Music Performance Agreement

# Shopping Center

Account # _____ 43

**LI-2017/SEPT-43**

AGREEMENT, made at New York, N.Y. on *(Date Will Be Entered by BMI Upon Execution)* _____ , between BROADCAST MUSIC, INC., a corporation organized under the laws of the State of Delaware (hereinafter called BMI) with principal offices at 7 World Trade Center, 250 Greenwich Street, New York, N.Y. 10007-0030, and

**ENTER LEGAL NAME** _____
*Name of Corporation, Partnership or Individual Owner*

**ENTER TRADE NAME** _____
*(Doing business under the name of)*

**CHECK APPROPRIATE BOX AND COMPLETE**

☐ **Corporation** _____ (State of Incorporation)

☐ **Partnership** (Enter names of partners) _____ _____ _____

☐ **Individual Owner** (indicate residence address below under Mailing Address)

| **PREMISES ADDRESS** | **MAILING ADDRESS** |
|---|---|
| | |
| *Street Name* | *Street Name* |
| *City* *State* *Zip* | *City* *State* *Zip* |
| *Telephone No.* *Contact Name* | *Telephone No.* *Contact Name* |
| *Title* | *Title* |

## GENERAL PROVISIONS

1. BMI hereby grants to LICENSEE a non-exclusive license to perform, present or cause on the licensed premises, or as otherwise set forth hereinafter, the performance of all musical works of which BMI shall have the right to grant public performance licenses during the term hereof. Said license shall be restricted to performance of music in the manner described herein and is granted in consideration of the 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:

   (a) 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 other context which may constitute an exercise of the "grand rights" therein; or

   (b) the right to broadcast, telecast, cablecast or otherwise transmit the performances licensed hereunder to persons outside of the licensed premises.

   (c) This license does not authorize performances of music by means of a coin-operated phonorecord player (jukebox).

2. 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. Such indemnity shall be limited to works which are licensed by BMI at the time of LICENSEE's performances. BMI's Clearance Department 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.

3. If, during the term hereof, LICENSEE shall permanently cease to operate the premises, whether by reason of sale or lease thereof, or otherwise, this Agreement and LICENSEE's obligation to BMI shall thereupon terminate; provided, however, that LICENSEE shall, within ten (10) days thereafter, give written notice of such termination to BMI, setting forth the effective date thereof and the name of the new owner or operator of the premises, as the case may be, and that LICENSEE shall submit all reports and pay to BMI all fees due hereunder until said effective date.

4. 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.

5. (a) BMI shall have the right to require such data or information as may be necessary in order to ascertain the license fee hereunder.

   (b) BMI shall have the right by its authorized representatives, at any time during customary business hours and upon thirty (30) days advance written notice, to examine the books and records of account of LICENSEE to such extent as may be necessary to

verify any and all statements rendered and accountings made hereunder. BMI shall consider all data and information coming to its attention as the result of any such examination of books and records as confidential. If any audit conducted reveals a deficiency of twenty-five percent (25%) or more between the amount of fees previously reported as being due by LICENSEE and the amount actually found to be due BMI for the audited period, LICENSEE shall pay, in addition to the sum additionally due, a surcharge of fifteen percent (15%) of the total amount remaining due BMI. If LICENSEE does not pay said surcharge and deficiency within thirty (30) days of written notice by BMI, an interest charge of one percent (1%) per month may be imposed by BMI on said surcharge and deficiency from the date of such written notification.

6. Upon any breach or default of the terms and conditions of this Agreement, BMI shall have the right to cancel this Agreement, but any such cancellation shall only become effective if such breach or default continues thirty (30) days after LICENSEE's receipt of written notice thereof. 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 shall be a waiver of the right to require full and complete performance of this Agreement thereafter of the right to cancel this Agreement in accordance with the terms of this Paragraph.
7. Any notice required or permitted to be given under this Agreement shall be in writing and shall be deemed duly given when sent by ordinary first-class U.S. mail to the party for whom it is intended, at its address hereinabove stated, or any other address which either party hereto may from time to time designate for such purpose, and when such notice is so mailed, it shall be deemed given upon the mailing thereof. Any such notice sent to BMI shall be to the attention of the Licensing Department. Any such 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.
8. All disputes of any kind, nature or description arising in connection with the terms and conditions of this Agreement shall be submitted to arbitration in the City, County and State of New York, for arbitration under the then prevailing rules of the American Arbitration Association by an arbitrator or arbitrators to be selected as follows: Each of the parties hereto 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 the 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.
9. BMI may impose a late payment charge of one percent (1%) per month from the date payment was due on any payment that is received by BMI more than thirty (30) days after the due date.
10. In the event that the payment of any license fee to BMI by LICENSEE pursuant to this Agreement causes BMI to become liable to pay any tax (whether sales, use, gross receipts, business or otherwise) which is based upon the amount received by BMI from LICENSEE, then LICENSEE agrees to pay to BMI the full amount of such tax together with LICENSEE's fee payment(s) as billed by BMI.
11. 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.
12. This Agreement constitutes the entire understanding between the parties, shall not be binding until signed by both parties, and cannot be waived or added to or modified orally, and no waiver, addition or modification shall be valid unless in writing and signed by the parties. The rights of LICENSEE shall not be assignable. This Agreement, its validity, construction and effect, shall be governed by the laws of the State of New York. The fact that any provisions herein are found by a court of competent jurisdiction to be void or unenforceable shall not affect the validity or enforceability of any other provisions.

**SPECIAL PROVISIONS - SHOPPING CENTER**

13. The license granted to LICENSEE pursuant to Paragraph 1 hereof shall be limited to performances of music during the term of this Agreement in the common areas of LICENSEE's shopping center or mall, as long as there is no direct or indirect admission charge to any portion of such common areas where musical performances occur. Such performances may be by: (a) recorded music, via the playing of records, pre-recorded tapes, or other mechanical devices, or the reception of broadcast audio transmissions on receiving apparatus and amplifications thereof through loudspeakers located in the common areas, including audio-visual use ("Background Use") or; (b) musicians, singers or other entertainers actually present and performing in the common areas using live or recorded music ("Entertainment Use"). In no event shall this license extend to performances of any music within any store or other leased area in LICENSEE's shopping center or mall, other than incidentally.
14. The term of this Agreement shall begin on the first day of _____ and end on the last day of _____ and shall continue thereafter unless cancelled by either party as of the end of the initial term or any subsequent one (1) year term (herein sometimes referred to as a "contract year" upon thirty (30) days advance written notice to the other party. BMI shall have the right to cancel this Agreement along with the simultaneous cancellation of the Agreements 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.

15. (a) LICENSEE agrees to pay BMI for each contract year during this Agreement an estimated fee as an advance on account of the actual fee. Such estimated fee shall then be subject to adjustment in accordance with Paragraph 16 hereof, and the resulting actual fee shall be determined in the following manner: (i) for Background Use, LICENSEE shall pay the applicable annual fee on Schedule A for the Gross Leasable Area (as that term is understood in the real estate industry) of LICENSEE's shopping center, and (ii) for Entertainment Use, LICENSEE shall pay the applicable Per Day Rate indicated on Schedule B for LICENSEE's Gross Leasable Area times the number of such events which occurred during said year. "Gross Leasable Area" as used in the Agreement shall also include, but not be limited to, all anchor stores, kiosks and free standing units whether or not owned by LICENSEE at the licensed premises. In no event, however, shall LICENSEE for Entertainment Use (Schedule "B") pay less than $165 or more than $3,000 for any contract year during the term of this Agreement.

(b) For the first contract year of this Agreement, LICENSEE's estimated fee shall be the sum of the applicable fee for Background Use in accordance with Schedule A and the applicable fee for Entertainment Use in accordance with Schedule B (which Entertainment Use Fee shall not be less than $165 if any Entertainment Use occurs).

**Gross Leasable Area**

- LICENSEE warrants and represents that the Gross Leasable Area is…… **1** Sq. Ft.
  *[Gross Leasable Area of Shopping Center per Paragraph15 (a)]*

**Background Use** *(See Schedule A below)*

- LICENSEE's Background Use will include audio-visual (projection TV, televisions, monitors, video cassettes, etc.)…….. ☐ yes ☐ no
  *(Check Appropriate Box)*
- Based on Box 1 and audio-visual use checked above, LICENSEE's Class from Schedule A is…… **2** _____
  *(Class - Schedule A)*
- LICENSEE's Background Use Fee (from Schedule A) is…… **3** $ _____
  *(Background Use Fee)*

**Entertainment Use** *(See Schedule B below)*

- Based on Box 1, LICENSEE's Class from Schedule B is…… **4** _____
  *(Class - Schedule B)*
- The Per Day Rate for LICENSEE's Class from Schedule B is…… **5** _____
  *(Per Day Rate)*
- LICENSEE estimates that the number of days containing events using music for Entertainment Use during the first contract year is…….. **6** _____
  *(Number of Days of Entertainment Use)*
- LICENSEE's Entertainment Use Fee (Box 5 multiplied by Box 6, but not less than 165 or more than $3,000) is…… **7** $ _____
  *(Per Day Rate Multiplied by No. of Days of Entertainment Use)*

**Total Fee**

- Accordingly, for the first contract year, LICENSEE's total estimated license fee, payable in full upon the signing of this Agreement is…..……(Add Box 3 and Box 7) $ _____
  **TOTAL FEE**

**SCHEDULE A - BACKGROUND USE**

| Gross Leasable Area (Square Feet) | Class | Annual Fee without Audio-Visual | Class | Annual Fee with Audio-Visual |
|---|---|---|---|---|
| Less than 100,000 | 1A | $180 | 1B | $243 |
| 100,000 to 299,999 | 2A | $360 | 2B | $486 |
| 300,000 to 749,999 | 3A | $720 | 3B | $972 |
| 750,000 and Over | 4A | $960 | 4B | $1,296 |

**SCHEDULE B - ENTERTAINMENT USE**

| Gross Leasable Area (Square Feet) | Class | Per Day Rate |
|---|---|---|
| Less than 100,000 | 1C | $20 |
| 100,000 to 299,999 | 2C | $25 |
| 300,000 to 749,999 | 3C | $30 |
| 750,000 and Over | 4C | $35 |

**Annual Entertainment Use Fee: Minimum $165 – Maximum $3,000**

(c) The estimated fee for the second and subsequent contract years shall be the actual fee for the previous contract year and shall be due and payable in full no later than twenty (20) days following the start of each such contract year.

16. (a) At the same time that LICENSEE pays its estimated license fee hereunder for the second and subsequent contract years, LICENSEE shall submit a report, certified by an officer or by the auditor of LICENSEE, setting forth, for the previous contract year, the Gross Leasable Area of LICENSEE's shopping center and the number of days containing events which made Entertainment Use of Music and whether any Background Use of music utilized audio-visual performances.

    (b) If the actual fee is greater than the license fee already paid by LICENSEE for the contract year, LICENSEE agrees to pay BMI the difference within thirty (30) days of the mailing by BMI to LICENSEE of the adjusted statement of license fees.

    (c) If the actual fee is less than the license fee already paid by LICENSEE to BMI for the contract year, BMI agrees to credit the difference between the actual and estimated license fees to the account of LICENSEE, and if such adjustment occurs in the last contract year of this Agreement, BMI shall refund said sum promptly.

    (d) In the event that LICENSEE fails to timely submit to BMI the report required by Paragraph 16 (a) for any contract year, LICENSEE hereby appoints, authorizes and directs BMI, at BMI's option, to assess a reasonable estimated license fee for such contract year. BMI shall give written notice to LICENSEE of the license fee so calculated by BMI. LICENSEE shall have thirty (30) days after the mailing of such written notice by BMI to submit the required report. If BMI does not receive from LICENSEE the required report after such notice period has expired, BMI and LICENSEE agree that BMI's estimated fee shall then be established as the actual fee for the year unreported by LICENSEE. BMI and LICENSEE further agree that such established actual fee shall also become the basis for the estimated fee for the following contract year. LICENSEE agrees to waive its right to file its report for any contract year in which BMI's estimated fee becomes the actual fee.

17. If Paragraph 3 of this Agreement shall become applicable, the Background Use Fee due BMI by LICENSEE through the effective date of termination shall be a proration of the fee for the contract year of termination, but in no event less than $180. There shall be no proration of the Entertainment Use Fee.

IN WITNESS WHEREOF, this Agreement has been executed by the duly authorized representatives of BMI and LICENSEE all as of the date above written.

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** | |