Music Performance Agreement

# Facilities
## - 10,000 and more seats -

**39M**

**LI-11/17-39M**

### 1. DEFINITIONS

(a) **Facility** shall include, but not be limited to, a concert hall, stadium, auditorium, civic center, coliseum, theatre, amphitheater, museum, library, stage, restaurants/nightclubs or similar venues whether enclosed or not, where an Attraction may be presented, located within the United States of America, its territories and possessions.

(b) **Attractions** shall mean concerts, variety shows (excluding circuses), pageants and other similar spectator events (including events sponsored by charitable organizations or for charitable purposes) that include music, whether or not music is the principal type of entertainment.

(c) **Seating Capacity** shall mean the total number of seats permanently affixed in the Facility where the Attraction is presented plus any temporary seats added within the Facility for a particular Attraction. If the total number of seats available for the Attraction shall be less than that of the permanent Seating Capacity of the Facility, "Seating Capacity" shall mean the total number of seats available for the particular Attraction. If a Facility does not have permanent seating, "Seating Capacity" shall mean the total number of persons attending a particular Attraction. If a Facility has lawn seating, then "Seating Capacity" shall mean the total number of seats permanently affixed in the Facility, in addition to total lawn Seating Capacity as determined by the local Fire Marshall.

(d) **Gross Ticket Revenues** shall mean the total monies received, directly or indirectly, by LICENSEE or their authorized representatives from all ticket sales per Attraction. The term "Gross Ticket Revenues" shall not include: 1) federal, state and/or local taxes; 2) building/facility charge per ticket sold; 3) ticketing agent/service charge placed on each ticket sold; or 4) facility parking fees. Should the artist/performing act(s) choose to donate a portion of their fees from each ticket sale to a particular charity, then the appropriate deduction may be taken from the "Gross Ticket Revenues"; provided however, that BMI be given copies of said artist/performing act(s) agreement(s) stipulating such with the exact amount of the charitable donation per ticket sold.

(e) **Benefit Concert** shall mean a public entertainment performance or social event held to raise funds for a specific person or cause in which all proceeds less direct expenses are donated to charity.

### 2. BMI GRANT

(a) BMI hereby grants to LICENSEE, for the Term of this Agreement, a non-exclusive license solely to perform, present or cause the performance of, as part of Attractions in Facilities, **including recorded music** performed in conjunction with Attractions before, after or during the intermissions thereof, all the musical works as to which BMI shall have the right to grant public performance licenses during the Term hereof. Such license shall be restricted to performance of music in the manner described herein, and is granted in consideration of payment of the license fees as set forth herein and is subject to all of the terms and conditions hereof. This license does not include: (i) dramatic rights, the right to perform dramatico-musical works in whole or in substantial part, the right to present individual works in a dramatic setting or the right to use the music licensed hereunder in any context which may constitute an exercise of the "grand rights" therein; or (ii) the right to simultaneously broadcast, telecast, cablecast, or otherwise transmit (including by the Internet or on-line service) the performances licensed hereunder to persons outside of the Facility in which they originate; (iii) performances of music by means of a coin-operated phonorecord player (jukebox).

(b) BMI reserves the right at its discretion to withdraw from the license granted hereunder any musical work as to which any legal action has been instituted or a claim made that BMI does not have the right to license the performing rights in such work or that such work infringes another composition.

### 3. REVIEW OF STATEMENTS/ACCOUNTINGS

(a) BMI shall have the right to verify such data or information that is required to be furnished by LICENSEE pursuant to Paragraph 11(a) and (b), by reference to a reliable, published, third-party industry source (such as Pollstar) and by BMI's authorized representatives, at any time during customary business hours, and upon thirty (30) days advance written notice, examining those portions of LICENSEE's books and records of account to such extent as may be necessary to verify any and all statements and/or accountings made hereunder. BMI shall consider all data and information coming to its attention as the result of any such examination of LICENSEE's books and records confidential.

(b) In the event BMI discovers an inaccuracy in any information reported by LICENSEE pursuant to Paragraph 11(b), either through an examination of LICENSEE, or otherwise, and as a result it is revealed that LICENSEE underpaid license fees to BMI, and the correct license fee is not paid to BMI within thirty (30) days of BMI's notice to LICENSEE of the inaccuracy or underpayment, then LICENSEE shall pay a late payment charge on the additional license fees due as a result of the examination(s) of one and one-half percent (1 ½%) per month, or the maximum rate permitted by law, whichever is less, from the date(s) the license fees should have been paid pursuant to this Agreement.

### 4. LATE PAYMENT CHARGE

BMI may impose a late payment charge of one and one-half percent (1 ½%) per month from the date any payment is due hereunder on any payment that is received by BMI more than one month after the due date.

## 5. INDEMNITY BY BMI

BMI agrees to indemnify, save harmless and defend LICENSEE, its officers and employees, from and against any and all claims, demands or suits that may be made or brought against them or any of them with respect to the performance of any material licensed under this Agreement. This indemnity shall be limited to works which are licensed by BMI at the time of LICENSEE's performances. BMI will, upon reasonable written request, advise LICENSEE whether particular musical works are available for performance as part of BMI's repertoire. LICENSEE shall provide the title and the writer/composer of each musical composition requested to be identified. LICENSEE agrees to give BMI immediate notice of any such claim, demand or suit, to deliver to BMI any papers pertaining thereto, and to cooperate with BMI with respect thereto, and BMI shall have full charge of the defense of any such claim, demand or suit.

## 6. TERMINATIONS OF AGREEMENT BY LICENSEE

If LICENSEE permanently ceases to present Attractions, this Agreement and LICENSEE's obligation to BMI shall thereupon terminate, provided, that LICENSEE shall, within ten (10) days thereafter, give written notice of such termination to BMI, setting forth the effective date thereof and that LICENSEE shall submit all reports and pay to BMI all fees due hereunder until said effective date.

## 7. BREACH OR DEFAULT/WAIVER

Upon any breach or default of the terms and conditions of this Agreement, BMI has the right to cancel this Agreement, but any such cancellation shall only become effective if such breach or default continues thirty (30) days after the date of BMI's written notice to LICENSEE. The right to cancel shall be in addition to any and all other remedies which BMI may have. No waiver by BMI of full performance of this Agreement by LICENSEE in any one or more instances will be a waiver of the right to require full and complete performance of this Agreement thereafter or of the right to cancel this Agreement in accordance with the terms of this Paragraph.

## 8. OFFER OF COMPARABLE AGREEMENT

In the event that BMI, at any time during the Term hereof, shall, for the same class and category as that of LICENSEE, issue licenses granting rights similar to those in this Agreement on a more favorable basis, BMI shall, for the balance of the Term, offer LICENSEE a comparable agreement.

## 9. ARBITRATION

All disputes of any kind, nature or description arising in connection with the terms and conditions of this Agreement, not subject to the jurisdiction of the BMI Rate Court, shall be submitted to the American Arbitration Association in the City, County and State of New York, for arbitration under its then prevailing arbitration rules. The arbitrator(s) are to be selected as follows: Each of the parties shall, by written notice to the other, have the right to appoint one arbitrator. If, within ten (10) days following the giving of such notice by one party the other shall not, by written notice, appoint another arbitrator, the first arbitrator shall be the sole arbitrator. If two arbitrators are so appointed, they shall appoint a third arbitrator. If ten (10) days elapse after the appointment of the second arbitrator and the two arbitrators are unable to agree upon a third arbitrator, then either party may, in writing, request the American Arbitration Association to appoint the third arbitrator. The award made in the arbitration shall be binding and conclusive on the parties and judgment may be, but need not be, entered in any court having jurisdiction. Such award shall include the fixing of the costs, expenses and attorneys' fees of arbitration, which shall be borne by the unsuccessful party.

## 10. FEES

(a) LICENSEE agrees to pay BMI a fee for each performance of an Attraction that the LICENSEE promotes, except where another person, entity or venue is responsible for paying the license fee for that performance, computed on the basis set forth in Schedule A (or in the case of a Benefit Concert or no charge Attraction, Schedule B) of this Agreement.

(b) The minimum annual fee billed and payable shall be $150.00 per year.

(c) When an Attraction is believed to be comprised entirely of musical compositions for which BMI shall not have the right to grant public performance licenses, LICENSEE may, at its option, submit a schedule, including writer and publisher information, for all those musical compositions performed at said Attraction, *including opening acts and recorded music, if any*, and in those instances in the opinion of BMI, where all of the musical compositions performed at said Attraction are ones to which BMI does not have the right to grant public performance licenses, no fee shall be due and payable to BMI. In the event no schedule is submitted to BMI, LICENSEE must pay the applicable fee for said Attraction pursuant to Schedule A (or in the case of a Benefit Concert or no charge Attraction, Schedule B) of this Agreement.

## 11. REPORTING OF ATTRACTIONS/PAYMENT

(a) LICENSEE shall submit reports and payments quarterly. LICENSEE shall submit the reports setting forth the Attractions which actually were presented during each period. For all quarterly periods, reports and payments shall be due on the twentieth ($20^{th}$) day of January, April, July and October of each year of this Agreement for all Attractions presented by LICENSEE during the prior calendar quarter. Should LICENSEE fail to report and submit payments to BMI within thirty (30) days after the specified date, then BMI will apply estimated billings to the account based on the prior quarter's figures for such LICENSEE. Any differences between the estimated and the actual reported fee shall be payable by LICENSEE when the report is submitted. If BMI's estimated fee is greater than the actual reported fee, then LICENSEE's account shall be credited with the difference.

(b) As required in this Paragraph, LICENSEE shall furnish to BMI, when it makes payment of license fees pursuant to this Agreement, a statement, on forms available from BMI, signed by an officer or auditor of LICENSEE, setting forth all performances of ***all*** Attractions occurring during the applicable calendar quarter reporting period in LICENSEE's Facility. Such statement shall include the name of each Attraction, the Seating Capacity for each Attraction, the dates of each Attraction, the number of performances each day and the Gross Ticket Revenues (as defined in Paragraph 1(d)) for a regularly scheduled performance of each Attraction. LICENSEE's statement shall also include performances of Attractions where another person, entity or venue is responsible for paying the license fee. A statement shall be furnished to BMI by LICENSEE for each reporting period during the Term of the Agreement, regardless of whether or not any performances occurred during that period.

(c) In the event that LICENSEE engages in the presentation of an Attraction in conjunction with, or sells or otherwise transfers the promotional responsibility of an Attraction to, other persons or entities licensed separately by BMI under its Musical Attractions or Facility Music Performance Agreements, LICENSEE shall indicate on the statement required by Sub-paragraph 5(b) hereof the names of all other persons, entities or venues promoting or co-promoting, or otherwise responsible for, each Attraction and who is responsible for payment of the BMI license fee for such Attraction. Transferring liability for promoted Attractions to anyone **but** a licensed promoter or co-promoter of the Musical Attractions is not permitted. If the responsible promoter, co-promoter or person, entity, or venue is not licensed by BMI under its Musical Attractions or Facility Music Performance Agreements, LICENSEE shall be deemed liable for payment of the fees due for such Attraction. In the event BMI receives a fee for an Attraction from both LICENSEE and one or more of its co-promoters or other promoter, or person, entity or venue, the total of which exceeds the amount due, BMI shall refund or credit the excess proportionally among all promoters, co-promoters, persons, entities, or venues who made payment.

(d) LICENSEE shall deliver to BMI for each calendar quarter, by the twentieth (20th) day following the end of the calendar quarter, copies of any programs or lists of the musical works presented by LICENSEE in its Musical Attractions during such quarter. Programs prepared for audiences or for the LICENSEE's own use are to be included, and shall include the presentation of encores to the extent possible. Nothing contained herein shall be deemed to require LICENSEE to deliver material not otherwise prepared.

| **SCHEDULE A.** LICENSEE FEE SCHEDULE | |
|---|---|
| **SEATING CAPACITY** | **FEE BASIS PERCENTAGE APPLIED TO GROSS TICKET REVENUES PER ATTRACTION** |
| 10,000 AND MORE SEATS | 0.15% |

| **SCHEDULE B.** LICENSEE FEE SCHEDULE | | | |
|---|---|---|---|
| **SEATING CAPACITY** | | | **FEE PER BENEFIT CONCERT OR ATTRACTIONS WITH NO CHARGES** |
| 0 | to | 250 | $15.00 |
| 251 | to | 750 | $18.00 |
| 751 | to | 1,500 | $28.00 |
| 1,501 | to | 2,500 | $45.00 |
| 2,501 | to | 5,000 | $67.00 |
| 5,001 | to | 7,500 | $90.00 |
| 7,501 | to | 10,000 | $125.00 |
| 10,001 | to | 15,000 | $190.00 |
| 15,001 | to | 20,000 | $260.00 |
| 20,001 | to | 25,000 | $315.00 |
| 25,001 | to | 40,000 | $345.00 |
| 40,001 | to | over | $480.00 |

## 12. NOTICES

Any notice under this Agreement will be in writing and deemed given upon mailing, when sent by ordinary first-class U.S. mail to the party intended, at its mailing address stated, or any other address which either party may designate. Any such notice sent to BMI shall be to the attention of the Vice President, Licensing Department at 10 Music Square East, Nashville, TN 37203. Any notice sent to LICENSEE shall be to the attention of the person signing this Agreement on behalf of LICENSEE or such other person as LICENSEE may advise BMI in writing.

## 13. MISCELLANEOUS

(a) This Agreement shall not be prejudicial to any position taken by either of the parties as to what is a reasonable license fee or as to the form of license for any subsequent licensing period.

(b) This Agreement is the entire understanding between the parties, will not be binding until signed by both parties, and cannot be waived or added to or modified orally, and no waiver, addition or modification will be valid unless in writing and signed by the parties. This Agreement is executed by the duly authorized representative of BMI and LICENSEE. The rights of LICENSEE are not assignable. This Agreement, its validity, construction and effect, will be governed by the substantive laws of the State of New York. The fact that any provisions are found by a court of competent jurisdiction to be void or unenforceable will not affect the validity or enforceability of any other provisions. All headings on this Agreement are for the purpose of convenience and shall not be considered to be part of this Agreement.

## 14. TERM OF AGREEMENT

The initial Term of this Agreement shall begin on _____ and end on December 31, _____ ("Term") and shall continue thereafter for additional periods of one (1) year each, unless canceled by either party at the end of the Term or any subsequent one-year period, upon not less than sixty (60) days advance written notice by regular U.S. mail to the other party. Each one (1) year period is a "contract year." BMI shall have the right to cancel this Agreement along with the simultaneous cancellation of all other licensees of the same class and category as LICENSEE, as of the end of any month during the Term, upon sixty (60) days advance written notice.

## AGREEMENT

THIS AGREEMENT made and entered into on *(Date will be entered by BMI upon execution)* _____ between BROADCAST MUSIC, INC., a corporation with principal offices at 7 World Trade Center, 250 Greenwich Street, New York, N.Y. 10007-0030, hereinafter referred to as BMI, and the entity described below and hereinafter referred to as LICENSEE.

**PLEASE RETURN THIS ENTIRE SIGNED LICENSE AGREEMENT TO:**
**BMI, 10 MUSIC SQUARE EAST, NASHVILLE, TN 37203**

**ENTER LEGAL NAME:**

_____
(Name of Corporation, Partnership, or Individual Owner)

**ENTER TRADE NAME:**

_____
(Doing business under the name of)

**CHECK APPROPRIATE BOX AND COMPLETE**

☐ Individual Ownership

☐ LLC ☐ Corporation _____
(State of Incorporation, if different from Licensed Premises)

☐ LLP ☐ Partnership _____
(Enter names of partners)

☐ Other _____

Fed. Tax ID # _____

**LICENSED PREMISES**

*(Street Address)*

*(City)* *(State)* *(Zip)*

*(Telephone Number)* *(Fax Number)*

*(Contact Name)* *(Title)*

*(Email Address)* *(Web Address)*

**MAILING ADDRESS**
(if different from Licensed Premises)

*(Street Address)*

*(City)* *(State)* *(Zip)*

*(Telephone Number)* *(Fax Number)*

*(Contact Name)* *(Title)*

*(Email Address)*

**TO BE COMPLETED BY LICENSEE**
**By signing this Agreement you agree that the foregoing is a true and accurate representation of your Music Policy.**

I have read and have understood all of the terms and conditions herein and my signature below is evidence of this.
***(SIGN HERE – PLEASE INCLUDE PAYMENT)***

_____
Signature

_____
Print Name / Title

**FOR ADMINISTRATIVE USE ONLY**
**TO BE COMPLETED BY BMI**
BROADCAST MUSIC, INC.

| FOR BMI USE ONLY | | |
|---|---|---|
| | | |
| **Account No.** | **COID** | |