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OPTIONS PAPER

**REVIEW OF THE INTERNATIONAL MUSIC MANAGERS'
FORUM ASPIRATIONAL CODE OF CONDUCT**

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July 2009

Written submissions due **4 September 2009**

HOW TO MAKE A SUBMISSION

Interested persons are invited to provide written submissions to Dr Guy Morrow at the Department of Media, Music and Cultural Studies, Macquarie University.

Please send submissions by email to: guy.morrow@mq.edu.au

If you do not have access to email, please send submissions to:

Dr Guy Morrow
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Macquarie University
SYDNEY NSW 2109
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Phone: 612 9850 2199

Fax: 612 9850 6593

Submissions must be received by **4 September 2009**.

If you decide to participate, you will be asked to dedicate approximately one hour of your time in order to discuss the ways in which you conceptualise your management of artists in the International popular music industry. Recordings of interviews will be transcribed and used in the written publications that will be produced by this project.

Any information or personal details gathered in the course of the study are confidential. No individual will be identified in any publication of the results. Dr Guy Morrow, Jason Free and Dr Catherine Moore will be the only people to have access to the data.

Please also sign and return the Information and Consent form that is located at the end of this document.

Additional copies of this discussion paper are available on the IMMF website (www.immf.com).

1. INTRODUCTION

The international music industry has decentralized¹ and this has shifted more commercial control from monopoly companies to smaller artist-manager teams. This project addresses the issue that these artist manager teams are not regulated by a code of conduct. The International Music Managers' Forum (IMMF) is a voluntary body seeking to create new standards in relation to artist management practices and to the enforcement of international copyright law. Their aim is constrained by lack of empirical research. The Aspirational Code of Conduct that was developed for the IMMF (provided below) will be used as a starting point for discussion concerning the development of the Code of Conduct. This project is significant because it provides the first in-depth analysis of artist management practices in the current phase of decentralisation.

Over the past three years members of the IMMF Executive have been in discussions with Dr Guy Morrow (Lecturer Department of Contemporary Music Studies Macquarie University) regarding the development of a Code of Conduct for artist managers in the music industry both in a national and international format.

The work has progressed significantly since the initial discussion with the international aspects being provided by Dr Catherine Moore of New York University and also Jason Free from the Six Finger Think Tank in the U.S.

Dr Morrow has received a new staff grant from Macquarie University to further develop the Manager's Code of Conduct as a research area.

Upon adoption of the Code of Conduct as developed by Dr Morrow in consultation with the IMMF Executive, the IMMF believes that the formal undertaking to accept and respect the statutes and the Code of Conduct by all members, provides a far greater level of protection for artists and an overall increase in the professional standards of management than other regulatory options.

2. PURPOSE OF THIS OPTIONS PAPER

In order to make sure the Code of Conduct provides adequate and appropriate protection for artists, and so that it provides a set of guides for personal behaviours and values which help an artist-manager team to establish a positive working environment, we are seeking stakeholder input on:

¹ According to Terrell (2005), decentralization involves the “planned, or spontaneous, redistribution of an industry, or industry sector’s resources ... from a state of relative spatial concentration to a more dispersed condition (Terrell 2005: 1).”

- the nature and extent of the ‘problem’, that is, what are the main risks for artists in their commercial relationship with managers in the current phase of decentralisation?
- the appropriate level, type and targeting of self-regulation to address these problems without imposing red tape.

We seek to research the sorts of regulatory provisions that could meet the needs of the IMMF.

3. Aspirational Code of Conduct

The following Aspirational Code of Conduct that was developed for the IMMF will be used as a starting point for discussion concerning the development of the Mandatory Code of Conduct.

Has an IMMF branch made any amendments to the following Aspirational Code of Conduct?

(Aspirational) Code of Conduct of the IMMF

Music Managers must aspire, at all times and to the best of their ability to:

1. Devote sufficient time so as to properly fulfill the requirements of good management in the interest of the artists as they understand them;
2. Not knowingly act in any fashion which is detrimental to their clients’ interests;
3. Conduct themselves in a manner which is professional and ethical and which abides by best business practices and methods accepted in their country.
4. Conduct all of their affairs with their clients in a transparent manner;
5. Protect and promote the interest of their clients to the highest possible standard;
6. Exercise the rights and powers implied or granted to them by their clients in a written agreement for the client’s best interest as the manager understands them.
7. Ensure that no conflict of interest shall infect the discharge of their duties towards their clients.

Music Managers shall respect the integrity of other managers in their relationships with their artists and not actively interfere with same except directly with the manager. If approached by an artist who was previously the client of another manager, a manager shall endeavour to confirm that the artist has fulfilled his, her, or their legal obligations to the previous manager before entering into a management relationship with the artist.

Where a manager acts as publisher, agent, record producer or in any other capacity as well as a manager for his, her, or their clients, they shall declare such interests so that the artist has the ability to determine for themselves if they feel it constitutes a conflict of interest.

Where a manager acts in any other capacity as well as manager for his, her or their clients where such activity ordinarily involves the charging of fees or commissions, the manager shall not charge multiple fees or commissions, instead charging either the agreed management commission alone or the fee or commission usually charged for that other activity and forgoing their management commission. Where the manager elects to charge a fee or commission other than the management commission they shall first gain the consent of their artist.

Managers must ensure that all monetary transactions made on behalf of or in the interest of the client and all books of account and records must always be reasonably open for the inspection of the artist or their appointed representative.

Where a manager engages an artist under a written agreement, the manager shall endeavour to ensure that their client seeks and receives expert legal advice on the terms of such agreement before signing it.

Managers will endeavour to keep themselves well informed of current events and legislation, both national and international, as it pertains to the proper exploitation of their client's career and the proper administration of their client's business.

4. Is a Mandatory Code of Conduct Needed?

4.1 Artists are often in a weak bargaining position compared to representatives

Although some authors such as Rogan (1988) and Morrow (2006) have attempted to deconstruct what is believed to be the most prevalent stereotype of an artist manager – the familiar caricature of a cigar-smoking hustler who takes advantage of star-struck adolescents, much of the discourse stemming from regulatory bodies is fairly one-sided and implicitly reinforces this stereotype.

For example, the state Government in New South Wales (NSW), Australia, is conducting a review of the Entertainment Act 1989 that currently regulates artist managers in this state. The following are some excerpts from the options paper they have produced concerning this initiative:

The entertainment industry is competitive for performers and they may find it difficult to negotiate a fair deal with representatives because of a poor bargaining position. Young and inexperienced performers are often the most vulnerable ...

... Creative professionals are not usually in the entertainment industry for profit alone, but also to pursue their own artistic endeavour and the enjoyment of performing, which can also make them vulnerable when dealing with agents or managers ...

Performers may be heavily reliant on the agent or manager for work because agents have more employer contacts or a special relationship with employers. Performances are often one-off and unpredictable so

performers may not be in a position to refuse unfavourable service agreement terms like high commissions, or complain about poor service like late payment of fees ...

The performer is unlikely to have the same knowledge or experience of contracts and negotiations as the agent or manager. The agent or manager may retain a lawyer who can be contacted when needed, whereas a performer may not be experienced in how to get legal advice. (4)

Publications like this are generated by regulators who have an outsider's perspective on the music industry. The self-regulation that an mandatory Code of Conduct would enable would help the IMMF to challenge artist manager stereotypes and to address the fact that artist managers are not only driven by economic forces, such as generating income to pay their rent, or working towards the chance that they will see a large financial return from their investment of time and energy; artist managers also derive enjoyment out of the 'flow' (Csikszentmihalyi, 1996: 110) of creativity in management.

Is the power imbalance evoked here generally true when it comes to artist-artist manager relations (or not)?

4.2 Performers are often reluctant to take legal action

Managers have a number of duties to the artists under the common law² and generic fair trading laws. Artists have the option of taking court action if these are breached. A manager has a duty to exercise due care, skill and diligence under the service contract and an agent at common law in many countries must:

- act honestly
- exercise due care, skill and diligence
- avoid conflicts of interest
- maintain confidentiality
- not profit secretly from the agency, and
- keep proper accounts.

Despite these protections, legal action through the courts may be too expensive, too risky and take too long when compared to the value of a claim. The legal costs may outweigh the amount a performer is likely to gain from taking action.³

Performers may also be reluctant to pursue complaints because of the influence of

² Common law is law made by judges and not made by Acts of Parliament. A person wishing to defend common law rights must take action themselves, usually by negotiating with the other party or taking court action.

³ New South Wales Government, Department of Premier and Cabinet Better Regulation Office (2009) Better Regulation Office and Office of Industrial Relations, Options Paper, Review of the Entertainment Industry Act 1989 (www.betterregulation.nsw.gov.au).

representatives in the industry. This might explain the low level of take up of lower cost legal options that are available to artists in different countries.⁴

It is not clear whether the main factor deterring performers from using these lower cost legal options is poor knowledge, or fear or retribution because of the influence of representatives in the industry. In any case, the particular characteristics of the industry indicate a need to actively regulate to prevent unscrupulous behaviour rather than having performers rely on the legal system to seek redress.⁵

4.3 A representative who acts for an artist in relation to all five key income stream groups⁶ may have a conflict of interest.

For example, a manager who also acts as a booking agent over the one deal has a conflict of interest. As an agent or manager, he or she must work to get the best terms for the artist from the venue. As a booking agent, he or she must get the venue the best terms from the artist. This conflict means that there is a risk that he or she will not act in the best interests of the artist, the venue, or both.⁷ Similar conflicts of interest emerge when the artist manager is also the record label and/or song publisher.

As the agent or manager may receive a commission from both parties, there is also an incentive for them to find work for the performer at a venue that will also pay a booking commission. This may be disadvantageous for the performer if it results in better paid work being passed up by the agent/manager. At the same time, however, there may be advantages in the same person undertaking the two functions. A performer may be more likely to be given work at a venue that their agent or manager also represents as a booking agent.

It is recognised that many agents and managers also act as venue bookers to

⁴ For example, in the state of NSW in Australia artists can make a complaint to the Office of Industrial Relations, and they can take action through the Consumer, Trader and Tenancy Tribunal (CTTT). The CTTT is available to all consumers, including artists, under the *Consumer Claims Act 1998* to take action over small claims that would not be worth pursuing through the courts. If a representative has not paid a performer, the CTTT may order the representative to pay the money owing. Application fees for taking a matter to the CTTT range from \$34 to \$183 and no legal representative is required.

⁵ The NSW Government discussion paper to which this section is referring is available on the Better Regulation Office website (www.betterregulation.nsw.gov.au).

⁶ From the perspective of the actual artist and their management, the sale of recordings in different formats only generates one in five potential income streams. Artist managers conceptualize the business holistically in terms of income that can be generated from live performances, merchandise sales, song publishing, sponsorship deals, as well as record sales.

⁷ The NSW Government discussion paper that this example is taken from is available on the Better Regulation Office website (www.betterregulation.nsw.gov.au).

make their business viable. Restricting this practice would potentially remove the conflict of interest but it would also effect the business of these representatives. We are seeking more information from stakeholders to better understand the nature and seriousness of these risks, so as to develop a Code of Conduct that is appropriately targeted.

Is the above (4.1, 4.2, 4.3) an accurate description of the main risks for artists in their commercial relationships with managers? Are there any other major sources of disadvantage for artists or artist managers in the music industry? Please provide details and examples.

5. Establishing a Mandatory Code of Conduct

Requiring that representatives comply with performance standards would discourage poor service. Currently, there is no mandatory Code of Conduct for artist managers. Without clear standards, there is no way for various regulators to assess claims of misconduct.

The IMMF can refuse membership on character grounds for repeated dishonest behaviour. In this way a code of conduct would provide a way to penalise repeated dishonest behaviour by an industry representative.

It is therefore proposed to introduce a Code of Conduct and penalties for misconduct.

The statutes of the IMMF state that member organizations must have a Code of Conduct to which members have to adhere (one that is congruent with that promulgated by the IMMF) and that mechanisms for the removal of members who do not adhere to that code must be in place. Therefore the discussion here concerns the realization of this section of the IMMF statutes that already exists.

The code would not include minimum competency requirements, such as a duty to exercise due skill, care and diligence, since it would be difficult to determine what acceptable conduct is. Rather, it would broadly set out the characteristics of fair and ethical conduct in the context of the artist/representative commercial relationship. Representatives would not have to formally sign up to the code, but would be agreeing to abide by it simply by operating as a representative who is a member of an IMMF branch.

The code would need to be developed in close consultation with industry. An industry working group is therefore needed to assist the IMMF in drafting the code.

Do you support the introduction of a mandatory Code of Conduct? If so, what should be included?

6. Provide for Effective Dispute Resolution and Enforcement

Providing a speedy, effective and cheap dispute resolution body as an alternative to court action makes it easier for artists to take action when they believe a representative has breached the Code.

A Complaints Committee could be established by each of the IMMF branches. These committees could effectively hear and resolve complaints.

It is proposed to amend the IMMF statutes to enable different IMMF branches to deal with complaints.

Do you agree with the above proposals?

7. Measures to Target Conflicts of Interest

Currently, the Aspirational Code of Conduct provides that Music Managers must aspire, at all times and to the best of their ability to:

- Conduct all of their affairs with their clients in a transparent manner;
- Protect and promote the interest of their clients to the highest possible standard;
- Ensure that no conflict of interest shall infect the discharge of their duties towards their clients.
- Where a manager acts as publisher, agent, record producer or in any other capacity as well as a manager for his, her, or their clients, they shall declare such interests so that the artist has the ability to determine for themselves if they feel it constitutes a conflict of interest.
- Where a manager acts in any other capacity as well as manager for his, her or their clients where such activity ordinarily involves the charging of fees or commissions, the manager shall not charge multiple fees or commissions, instead charging either the agreed management commission alone or the fee or commission usually charged for that other activity and forgoing their management commission. Where the manager elects to charge a fee or commission other than the management commission they shall first gain the consent of their artist.
- Managers must ensure that all monetary transactions made on behalf of or in the interest of the client and all books of account and records must always be reasonably open for the inspection of the artist or their appointed representative.

The current Aspirational Code of Conduct addresses conflicts of interest in the aforementioned ways. Stakeholders have reported that ‘double-dipping’ is a problem in the industry. They also claim that it is common industry practice for the employer to pay representatives a global amount when conflicts of interest emerge across revenue streams. Such a practice gives artist managers the opportunity to easily take two commissions.

On the other hand, it may be reasonable for an artist manager to be able to charge two parties, as long as an artist knows if their agent/manager is also acting on behalf of two or more different parties that manifest conflicting interests. The artist could weigh up the risks of being overcharged with the benefits of having a representative in a good position to find them work.

Some representatives have suggested that the viability of their business depends on being able to also work as a venue booker etc and that this should not be prohibited or unduly restricted.

Would disclosure reduce risks for artists arising from a person acting on behalf of both the performer and the venue (for example)?

Is the practice of an artist manager acting in any other capacity as well as manager on behalf of their client damaging to artists, or does it sometimes benefit the client?

What are the impacts on artist managers, artists and other third parties of restricting the ability of a person to work in multiple capacities?

8. Compliance Measures

The regulatory framework needs to include mechanisms to encourage representatives to do the right thing and adhere to the Code. There are many ways to do this, ranging from information campaigns, auditing and inspection powers, to strict sanctions such as fines and prohibition orders.

Is rescinding IMMF membership for wrong doing the only compliance measure that is needed?

Are there any other compliance measures that can be put in place?

9. Sub-Clauses

The different elements of the code could have sub-clauses – i.e. “if artist managers don’t adhere to this then they could adhere to this or this (as long as they are to arrive at the same end).” This could satisfy different people’s perspectives on the Code and address differing contextual requirements.

Do you agree that sub-clauses could be used in order to enable the code to work in different countries?

Bibliography

- Csikszentmihalyi, M (1996) *Creativity: Flow and The Psychology of Discovery and Invention*, New York: Harper Collins.
- Morrow, G (2006) *Managerial Creativity: A Study of Artist Management Practices in the Australian Music Industry*. Dissertation. Macquarie University, Sydney.
- New South Wales Government, Department of Premier and Cabinet
Better Regulation Office (2009) Better Regulation Office and Office of Industrial Relations, Options Paper, Review of the Entertainment Industry Act 1989 (www.betterregulation.nsw.gov.au).
- Rogan, J (1988) *Starmakers and Svengalis*, London and Sydney: Futura.
- Terrell, P (2005) 'Decentralization and Growth in the U.S. Music Industry, An Emerging Paradigm: A Longitudinal Comparative Analysis.' *MEIEA Journal* Vol 5 No 1, 33-57.

Information and Consent Form

Name of Project: The changing role of artist managers in a post-monopolised and decentralised music industry.

You are invited to participate in a study of Artist Management Practices in the International Popular Music Industry. Due to the declining sales of recorded music in the CD format⁸, record companies are fulfilling less prominent roles in the music business, while the influence of artist managers and their firms is increasing. This is because artist managers deal with all five income stream groups that stem from their clients' work: records, live performance, merchandise, song publishing and sponsorship (Morrow, 2006). The hypothesis guiding this project is the idea that conflicts of interest will become more common as artist managers rise up the value chain that exists in the music business. The propositions that will initially be put forward to explain the hypothesis are as follows:

⁸ According to IFPI data, world sales of recorded music fell 7.6% in value in 2003 and this fourth consecutive year of falling record sales is attributed to the combined effects of digital and physical piracy and competition from other entertainment products (2004). It is in this industrial context that in 2004 Sony Music merged with BMG in order to generate \$400m in cost savings (International Federation of Phonographic Industries www.ifpi.org).

1/ Artist managers will increasingly assume the role of the record company while also controlling their client's live performance income, income from merchandise, income from song publishing and income from sponsorship agreements.

2/ While artist managers will increasingly find themselves within a web of potential conflicts of interest, because record companies are moving to participate in income from all five income stream groups because of the decline in record sales, they too may face numerous conflicts of interest.

3/ The role of artist management will increasingly move from service provision to a situation where the role necessitates owning and controlling the equity in the artistic products/assets.

The study is being conducted by:

Dr Guy Morrow: Lecturer with the Department of Media, Music and Cultural Studies
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1. This research is being conducted to meet the requirements for a new staff grant that was awarded to Dr Guy Morrow.

If you decide to participate, you will be asked to dedicate approximately one hour of your time in order to discuss the ways in which you conceptualise your management of artists in the International popular music industry. Recordings of interviews will be transcribed and used in the written publications that will be produced by this project.

Any information or personal details gathered in the course of the study are confidential. No individual will be identified in any publication of the results. Dr Guy Morrow, Jason Free and Dr Catherine Moore will be the only people to have access to the data.

If you decide to participate, you are free to withdraw from further participation in the research at any time without having to give a reason and without consequence.

Each participant will receive a copy of the written research report in the mail upon completion.

I, _____ have read _____ and understand the information above and any questions I have asked have been answered to my satisfaction. I agree to participate in this research, knowing that I can withdraw from further participation in the research at any time without consequence. I have been given a copy of this form to keep.

Participant's Name:
(block letters)

Participant's Signature: _____ Date:

Investigator's Name:
(block letters)

Investigator's Signature: _____ Date:

The ethical aspects of this study have been approved by the Macquarie University Ethics Review Committee (Human Research). If you have any complaints or reservations about any ethical aspect of your participation in this research, you may contact the Ethics Review Committee through its Secretary (telephone 612 9850 7854; email ethics@mq.edu.au). Any complaint you make will be treated in confidence and investigated, and you will be informed of the outcome.