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__Venue Law__ is a monthly column that addresses issues of interest and compelling concern for venue owners and operators. We identify an issue, examine the circumstances and suggest the actions you might consider for your venue. We welcome your suggestions.

Protecting Your Venue From Rogue Performances - It's Not About First Amendment Rights But About Contractual Obligations

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THE ISSUE:

From wardrobe malfunctions to political activism, rogue performances can be much more than just annoying to your paying customers. They can result in unexpected and unwanted liability for you. As the manager of a venue, how do you protect your venue, the venue's partners and sponsors, and paying customers from performers that decide their advertised performance provides an unfettered platform for them to present something quite different from what is expected?

Past performances, reputation and advertising contribute to shaping consumer expectations of the value to be received for the price of admission. A "rogue performance" happens when a performer purports to present a certain type of performance, and then uses the event to present views or activities that the paying customers, sponsors and the venue operators were not expecting as part of that performer's show.

The performer has, in effect, a captive audience and a convenient stage that can be turned into a "bully pulpit". Is this a First Amendment issue or a matter of contractual obligation? And what do you do to protect the venue, sponsors and paying customers?

THE CIRCUMSTANCES:

This issue is not about a well known performer disappointing an audience with the quality or the length of a performance. It is, essentially, about an inappropriately and unexpected performance. One of the most current examples has been identified as the "Linda Ronstadt issue." In this case Ms. Ronstadt decided that an event should include expression of her personal political beliefs, a presentation that was not advertised. On this occasion Ms. Ronstadt apparently offended a large and vocal portion of a paying audience. Many of the patrons demanded refunds. Such acts can have a detrimental effect on the goodwill and business reputation of the venue.

History is replete with rogue performances. By far the best known rogue performance happened during half-time at Super Bowl XXXVIII. The performance introduced the phrase "wardrobe malfunction" into the American lexicon. Unfortunately many in the global audience were shocked. The "wardrobe malfunction" subjected many broadcasters to federal fines and resulted in the passing of federal legislation that imposes hefty fines for these type of actions.

During a presidential election year and times of military conflict, political statements are much more common. With the expansion of cable and satellite visual and audio communication all individuals and entertainers often feel the urge to express their political views on a public stage. Fortunately, we live in a country that not only promotes the public sharing of diverse political viewpoints, but one that expressly protects the constitutional right to expression.

However, there is, arguably, a time and a place for these sorts of comments. The time and the place does not include utilizing an event at a venue advertised as a certain type of performance, attracting a paying audience based on advertisement, and then replacing or supplementing the advertised entertainment to the paying patrons with a political diatribe or stump speech. Nor should a contracted performer be allowed to decide that an event advertised as a family event be a stage for provocative or risqué shock elements such as a "wardrobe malfunction."

Venues have restrictions relative to the types of performances that can be presented. Among the questions that deserve consideration are the following.

1. Is the venue subject to local laws and regulations on the content of performances?
2. Does the venue have “sponsorship” by public entities that provide funding for or ownership of the venue?
3. What do the advertisers and sponsors of the event expect of the anticipated content of the performance to the extent that their agreements are based on certain product identification with the events held at the venue?

Local or municipal regulations that include limitations about performance content may appear to violate First Amendment freedoms guaranteed by the Constitution. However, communities have rights associated with content and performance appropriate for their community as well as the protections of performance contracts agreed to by all parties. For a venue operator working with and in a municipality, the time and the place to challenge these rules is not after a performer has pushed the envelope.

Venue sponsors also have expectations and rights based upon agreements with you. They have invested substantial money and often other resources to develop business goodwill through their association with your venue. That business goodwill can be adversely affected by rogue performers. The backlash against such performances may not be directed exclusively at the performer, but also at the sponsors of the venue.

Last, but not least, paying customers should be able to rely on the advertisements and other information received that influence their decision to purchase tickets and attend an event. A rouge performer that lures patrons to the venue based on one claim and then delivers unexpected or unwanted additions to a performance may well violate their agreement with the venue and the implied representation of the promoter to the ticket holder and the venue and/or event sponsors.

WHAT DO YOU DO:

So whether the performer has waved the flag or burned it, or had some kind of questionable wardrobe malfunction, what are your options and what should you do? The first key is to try to address the issue before a rogue performance occurs. The adage is true - an ounce of prevention is worth a pound of cure.

Start by looking carefully at the performer, their performance history and their known content. For example, if the performer is a comedian you already have an idea of the content of the performance. It may be verbally risqué and/or include satire and political humor. As such, the performance would be advertised as such. If the performer is a musical performer, you should already have a good idea of the typical scope of the performance. Again, advertisements should be based on what is expected and presented to be the performance.

Armed with the best information available, and anticipating, if necessary, worst-case scenarios, attempt to address potential problems specifically in an engagement contract.

What restrictions affect the venue:

* Sponsor restrictions (vendor agreements, naming rights agreements, etc.).
* Municipal restrictions.
* Business goodwill of the venue and the venue's sponsors.

Paying Customer Satisfaction (Patrons):

* What is advertised to the customer in the media and through ticket distribution companies (including on the internet).
* Refund policy.

Contractually limit the Performer:

* Content of the Performance: Define the type of performance and content. The content of the performance should directly relate and conform to the restrictions that the venue is subject. Specifically prohibit certain activities. This is not a First Amendment concern. The entertainer is contracting to present a performance. The government is not restricting free speech of the performer. The performer can express his or her concerns publicly without charging the public under pretense.
* Advertised Performance: This ties to the Content of the Performance. Patrons are relying on what is presented in advertisements to purchase tickets. The performance content should meet certain standards and not contain undesired and named elements.
* Warranties: The performer should warrant that he or she will provide the performance as described in the Agreement.
* Acknowledgments: The performer should acknowledge that the venue and the sponsors have expended great expense and efforts to develop business goodwill and that performers failure to provide a performance advertised or incorporating prohibited acts will damage the venue and the venue sponsors for which damages the Performer should be liable.
* Indemnification: Performer (or at the least their promoters) should hold venue and venue sponsors harmless for a performer's breach of contract including presentation of unadvertised political comments or risqué material.
* Insurance: The performer should provide an insurance policy and/or bond to at least cover a minimum of the cost to refund tickets should the performer's conduct and performance fall outside of the agreed scope of the engagement and advertised performance.

Optimally, a venue should attempt to contractually define the scope of the performance in conjunction with the advertised scope of the performance. In that manner the scope is limited to what is allowable and approved by the venue and it's sponsors. As such, patrons are able to make an informed decision on choosing to pay to attend the performance. Sufficient warranties, indemnification and insurance should ensure the performance will remain within the scope of the performance agreement and provide sufficient remedies for breaches. The reality may, however, be quite different. Venue operators that try to push the promoter and performer to a defined scope of entertainment may find the promoter and performer readily passing on the opportunity to play the venue for another less restrictive venue either in the same area or even bypassing the area altogether. There is no perfect solution to this recent phenomenon. At the various least, venue operators should be both aware and cautious of those performers with a propensity or reputation for these "outside of the box" activities. At the very least, the venue should include broad disclaimers to their patrons to avoid ticket refund claims and scrutinize their existing agreements for the venue to ensure that these types of performers won't create new third-party problems for the operator.

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