters for live performances.⁸²

Solo artists need to make sure they have clear contracts with hired employees. The “guest artist” or a “work for hire” can try to claim copyright ownership for the songs produced when a “solo artist” works with other

⁷² *Id.*

⁷³ *Id.*

⁷⁴ Alan H. Kress & Daniel Cutler, 8 ENT. INDUSTRY CONT. ¶143.01 Individual Artists (Doug Nevin ed., LexisNexis 2020).

⁷⁵ Sanda Feldman, *DBA: Doing Business Under an Assumed Name* (Feb. 8, 2019), <https://ct.wolterskluwer.com/resource-center/articles/whitepaper-dba-doing-business-under-assumed-name>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ KRESS, *supra* note 74.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² KRESS, *supra* note 74.

artists and the documents are not explicit about employment status. This legal issue was seen in *Sebastian Music Group, Inc. v. Ayala-Rodriguez*, where Plaintiff DJ Eliel, an urban music Disc Jockey, and exclusive author/composer of Sebastian Music Group (Sebastian Music), brought suit against Defendant Ramon Luis Ayala-Rodriguez (aka Daddy Yankee).⁸³ On May 21, 2007, Plaintiffs filed a civil action for declaratory judgment under the Copyright Act, requesting that the Court declare Plaintiff DJ Eliel co-author of the "Lo que Paso, Paso" and "Cuentame" musical compositions and sound recordings as featured in the "Barrio Fino" and "Barrio Fino En Directo" albums, and Plaintiffs be delivered their share of monies derived from the commercial exploitation of such musical works.⁸⁴ Defendant Daddy Yankee, without DJ Eliel's consent and/or acquiescence, submitted multiple registration forms, claiming full authorship rights of the "Lo que Paso, Paso" and "Cuentame" musical compositions and sound recordings to the United States Copyright Right Office.⁸⁵ The registration forms SR 348-713 and PA 1-281-843, as originally submitted, did not list any author other than Daddy Yankee.⁸⁶ Plaintiffs argue that the songs are joint works co-authored by Plaintiff DJ Eliel and Defendant Daddy Yankee, and Defendants argue that any contribution by DJ Eliel to the songs was insignificant and did not rise to the level necessary to create joint authorship.⁸⁷ The court cited to the Copyright Act's definition of a joint work which states that a joint work is "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."⁸⁸ The court in this case also went on to explain that in order to establish co-authorship of a joint work, the claimant must show that each of the putative co-authors: (1) made independently copyrightable contributions to the work; and (2) intended to be co-authors whose respective contributions would be merged into a joint work.⁸⁹ The court denied Plaintiff's motion for summary judgment because factual disputes existed as to both of the elements required to establish joint ownership under the Copyright Act.⁹⁰ If Daddy Yankee had clearly established an agreement that DJ Eliel was solely hired just to work on the sound recordings but not to receive copyright ownership, there would be no legal action against him.

The next type of business entity is a general partnership. The Uniform Partnership Act defines a partnership as "an association of two or more

⁸³ *Sebastian Music Grp, Inc. v. Ayala-Rodriguez*, 594 F. Supp. 2d 176, 177 (D.P.R. 2008).

⁸⁴ *Id.* at 177.

⁸⁵ *Id.* at 178.

⁸⁶ *Id.*

⁸⁷ *Id.* at 179.

⁸⁸ 17 U.S.C. § 101.

⁸⁹ *Sebastian*, 594 F. Supp. 2d at 179.

⁹⁰ *Id.* at 181.

persons to carry on as co-owners of a business for profit.”⁹¹ As stated in *Dickenson v. Samples*, “A primary element in partnership organization is to participate in the management of a business... therefore, it is virtually essential that such a relationship existed.”⁹² A group may organize quite intentionally as a business venture or may evolve with seeming haphazardness over time, e.g., a lead guitarist joins up with a bass player, keyboard player, drummer, and a singer, perhaps at the initiation of a group member, perhaps at the instigation of a producer or manager.⁹³

As a general partnership, all members are personally responsible for any debts the partnership may incur or for any legal action taken against the partnership.⁹⁴ This means that if a partner takes out a loan, the other partners are “jointly and severally liable,” and their personal assets can be attached and liquidated to pay off any debts.⁹⁵ For tax purposes, members of a partnership are only taxed individually, and the partnership itself is not taxed secondarily.⁹⁶ One benefit of a partnership is increasing the likelihood of securing a loan from creditors, who see a group of borrowers as more stable than a single sole proprietor.⁹⁷ If partners wish to add a new member, they must get a unanimous vote from the other members.⁹⁸ Conversely, if the group breaks up or one of the group members quits, the partnership ends.⁹⁹

Courts have stated that ordinarily, the existence of an actual partnership is evidenced by the right of the respective parties to participate in the profits and losses of the business, the contribution by the partners of either money, property, or services, and some degree of participation by the partners in the management and control of the business.¹⁰⁰ However, a written partnership agreement is important for a variety of reasons, particularly because unless specifically agreed otherwise, the rights and obligations of the partners will be governed by the partnership laws of the state selected by the partnership to govern its affairs.¹⁰¹ If a partnership agreement is not established, the court’s default rules will split everything 50/50 in the instance of a legal dispute.¹⁰²

⁹¹ Uniform Partnership Act § 6 (1).

⁹² *Dickenson v. Samples*, 104 Cal. App. 2d 311, 315 (1951).

⁹³ Alan H. Kress & Daniel Cutler, 8 ENT. INDUSTRY CONT. ¶ 144.01 Partnership Among Group Members (Doug Nevin ed., LexisNexis 2020).

⁹⁴ FOX, *supra* note 70.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ FOX, *supra* note 70.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *In re Lona*, 393 B.R. 1, 14 (Bankr. N.D. Cal. 2008).

¹⁰¹ KRESS, *supra* note 93.

¹⁰² *Id.*

The third form of a business entity is a Limited Liability Corporation (LLC). An LLC has many of the benefits of a partnership while shielding the members from personal liability. As a member of an LLC, band members are not responsible for the debts or contractual obligations of a corporation.¹⁰³ This means that if the company defaults or falls into debt, band members are not personally responsible, and creditors cannot come after each individual band member’s personal assets.¹⁰⁴ When an artist uses a “loan-out corporation,” either a corporation or an LLC, counsel will be required to prepare an agreement referred to as a “Loan-Out Employment Agreement” which provides for the company’s employment of the artist, usually on an exclusive basis.¹⁰⁵ In the case of an individual artist, one attorney will invariably represent both the artist and his loan-out company and prepare the agreement.¹⁰⁶

Members of an LLC must put “LLC” in their company name and on business cards in order to let creditors know that they are working with a limited liability company.¹⁰⁷ Creditors cannot use personal assets as collateral in the instance of default; therefore, it is often more difficult to procure loans for an LLC than for a partnership or sole proprietorship.¹⁰⁸ Unlike a partnership, if a member of the LLC withdraws, the LLC still exists.¹⁰⁹ This structure allows for band members to shift in and out of the company.¹¹⁰ New members are admitted to an LLC through a unanimous vote by the existing members.¹¹¹ By default, an LLC is a “member managed” group which means that the members or owners are controlling the organization, and there is no separation of ownership and control.¹¹² However, an LLC is flexible, and its default rules are easily changed. Therefore, the members can appoint a manager—making the LLC a “manager-managed” group.¹¹³ This would be helpful when the members want to appoint someone who is more business savvy or fiscally responsible than the individual group members or when the members do not want to be troubled by mundane business decisions.¹¹⁴

¹⁰³ FOX, *supra* note 70.

¹⁰⁴ *Id.*

¹⁰⁵ Alan H. Kress & Daniel Cutler, 8 ENT. INDUSTRY CONT. ¶ 145.01 Corporations (Doug Nevin ed., LexisNexis 2020).

¹⁰⁶ *Id.*

¹⁰⁷ FOX, *supra* note 70.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² FOX, *supra* note 70.

¹¹³ *Id.*

¹¹⁴ *Id.*

The fourth form of a business entity is a corporation which, while complex, allows for the most freedom in restructuring and personalizing the organization's structure.¹¹⁵ To form a corporation, the members must file a certificate of incorporation with the state and pay a small fee—usually around \$250 but varying by state.¹¹⁶ Corporations also have the luxury of incorporating in the state of their choosing, which affects the laws surrounding the organization.¹¹⁷ A corporation is a great option if the group is trying to give members different rights in the company or assign different weight to votes.¹¹⁸ A corporation's structure can be adapted to make sure that specific members have more decision-making power.¹¹⁹ When a Board of Directors is created, it helps spread the power between all parties to give each member a voice.¹²⁰ However, a concern can exist with competing interests of board members.¹²¹ Nevertheless, there are duties that require board members to act with the honest belief that their decisions are in the best interest of the organization. If a musical recording group organizes as a corporation or LLC, the attorney representing the group should seek to have the interested parties enter into an agreement before the business is organized. The agreement may include one or more of the following:

- 1) The employment and respective salaries or profit participation of the shareholders or members of the LLC;
- 2) How shares are to be voted in elections of directors or how management and operation of the LLC shall be conducted;
- 3) Who the officers of the corporation or LLC are to be, if any;
- 4) Restrictions on the transferability of stock or membership interests;
- 5) Restrictions on shareholder and director action, or managing member action, ordinarily by requiring greater than statutory vote for the adoption of certain specified types of resolutions;
- 6) The circumstances under which dividends are to be declared if any;
- 7) Provision for some method of resolving corporate disputes or for dissolving the corporation or the LLC in the event of dissention or deadlock.¹²²

No matter what structure is chosen, it can be worthwhile to seek legal counsel when establishing any sort of business dealings due to the many caveats and exceptions that can apply in specific situations.

¹¹⁵ *Id.*

¹¹⁶ FOX, *supra* note 70.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Cole Sternberg, Comment, *Musicians, Record Labels, and Webcasters: In Need of an International Royalties Collection Society*, 11 UCLA ENT. L. REV. 399, 425 (2004).

¹²¹ *Id.*

¹²² KRESS, *supra* note 105.

WHEN IT COMES TO DECISIONS IN JOURNEY, THEY ARE NOT ALWAYS GOING TO BE MADE “ANYWAY YOU WANT IT”.

As a growing band, Journey’s road manager, Herbie Herbert became heavily involved in all business aspects of the band. On November 30, 1973, the Articles of Incorporation and By-Laws for an entity called “Nightmare Productions, Inc.” were filed and created specifically to control the affairs of Journey.¹²³ Herbie Herbert said that it was called Nightmare because “business tends to be that way, and that’s not the way [they wanted] it to be.”¹²⁴ San Francisco, California is home to Nightmare Productions Incorporated. By the end of 1981, Journey was fully established as a million-dollar corporation.¹²⁵ Herbie Herbert brought everything under Nightmare Productions. In a book written by Neil Daniels, Herbert explained how everything was done in-house. Herbert said,

I am not trying to create the military industrial complex rock group here, but I have acquired autonomy over the years and we completely create everything we do under one roof. We produce our music, record it, master it; we create parts, and we ship those parts direct to the manufacturing plant around the world. We create our art, come up with the image and layout ... [w]e know how to magnetically strip in a barcode so that when it is run over a computer, the cash register will go ‘ding’.¹²⁶

Jonathan Cain, Neal Schon, Steven Smith and Ross Valory each own 1/6th of the shares of Nightmare Productions.¹²⁷ Other individuals, Steve Perry and Herbie Herbert formerly affiliated with Journey, own the remaining shares.¹²⁸ The bylaws of Nightmare Productions provide for a three-member Board of Directors, and in 2019, the three directors were Cain, Schon and Valory.¹²⁹

The very purpose of Nightmare Productions was to facilitate Journey. However, as previously described, Smith and Valory instead used Nightmare Productions “as a tool to destroy the fabric of the band, undermining the very

¹²³ Erica Banas, *Journey Lawsuit: Attorney for Neal Schon, Jonathan Cain Offers New Statement*, 94.7 WCSX (Mar. 5, 2020), <https://wcsx.com/2020/03/05/journey-lawsuit-neal-schon-jonathan-cain-attorney-statement/>.

¹²⁴ DANIELS, *supra* note 2, at 26.

¹²⁵ *Id.* at 96.

¹²⁶ *Id.* at 96-97.

¹²⁷ Compl. ¶ 37.

¹²⁸ *Id.*

¹²⁹ *Id.*

reason for Nightmare Productions' existence."¹³⁰ While the purpose of a Board of Directors is supposed to give all members equal votes, the voting power was not equal among Journey members when only three of the members were a part of it. Smith and Valory pointed out the inequality since the essence of the current lawsuit between the Journey members is about control of the corporation. Smith and Valory thought that by adding themselves to the Board of Directors, they would then be able to make all the decisions ultimately lean in their favor but in doing so, a lawsuit was created.

NAME AND LOGO

THE BAND NAME IS THE MOST IMPORTANT ASPECT OF THE BAND ITSELF SINCE IT IS HOW FANS ASSOCIATE THE MUSIC WITH THE BAND MEMBERS

The issue of who owns the band name is handled within the Band Agreement. A band name is usually created first even before the members achieve any level of success, and yet, the members have no idea how valuable a band name really is and the role it plays. If the Band Agreement is silent on how the band name should be handled, then each member might be assumed to be an equal owner of the name. This issue must be addressed in the band agreement to resolve potential issues ranging from when the lead singer and songwriter leaves to when a majority of the band members leave and form a separate group usually wanting to take the name with them.

The name of a business is an extremely valuable asset since the public will likely associate a product or service with the name.¹³¹ Musical groups occasionally use the names of the performers as the group name (for example Crosby, Stills, Nash and Young; the Lennon Sisters) or the name of one performer who is considered the star (such as "Bruce Springsteen and the E Street Band").¹³² However, most groups use a name that does not identify or use any band member's actual name.¹³³ An article by Gregory M. Krakau and John A. Mizhir Jr. outlined six "Steps to Success" when adopting and using a band name.¹³⁴ Step One is brainstorm which requires creativity to come up with a cool sounding name along with a couple backups.¹³⁵ Step Two is to do the necessary homework in researching and seeing if the same

¹³⁰ BANAS, *supra* note 123.

¹³¹ ALAN H. KRESS & DANIEL CUTLER, 8 ENT. INDUSTRY CONT. ¶ 141.01 (Doug Nevin ed., LexisNexis 2020).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Gregory M. Krakau & John A. Mizhir Jr., *Practice Tips: Trademark Rights of Musical Groups*, L.A. LAW. 11 (2007).

¹³⁵ *Id.* at 14.

name is already in use.¹³⁶ Step Three requires conducting a trademark search.¹³⁷ Step Four entails forming a business entity and creating a written agreement providing that the business entity takes ownership of the name.¹³⁸ The agreement should also make clear that a departing band member retains no rights to the name, regardless of whether the band member quits or is fired.¹³⁹ Step Five recommends registering the band name as a mark with the U.S. Patent and Trademark Office.¹⁴⁰ Step Six states bands should avoid abandonment by keeping their websites in operation at all times.¹⁴¹ Bands should do everything in their power to collect all royalties due and to save all records of royalties collected based on the band name.

One argument that band members have when it comes to the rights of the band name is that original members believe that their rights are stronger and more important than newer members of the band. However, according to an article by Edwin F. McPherson, "Any claim that a departing member of a group has rights to the name of that group because of the length of his or her tenure with the group has been soundly rejected by the courts."¹⁴² The article cited several cases in which a member of the band left; the member tried to use the band name; the remaining members sued the former member for trademark infringement and won. One case in particular was *Marshak v. Sheppard*, where Rick Sheppard, a former member of The Drifters, left the group and began performing as "Rick Sheppard of the Drifters" and "Rick Sheppard and the Drifters."¹⁴³ None of these performances were authorized by Larry Marshak (Marshak) who was the manager of the Drifters.¹⁴⁴ Marshak contends that the Defendants have profited thereby, and unless Defendants' conduct is permanently enjoined, Plaintiff and his good-will and reputation will suffer irreparable injury.¹⁴⁵ The court, concluding that the Defendant's ongoing use of those names was an attempt to "seek and obtain profit from the use of [The Drifters] name, combined with his own," found that such use clearly and unequivocally constituted trademark infringement.¹⁴⁶ Once a band has found a name it likes--and that no one else is using--the band should enter into a written agreement regarding ownership

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 15.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Edwin F. McPherson, *What's in a Name, The Use, Misuse, and Trademark Protection of Band Names*, 18 ENT. & SPORTS LAW. 3 (2000).

¹⁴³ *Marshak v. Sheppard*, 666 F. Supp. 590, 592 (S.D.N.Y. 1987).

¹⁴⁴ *Id.* at 592.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 604.

of the name.¹⁴⁷ If one band member wishes to maintain sole ownership of the band name--as may be the case when one member is the group's dominant creative force--he or she should be sure to have a signed agreement to that effect with the other band members.¹⁴⁸

TRADEMARKING THE BAND NAME AND LOGO ENSURES PROTECTION FROM OTHER BANDS AND PREVENTS PUBLIC CONFUSION WITH SIMILAR NAMES

The band's name needs to be protected so the name belongs to that band and no other groups can use it nor use any other similar name that might confuse the minds of the public, as a band or in any other business that might cause dilution of its trademark.¹⁴⁹ The best protection for a band name is afforded by obtaining a service mark registered with the United States Patent and Trademark Office (the USPTO).¹⁵⁰ These rights entitle the band to sue for trademark infringement if anyone else used their band name.¹⁵¹ If the band wishes to use the band's name with or without a logo on goods as well, the band will need to apply for trademarks for each class of goods on which the band wishes to use their band name.¹⁵²

The application should be filed in the name of the party that owns the mark or is entitled to use the mark in commerce, and not merely the name of the party filling out the application.¹⁵³ If multiple parties own the mark or are entitled to use the mark, each party must be identified in the application.¹⁵⁴ The court has also said in the case *Robi v. Reed* that "[A] person who remains continuously involved with the group and is in a position to control the quality of its services retains the right to use of the mark, even when that person is a manager rather than a performer."¹⁵⁵

If the artist is a solo performer, and he/she has not set up any type of separate entity (such as a corporation, limited liability company, etc.) to own the trademark, and is attempting to trademark his or her individual name or stage name, he or she may file the application in his or her name as an individual applicant.¹⁵⁶ If an artist is in a group with more than one member, each member can be made an owner of the mark.¹⁵⁷ An application

¹⁴⁷ KRAKAU, *supra* note 134, at 12.

¹⁴⁸ *Id.*

¹⁴⁹ GIBSON, *supra* note 38.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ USPTOvideo, *TMIN News 17: Rockin' the Trademark*, YOUTUBE (Jan. 9, 2018), <https://www.youtube.com/watch?v=4f3QrjefXWU&t=3s>.

¹⁵⁴ *Id.*

¹⁵⁵ *Robi v. Reed*, 173 F.3d 736, 740 (9th Cir. 1999).

¹⁵⁶ NETWORK, *supra* note 153.

¹⁵⁷ *Id.*

may be filed as joint individual applicants, with each member of the band listed as an individual applicant.¹⁵⁸ If various members of the band have formed a partnership to own the trademark rights, and the partnership has been organized under a particular business name, the application should be filed in that business name.¹⁵⁹ If band members, have set up a corporation or limited liability company (LLC) to be the owner of the mark, the official name of the corporation or LLC must be set out as the applicant's name.¹⁶⁰

JOURNEY MEMBERS ARE "LOVIN', TOUCHIN', SQUEEZIN" ON THE RIGHTS TO THE JOURNEY NAME AND TRADEMARK

In the early days of rock music, choosing a band name was relatively simple. Some acts reached back into the musical past and named themselves after influential predecessors.¹⁶¹ The Rolling Stones took their name from a song by bluesman Muddy Waters.¹⁶² Pink Floyd also found its inspiration in the blues, naming itself after Georgia blues-men Pinkney "Pink" Anderson and Floyd Council.¹⁶³ Using clever wordplay, by deftly changing a single "e" to an "a", the Beatles simultaneously evoked a hard-shelled insect and a musical term.¹⁶⁴

The story surrounding Journey's name is a little different. Before the name Journey was established, the band was known as the "Golden Gate Rhythm Section". A contest was put out on the radio to find a name, but the suggestions that were coming back were not very good or appropriate.¹⁶⁵ At the time, roadie John Villaneuva said that they should call the band Journey and Herbie Herbert agreed.¹⁶⁶ Some band agreements have clauses where the band member who came up with the name for the band will own all of the rights to the band name. These clauses are fine when working with individual artists; however, other band members in a group typically disagree with those types of clauses and request that ownership of the band name be made equal across all of the band members.

If Journey failed to have a clause in their band agreement stating who and what entity owned the name, roadie John Villaneuva could potentially have asserted ownership of the name of the band. However, that was not the case, and ownership of the name Journey is the center of the current lawsuit

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ KRAKAU, *supra* note 134.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ DANIELS, *supra* note 2, at 27.

¹⁶⁶ *Id.*

between the members of Journey. The band attempted to avoid ownership disputes with the use of a separate entity, Elmo Partners, to control the band's name and trademarks. In the original complaint, a 1998 agreement states that Neal Schon, Jonathan Cain and former member Steve Perry, through Elmo Partners, have the sole, exclusive, irrevocable right to control the Journey mark, including the Journey name.¹⁶⁷ They are, therefore, authorized to perform together as Journey, with or without anyone else.¹⁶⁸ The dispute arises because Steve Smith and Ross Valory believe that the Elmo Partners' ownership of the name ended which gave Nightmare Productions default ownership of the name. The outcome of this case hinges upon whether the Elmo Partners agreement was actually terminated and Nightmare Productions actually hold the rights to the name.

The current lawsuit is not the first time that Journey has sought to protect its name and trademark. In 1981, Journey's Nightmare Productions joined a class action suit consisting of fifteen management companies for various bands including REO Speedwagon, Black Sabbath, Aerosmith and Bruce Springsteen.¹⁶⁹ They filed this lawsuit against Creative Screen Design, LTD., Arnold Goldzweig and Allan Goldzweig.¹⁷⁰ In this case, the court found the defendants liable for printing and selling thousands of bootleg t-shirts and jerseys, each bearing the name of one or more of the plaintiffs.¹⁷¹ During the period July 1, 1979 through October 8, 1980, the total gross income received by Creative Screen Design LTD. reached \$437,022.¹⁷² The Court finds, that, at the bare minimum, one half, or fifty percent of the bootleg sales deprived Winterland and its licensors of the sale of a licensed shirt.¹⁷³ A total of 103,662 infringing t-shirts were sold by the defendants. Plaintiffs were therefore deprived of the sale of 51,831 licensed t-shirts.¹⁷⁴ The evidence introduced by plaintiffs at trial supports their right to recover for the misappropriation of, or the violation of their Right of Publicity.¹⁷⁵ In the context of this case, each plaintiff entertainer has a sole right to control the commercial exploitation of his name and/or likeness, including his use on t-shirts and jerseys.¹⁷⁶

SERVICES AND ACTIVITIES

¹⁶⁷ Compl. ¶ 53.

¹⁶⁸ *Id.* at 54.

¹⁶⁹ *Winterland Concessions Co. v. Creative Screen Design, Ltd.*, 214 U.S.P.Q. 188 (N.D. Ill. Nov. 16, 1981).

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 190.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

TOURING AND PERFORMANCE DECISIONS SHOULD BE AGREED UPON UNANIMOUSLY PRIOR TO ANY EVENT WHERE ANY BAND MEMBER MAKES AN APPEARANCE

A band is a unique and complex relationship, and with so many different personalities and goals among band members, business can sometimes get tricky.¹⁷⁷ When bands are creating, performing, traveling and practicing with the same people for hours on end, there is no question that leadership within the band is essential to get everyone on the same page, manage expectations, and create camaraderie.¹⁷⁸ Additionally, unless someone joins the band who already has a solo career, side projects require the band to agree upon such activities.¹⁷⁹ If there is an agreement up front to allow outside projects, the agreement will require that the band remain first priority.¹⁸⁰

When it comes to performances, along with radio airplay, live performances are considered the *sine qua non* (defined as essential or necessary) for exposing a performer to the public and conveying an image of what the artist and his or her music represent.¹⁸¹ A significant portion of demand is driven by consumer desire to associate with musicians.¹⁸² This associational affinity may exist because the musicians represent role models, and consuming their music satisfies a psychological need to be like them.¹⁸³ This makes it likely that consumers will prefer musicians similar in age to themselves and prefer musicians whose image expresses goals and behavior to which a consumer identifies or aspires.¹⁸⁴ When band members are not in agreement on the image they wish to create, or when their image they portray does not match the music, it creates confusion or dislike on the part of the consumer.

MEMBERS OF JOURNEY HAVE DISAGREED AT TIMES WHEN THEIR NAME WAS IN "LIGHTS

¹⁷⁷ Christiana Usenza, *10 Essential Qualities of Great Band Leadership*, SONICBIDS (June 30, 2014, 5:32 PM), <https://blog.sonicbids.com/10-essential-qualities-of-great-band-leadership>.

¹⁷⁸ *Id.*

¹⁷⁹ DONALD S. PASSMAN, *ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS* 351 (Simon & Schuster 10th ed. 2019).

¹⁸⁰ *Id.*

¹⁸¹ Alan H. Kress & Daniel Cutler, *Live Performances*, 8 ENT. INDUSTRY CONT. ¶ 150.01 (Doug Nevin ed., LexisNexis 2020).

¹⁸² Henry H. Perritt, Jr., *New Business Models for Music*, 18 VILL. SPORTS & ENT. L.J. 63, 147 (2011).

¹⁸³ *Id.* at 148.

¹⁸⁴ *Id.*

In 2017, headlines nationwide declared internal strife amongst the kings of '80s radio due to the presidency of Donald Trump.¹⁸⁵ Guitarist and founding member Neal Schon posted angrily on social media about three of his bandmates visiting the Trump White House on July 31 without him -- a visit, he says, the band previously agreed not to do.¹⁸⁶ Neal Schon was upset that all the press releases were titled "Journey went and visited the White House" when in fact it was not a band decision. It was always understood that religion or politics would never alienate any of their millions of fans. "Everybody's entitled to like and believe what they want but when we've had this discussion many many times it was always a no," Schon tweeted.¹⁸⁷ "Least a heads up since it is a band and one that I started... I think Management could let me know."¹⁸⁸ In a separate article, Jonathan Cain defended himself and the band by stating "It wasn't really a band sort of thing. We're friends with Sarah Huckabee from before the presidential thing.... It was just an offer to take a tour... It wasn't an endorsement... Not at all."¹⁸⁹

This particular disagreement extended into 2020 after the use of the song "Don't Stop Believin'" during the opening songs at President Trump's entrance for his Fourth of July speech at Mt. Rushmore. Once again, the band members went to Twitter to hash out their frustrations. This time Steve Perry spoke out first stating that "[a]s one of the Songwriters of "Don't Stop Believin'", I have not given permission to any political candidate to use this song!"¹⁹⁰ Neal Schon was quick to reply and said, "Huh ..., funny when I tried to stop it before a couple of years ago management told me you and Lee Phillips (Steve Perry's Attorney) didn't want to mess with it... so what makes it different now?"¹⁹¹

Political opinions among the band members might not have been as strong when the band was first formed. Discussions about politics and specific clauses in Journey's band agreement about whether songs can be used during political events might not have been explicitly stated. Whether

¹⁸⁵ Kevin L. Jones, *As Journey's History Shows, Infighting is Business as Usual* (Aug. 17, 2017), <https://www.kqed.org/arts/13805711/as-journeys-history-shows-infighting-is-business-as-usual>.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Andy Greene, *Journey's Jonathan Cain Talks Band Feud: 'Let's Hit Reset'*, *ROLLING STONE* (Feb. 15, 2018), <https://www.rollingstone.com/music/music-features/journeys-jonathan-cain-talks-band-feud-lets-hit-reset-198038/>.

¹⁹⁰ Steve Perry (@StevePerryMusic), TWITTER (July 3, 2020, 11:45 PM), <https://twitter.com/StevePerryMusic/status/1279260136645648384>.

¹⁹¹ Neal Schon (@NealSchonMusic), TWITTER (July 4, 2020, 3:45 AM), <https://twitter.com/NealSchonMusic/status/1279320506961768448>.

or not it was understood that the band would remain politically neutral, in light of recent events, it is clear that specific terms about politics should be discussed and explicitly stated in the band's agreement if it is not added already. A band's image and what they represent is an important detail of a band agreement and one that might need to be adjusted or revisited throughout the years.

INCOME, EXPENSES, AND ROYALTIES

INCOME

Many bands are controlled by one or two members while the rest of the band members are in effect, employees.¹⁹² Even as employees, however, the lesser band members can receive either a salary, a percentage, or both, though if they do receive a percentage, it is usually considerably less than that of the major band members.¹⁹³ Live performances are also an important vehicle for generating income, both in themselves and by promoting sales of the artist's records.¹⁹⁴ The principal source of live concert income for an artist is generally the fee paid by the concert or tour promoter in consideration of the artist's performance.¹⁹⁵ The compensation for live performances depends upon the artist's popularity and ability to attract a paying audience, often referred to as the artist's ability to "draw an audience" or to "sell tickets."¹⁹⁶ In addition to fees paid by promoters, established artists who perform live may also be able to earn income from one or more of the following related sources: (i) Merchandise sales, (ii) Tour sponsorships, (iii) Record sales, (iv) Motion pictures, television productions, and pay-per-view ("PPV") programs based on live performances.¹⁹⁷

It is important to discuss how the income is to be divided between the band members. There are no rules on how profits should be shared. The easiest way is to split the profits equally among all band members, but this can create irritation if some members work harder or contribute more than others.¹⁹⁸ Another frequently used approach is when the founding members are given a larger percentage than the other members who were hired later.¹⁹⁹

EXPENSES

¹⁹² Gibson, *supra* note 38.

¹⁹³ *Id.*

¹⁹⁴ Kress, *supra* note 181.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Passman, *supra* note 179 at 349.

¹⁹⁹ *Id.* at 350.

Being in a band is fun, but it's also a business.²⁰⁰ Band members must pay to book performances or pay for someone to book shows. Band members must pay for recording time, pay for CDs to be manufactured, promoted, marketed and sold, pay to make posters, pay for rehearsal space, and pay for legal fees, licenses or permits.²⁰¹ Those members floating the money want to be reimbursed or have others pay or contribute their fair share, and/or be paid more out of any royalties or profits.²⁰²

A band agreement can specify agreed upon terms that are presented and added to the venue contracts when the band accepts a performance gig. Major problems occur when a performance deal falls through, and without the terms, the band suffers a loss of money. A cancellation policy to protect the band from the venue's cancellation is a necessary part of a band agreement.

ROYALTIES

The royalties section of a band agreement explains what it means to own a song and how to determine who owns each song. As a band, the song writers will also need to file copyright applications for the songs they write. Copyright ownership and transfers of ownership rights must be determined. If another band member or an outside individual writes the lyrics, the contribution of that individual also will need to be stated in the copyright application.²⁰³ Band members should have the advice and assistance of a music attorney to ensure that copyrights are obtained for every song created by the band as well as every music video produced.²⁰⁴ The Copyrights to each song determines the royalties band members and their estates will receive over the lifetime of the song.

The use of songs in television shows, movies, or advertisements is one type of royalty. If a musical recording is to be synchronized with a visual portion of an audiovisual work (for example, a music video, television program, or motion picture), a synchronization license is required.²⁰⁵ In actuality, to make and distribute a motion picture or, presumably, a television show on DVD, the producer must obtain licenses for two rights: the performance right and a separate agreement with music publishers for the

²⁰⁰ Gibson, *supra* note 38.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Molly K. Bentley, *I Want my DVD: Considering A Modern Approach to Obtaining Synchronization Licenses*, 15 TEX. REV. ENT. & SPORTS L. 193 (2014).

right to include the copyrighted music in the audiovisual work, or a synchronization license in exchange for a fee.²⁰⁶

When a television show wants to use a band’s song in an episode, they must first contact the music publisher that controls the compositions and request to use the song in the show.²⁰⁷ As with all television license requests, there is a brief scene description so that the publisher is able to see the actual context in which the song is used as well as the projected timing or type of use.²⁰⁸ As a prime time show on either ABC, NBC, or FOX the band would get a specified amount of money each time the show is aired. Closing credit songs and opening credit songs make more money than if the song was played in the middle of the show or movie.²⁰⁹

JOURNEY STARTED OUT BEING “RAISED ON RADIO” AND NOW THEY ARE A MILLION-DOLLAR ENTITY

Journey was not always a million-dollar band. When the band was starting out, Manager Herbie Herbert took control. According to a Rolling Stone article from 1980, the bulk of earnings was plowed back into stage, sound and lighting equipment, and, as Perry says, the band purchased its own trucks, giving Journey not only financial savings, but control over their shows as well.²¹⁰ “We do very, very well,” says Herbert. “But every single person in our organization does very, very well... There are a lot of staff members here making \$50,000.”²¹¹ Herbert talks of profit-sharing and incentive programs for Nightmare Production’s thirty employees.

Thirty-eight years after it debuted on the album *Escape*, “Don’t Stop Believin’” is the go-to anthem for perseverance that has itself persevered, successfully riding wave after new wave of media. According to Nielsen Music, “Don’t Stop Believin’” holds the record as the most downloaded 20th-century song, and it has nearly 700 million streams on Spotify, at last count. The song found its real glory at the dawn of binge TV and the smartphone, and it has woven its way into weddings, bar mitzvahs, graduations, the 2005 World Series, *The Sopranos* and *Glee*.

²⁰⁶ *Id.*

²⁰⁷ Jeff Brabec & Todd Brabec, *Glee to Gold: A Music Licensing Goldmine for Songwriters and Music Publishing*, <https://www.lommen.com/wp-content/uploads/2016/03/Glee-to-Gold-A-Music-Licensing-Goldmine-for-Songwriters-and-Music-Publishing.pdf>.

²⁰⁸ *Id.*

²⁰⁹ PASSMAN, *supra* note 179 at 436-437.

²¹⁰ Ben Fong-Torres, *Journey: The Platinum Game Plan*, ROLLING STONE (June 12, 1980), <https://www.rollingstone.com/music/music-news/journey-the-platinum-game-plan-189450/>.

²¹¹ *Id.*

The “Glee Effect” brought about by the popularization of new songs and the re-popularization of more classic songs occurring on the show *Glee* gave new life once again to Journey’s “Don’t Stop Believin’”.²¹² In addition, the popular television show *Glee* also paid for the usage for three additional Journey songs including “Faithfully”, “Any Way You Want It” and “Lovin’, Touchin’, Squeezin’” in various episodes. Although current Journey is still touring, royalties remain a large portion of income for the band members. Within the current lawsuit, Smith and Valory wanted to add to their retirement income that was based solely on royalties by also including income from Journey’s tours even though they are no longer band members.

ENDING THE PARTNERSHIP

A BAND AGREEMENT MUST INCLUDE THE PROCESS WHEN BAND MEMBERS LEAVE

When creating a band partnership agreement, it is also important to cover issues involving firing band members and what occurs when a band member quits. When it comes to firing a band member, the band agreement should include what kind of vote it takes, whether that be a majority vote or unanimous vote of remaining members.²¹³ The agreement should also include the various types of behavior that would warrant discharge from the group. Examples of behaviors that could lead to ultimately firing a band member include, not showing up to rehearsals or performances or getting involved with criminal activity that harms the band’s reputation.

The terms of a leaving member’s agreement are spelled out in the group’s deal and are almost always less favorable than the deal for the group.²¹⁴ The agreement should make clear that a departing band member retains no rights to the name, regardless of whether the bandmember quits, is fired or was a founding member. The client seeking his own individual career after being part of a group may not be able to terminate agreements with parties such as personal managers and record companies since agreements with such parties often contain a provision entitled the “leaving member clause.”²¹⁵ The clause explains that if a group breaks up, the contracting party, i.e., the personal manager or the record company, has the right to continue the contractual relationship with each member of the group on an individual basis.²¹⁶ Of course, the continuance of a previously

²¹² *Id.*

²¹³ PASSMAN, *supra* note 179 at 345.

²¹⁴ *Id.*

²¹⁵ KRESS, *supra* note 74.

²¹⁶ *Id.*

established relationship with a manager or record company need not preclude an artist from an individual career, and he may find that his decision to move into an individual career has the full support of the manager or record company.²¹⁷

WHAT HAPPENED WHEN CERTAIN JOURNEY MEMBERS WENT THEIR “SEPARATE WAYS”?

Journey’s band members have left for various reasons including illness and injury. Steve Perry was forced to leave after suffering a hip injury and refusing to undergo the necessary surgery to get him back on stage.²¹⁸ Steve Augeri, who was Steve Perry’s replacement, also had to leave after battling throat issues that rendered him unable to tour.²¹⁹ Journey also had to fire its drummer Deen Castronovo after his years of alcohol and drug abuse led to his sentencing of four years’ probation for assaulting his fiancé.²²⁰ However, Castronovo’s dismissal from Journey has been different than Ross Valory and Steve Smith’s dismissal from Journey. When Castronovo was fired, the band made sure to leave him with a “substantial amount of money” to make sure he was taken care of.²²¹ Neal Schon and Jonathan Cain are not as forgiving this time. Court documents explain that Smith and Valory have destroyed the chemistry, cohesion and rapport necessary for the band to play together.²²² Journey can only tour successfully and succeed creatively if it is united and the band members trust one another; however, the actions taken by Smith and Valory shattered that trust.²²³ Schon and Cain have lost confidence in both of them and are not willing to perform with them again.²²⁴

CONCLUSION

²¹⁷ *Id.*

²¹⁸ Eduardo Rivadavia, *Why Steve Perry Left Journey for Good*, ULTIMATE CLASSIC ROCK (May 7, 2015), <https://ultimateclassicrock.com/steve-perry-leaves-journey-again/>.

²¹⁹ Andrew Magnotta, *Former Journey Singer Explains “Biggest Problem” With the Job*, iHEART RADIO (June 26, 2019), <https://www.iheart.com/content/2019-06-26-former-journey-singer-explains-biggest-problem-with-the-job/>.

²²⁰ Martin Kielty, *Journey looked after me despite firing me, say Deen Castronovo*, LOUDER SOUND (June 27, 2016), <https://www.loudersound.com/news/journey-looked-after-me-despite-firing-me-says-deen-castronovo>.

²²¹ *Id.*

²²² Ultimate Classic Rock Staff, *Journey Fire Ross Valory and Steve Smith*, ULTIMATE CLASSIC ROCK (Mar. 4, 2020), <https://ultimateclassicrock.com/journey-fire-ross-valory-steve-smith/>.

²²³ *Id.*

²²⁴ *Id.*

In conclusion, a band agreement is vital to the success of a band. It can prevent disputes relating to the hiring and firing of band members and ownership of the band's name and songs. It can help establish a proper business entity and set up a proper system for income and expenses. Journey's lawsuit under Neal Schon and Jonathan Cain was only filed in March 2020 against former members Ross Valory and Steven Smith, so it is still an ongoing case. Just like most bands, this was not their first disagreement and certainly not going to be the last. Journey's litigation has only just begun, and as with many bands who have had years of ongoing disputes, it is not clear whether there is an end in sight.

In retrospect, Journey established a band agreement from the beginning using Nightmare Productions as their business entity. The partnership aspect of the band agreement was also handled appropriately allowing Journey to be able to hire and fire members when necessary. This aspect has allowed Journey to exist as a band for forty years. The name of the band Journey is where the profit lies as well as the issues. The establishment of Elmo Partners within Nightmare Productions has raised issues as to the ownership of the name. It is unclear as to the reasoning behind the establishment of Elmo Partners. This in essence has created a loophole in the band agreement. While there is not a direct issue with the touring and performances of Journey and its band members, the income and profit has created another problem. Steven Smith and Ross Valory assume they should receive profits from the current tours even though they are no longer members. Unfortunately, this has caused an irreparable split between band members who all still are united as business partners under Nightmare Productions. The essence of the case is who controls Nightmare Productions, hence, who controls the name Journey and should reap the benefits. Although bands experience legal issues at some point in their career, the bands legacy is why members (Jonathan and Neal) "Don't Stop Believin".