

Guide to Performing Music Without Amplification in NYC

SUMMARY:

You are protected by the First Amendment when you perform un-amplified music in the subways and streets of New York City. At the least, you will probably be permitted to perform your music up to 85 db(A)-at-ten feet. If your volume exceeds that level and an officer determines that you are making an “unreasonable noise,” you may be in violation of New York’s disorderly conduct statute, Penal Law § 240.20(5), which is punishable by a fine of up to \$250 and/or imprisonment of up to 15 days.

SUBWAYS:

- You don't need a permit to perform in the subways (even if you're not in MTA's Music Under New York program).
 - *See, e.g., Carew-Reid v. Metropolitan Transportation Authority*, 903 F.2d 914, (2d Cir. 1990) (“the subway has been made a designated public forum for musical expression”)
- You have a right to perform acoustic music on platforms (but not to use amplifiers)
- You have a right to use amplified music on mezzanines (I think).
- You can legally sell tapes and CDs in the railroad terminals, but not in the subways
- You have a right to accept donations for your music (but not to solicit).
- You are not authorized to perform in subway cars, during NYCT public address announcements, or in areas undergoing construction.

STREETS AND PARKS

- Street music is a protected activity under the First Amendment, even when performed for donations.
 - *See, e.g., Goldstein v. Town of Nantuket*, 477 F.Supp. 606 (D.Mass. 1979); *Davenport v. Alexandria, Va.*, 683 F.2d 853 (1983) (“There has been shown no safety interest to outweigh the plaintiff’s First Amendment interests.”).

THE UNREASONABLE NOISE STANDARD

- Even without an amplifier, a person can be guilty of disorderly conduct if she makes “unreasonable noise” “with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof.” *See* Penal Law § 240.20(5).
 - “Unreasonable noise” means “any excessive or unusually loud sound that disturbs the peace, comfort or repose of a reasonable person of normal sensitivities or injures or endangers the health or safety of a reasonable person of normal sensitivities, or which causes injury to plant or animal life, or damage to property or business.” *See* NYC Code § 24-203(ccc).
 - This is a fairly subjective standard and so you may be at the police officers’ whim, but perhaps the volume level that would be “unreasonable noise” for un-amplified instruments would be the same as the maximum volume for amplifiers, which is 85-db(A)-at-ten foot. *See Guide to Amplification Rules at the RNC and other Protest Events*. The officer measuring the sound is required to take extraneous sounds such as horns, buses and ambulance sirens into account. *See Turley v. Giuliani* (S.D.N.Y. 2000). It is unclear how an officer would measure sounds made by a large group of people.

- You could try making some anonymous phone calls to a few precincts to determine how they measure unreasonable noise in situations where groups are performing un-amplified music. This website lists addresses and phone numbers of all the precincts in NYC: <http://www.ci.nyc.ny.us/html/nypd/html/phone.html>
- In any case, it might be a good idea to buy a fairly cheap sound meter to monitor your levels when you are performing.

PENALTIES

- Disorderly conduct is a “violation” of Penal Law §240.20(5), and punishments for a “violations” can include fines of up to \$250 and/or imprisonment up to 15 days. *See* CPL § 80.05 and CPL § 70.15.

WHAT TO DO IF CONFRONTED BY THE POLICE

- When police tell you to cease performing music or to change what you are doing, you have a few options:
 - You can ask them to measure your volume level with a decibel meter to make sure that it is actually above the 85 decibel level. You can also remind the officer that she must take extraneous sounds such as horns, buses and ambulance sirens into account.
 - You can refuse to comply with police requests. However, you should know that **refusing to comply with a lawful order of the police to disperse is itself another violation of the disorderly conduct statute**. Moreover, it may be advisable not to get arrested, as there is no guarantee that you will be able to win or even plead your case in court.
- If you are confronted by police following your use of amplification during RNC (or any other time), write down notes about the incident as soon as possible.
 - You should write down the date, time and place, as well as the officer’s name, title and badge number.
 - Indicate whether you were stopped, harassed, ticketed or ejected from the location and try to include a detailed description of what was said.
 - If there were any witnesses, including other protestors, you should take down their names and contact information.
- If you feel your rights have been violated, you can also contact the NLG at 212-679-6018 x16.

Prepared by Jason Cade
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