



Friends and Neighbors of the Orange County Fairgrounds

Working for a Fairgrounds that is Focused on the Community

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VIA E-MAIL

Chair Sandra Cervantes and Vice-Chair Natalie Rubalcava-Garcia
32nd District Agricultural Association
88 Fair Drive
Costa Mesa, CA 92626
E-Mail: scervantes@ocfairboard.com and nrubalcava-garcia@ocfairboard.com

RE: *Potential Intellectual Property Issues in Virtual Fair Proposal*

Dear Chair Cervantes and Vice-Chair Rubalcava-Garcia:

In the materials for the May 28, 2020 meeting of the 32nd District Agricultural Association (“32nd DAA”) Board, there is discussion of a possible “Virtual Fair” to be offered on-line in lieu of the cancelled 2020 OC Fair. As an initial matter, I want to commend all those involved in attempting to be responsive and to embrace non-traditional ways to serve the public. Unfortunately, in the discussion of the virtual fair there are proposed items which may create legal liability issues for the 32nd DAA that may not be readily obvious or have been thoroughly evaluated. The three items in question are:

- Flashback Tribute Band Concerts;
- Grounds Entertainer Videos¹ and
- Flashback Action Sports Arena Events.

The Flashback Tribute Band Concerts and the Grounds Entertainer Videos clearly raise potential copyright issues. I am assuming that what is contemplated is the streaming of recorded performances from past fairs. Even though the 32nd DAA hired the performers for the original performances, a very quick review of a sampling of the contracts for these events indicates that they are silent as to any rights of the 32nd DAA to re-broadcast the performances. Additionally, the 32nd DAA has potential copyright liability to all of the copyright holders of the music performed.

Liability for copyright infringement is not, ordinarily, an issue with which the 32nd DAA would have to deal because 17 U.S.C. §110(6) grants an exemption for performance of a nondramatic musical work to an “agricultural or horticultural organization, in the course of an annual agricultural or horticultural fair or exhibition.” Unfortunately, whether the contemplated “Virtual Fair” would

¹ It is unclear from the single line description, whether “Grounds Entertainer Videos” refers to videos of past performances or videos of new performances created expressly for the virtual fair. The concern raised herein deals, primarily, with the former instance.

satisfy the legal requirements for “an annual agricultural or horticultural fair or exhibition” is highly uncertain. For example, the 32nd DAA Board has already publicly voted to cancel the OC Fair for 2020 and the “virtual fair” is publicly characterized as a “re-creation of some of the OC Fair’s most beloved annual activities,” i.e. it has been characterized as an alternative to, not a virtual version of, the annual fair.

The Flashback Action Sports Arena Events are also potentially implicated to the extent that they include incidental copyrighted music or other copyrighted material to which the 32nd DAA does not have the broadcast rights.

Potential damages for copyright infringement can be significant. For example, a court may award statutory damages ranging between \$750 and \$30,000 per work as the court considers just, and, if there is a determination that the infringement was willful, statutory damages can increase to as much as \$150,000 per work. Because of this, I encourage you to evaluate the nature and extent of potential copyright issues for the 32nd DAA with experienced intellectual property counsel.

I encourage the 32nd DAA to ask the Office of the Attorney General to provide such advice, before engaging in these on-line activities. If the Office of the Attorney General lacks the intellectual property expertise to address these issues, I strongly encourage the 32nd DAA to ask for permission to engage outside intellectual property counsel to review its “virtual fair” plans.

Again, I want to commend the staff and Board members who were involved in this idea for their creativity and non-traditional thinking, but must strongly encourage the 32nd DAA to proactively address this potential liability.

Sincerely,



Vincent M. Pollmeier
Director, Friends and Neighbors of
the Orange County Fairgrounds

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