



SAMUEL MOSENKIS  
Vice President of Legal Affairs

April 28, 2010

Laura Conroy  
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Marketing Director  
232 NE Lincoln St Ste J  
Hillsboro, OR 97124-3048

VIA EMAIL (manager@hillsboromarkets.org)

Dear Ms. Conroy:

I am responding to your most recent e-mail regarding an ASCAP license for public performances made at the Hillsboro Farmers' Market and Hillsboro Tuesday Marketplace. Specifically, you request a legal basis for ASCAP's licensing in order to clarify conflicting information that has been posted to various farmers' market listservs regarding ASCAP and its licensing of users of music such as the Hillsboro Markets. The basis for ASCAP's licensing public performances is summarized below.

The current U.S. copyright law, codified in 1976 as Title 17 of the U.S. Code (the "Act"), sets out a number of separate rights afforded to copyright owners, including, as is relevant here, the right "to perform the copyrighted work publicly" 17 U.S.C §106(4). An analysis of whether particular performances of copyrighted musical works are within the scope of the public performance right granted by Section 106(4) of the Act must begin with the language of the statute itself. Congress specifically defined each of the terms "perform" and "publicly" in Section 101 of the Act as follows:

To "perform" a work means to recite, render, play, dance or act it...."

To perform ... a work "publicly" means –

(1) to perform ... it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or

(2) to transmit or otherwise communicate a performance . . . of the work to a place specified by clause (1) or to the public, by means of any device or process....

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By virtue of these clear definitions in the Act, the playing of copyrighted music at a place open to the public - such as a farmers' market - would require permission from the copyright owner, unless specifically exempted by the Act as discussed below. Liability attaches whether such performances are made by live performers, mechanically through CDs/MP3s, or via transmission, such as through radio or television broadcasts.

Since the seminal Supreme Court case regarding the performances of music occurring in a restaurant, Herbert v. Shanley Co., 242 U.S. 591 (1917), courts have routinely applied this law to myriad types of users employing live or mechanical music including, for example, bars, restaurants, cabarets, private clubs, skating rinks, retail stores, radio broadcasters, and markets. *See, e.g.* Chappel & Co. v. Middletown Farmers Market & Auction Co., 334 F.2d 303 (1964).

Moreover, in the case of live performances, liability attaches regardless of whether the musicians are paid to perform, Cass County Music Co. v. Vineyard Country Golf Corp., 605 F.Supp. 1536 (D. Mass. 1985), or are instructed specifically to not play copyrighted music. Chess Music, Inc. v. Sipe, 442 F.Supp. 1184 (D. Minn. 1977).

Finally, the fact that the user may be organized as a not-for-profit entity is irrelevant; the Act does not make such differentiations. Many not-for-profit entities are engaged in activities which include performances of copyrighted music -- private and state universities, cities and other governmental bodies, festival organizers, promoters of serious music concerts and dance schools, to name just a few. According to the drafters of Section 106(4), the right of public performance "is not limited by any 'for profit' requirement. The approach of the bill ... is first to state the public performance right in broad terms, and then to provide specific exemptions for educational and other nonprofit uses." H. Rep. No. 94-1476, 94th Cong., 2nd Sess. 62 (1976); reprinted in 1976 U.S. Code Cong. & Admin. News, 5676. The House Judiciary Committee explained the rationale for the broadened right of public performance:

The line between commercial and "nonprofit" organizations is increasingly difficult to draw. Many "nonprofit" organizations are highly subsidized and capable of paying royalties, and the widespread public exploitation of copyrighted works by public broadcasters and other noncommercial organizations is likely to grow. In addition to these trends, it is worth noting that performances and displays are continuing to supplant markets for printed copies and that in the future a broad "not for profit" exemption could not only hurt authors but could dry up their incentive to write.

Id. at 62-63.

Accordingly, there is no general exemption from liability under the law for not-for-profit entities.

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If specific performances of copyrighted music are to be exempt from copyright liability, they must fall within the parameters of the specific limited statutory exemptions set forth in Section 110 of the Act. None of those specific exemptions apply to general farmers' markets. The only relevant exemption is found in Section 110(4), the limited "catch-all" exemption that applies to purely noncommercial performances. However, the obviously commercial nature of ordinary farmers' *markets* such as Hillsboro's would negate the application of that exemption.

The musical performances at the Hillsboro Farmers' Market and Hillsboro Tuesday Marketplace - both live and mechanical - are therefore clearly "public performances" under the Act. And as discussed, no exemption under Section 110 would apply. Accordingly, a public performance license is required to avoid liability for copyright infringement under the Act. A user may negotiate such license directly with the copyright owner. However, considering the difficulties and inefficiencies of negotiating separately, in advance, with countless copyright owners, users routinely enter into license agreements with ASCAP to cover all the millions of works in ASCAP's repertory. ASCAP, as a result, has developed dozens of various licenses that are specifically tailored to meet the needs of different types of uses and venues. The retail license offered to the Hillsboro markets is one such license. The cabaret license to which you referred is another form of license offered to cabarets and bars. ASCAP, however, does not offer a general "nonprofit" license, but rather offers special rates under certain licenses for specific noncommercial uses. The retail license does not have such a noncommercial option.

Please let me know if you have any further questions. Otherwise, please contact Mr. Russ McGuire to finalize the license.

Sincerely,

A handwritten signature in black ink, appearing to read "Sam Mosenkis". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Sam Mosenkis

cc: Russ McGuire