



G A R V E Y S C H U B E R T B A R E R
A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

WASHINGTON, D.C. OFFICE
fifth floor
flour mill building
1000 potomac street nw
washington, d.c. 20007-3501
TEL 202 965 7880 FAX 202 965 1729

OTHER OFFICES
beijing, china
new york, new york
portland, oregon
seattle, washington
GSBLAW.COM

Podcasting: Do you have the Rights?

By Melodie A. Virtue, Garvey Schubert Barer

A podcast is an Internet media file which can be downloaded for playback on personal computers and portable media players. Podcasts may contain audio, video, images, text, PDF, or other types of file. Although there is some uncertainty about the status of a podcast for copyright purposes, you should assume that a podcast may be a reproduction and distribution of a copyrighted work. Before posting a broadcast program for podcast, make sure you have permission to use copyrighted materials included in the program.

A broadcast program that uses copyrighted material such as songs and video will need one or more licenses in order to “perform” or distribute the work. Program hosts and actors may also have “publicity” rights in the program that need to be secured.

Music Rights

Music may consist of at least two separate copyrighted works. One is the musical composition, known as the musical work. The copyright in the musical work, consisting of lyrics and musical notes, is usually owned by the composer or songwriter. The copyright in the musical work can be shared by the lyricist and band members who arranged the notes to the music, but typically those rights are assigned to music publishers. The second type of work is a sound recording, a particular recording of musical work. The copyright in the sound recording is usually held by a record company.



The copyrights in the musical work and the sound recording each confers the right to reproduce, distribute, and publicly perform the respective works. Those rights must be "cleared" – i.e., licenses or permissions to use the music must be obtained – before music can be used on the Internet.

Public Performance Right – Streaming vs. Podcasting

ASCAP, BMI, and SESAC administer licenses for the public performance of musical works. Historically, no license has been required for the public performance of a sound recording that is broadcast, but a license is required for a *digital* performance of sound recordings – for example, by streaming the work on the Internet. To facilitate the use of copyrighted material on the Internet, webcasters have been granted a statutory (or “compulsory”) license to perform digital sound recordings. An organization called SoundExchange administers the statutory royalties for digital sound recordings for non-interactive use of music on the Internet.

The statutory license is not available for podcasts, however, and may indeed not be needed. A recent court decision found that a "performance" requires that the music be perceived by the listener contemporaneously with the transmission of the music. When podcasts are downloaded, a recipient can store the file for later access and physically manipulate the file by rewinding, pausing, or fast-forwarding the content. Thus, unlike a stream, a podcast file is not perceived contemporaneously with the transmission. Although it is possible the case will be appealed, podcasters for now do not need to obtain a public performance license in the musical work from ASCAP, BMI, and



SESAC, although they still do need to obtain a license to “reproduce” the musical work and the sound recording.

Reproduction Right

When a song is included in a podcast, the podcaster “reproduces” that song. The reproduction rights in the musical work and in the sound recording must be separately secured.

For the right to reproduce the musical work, a podcaster needs to secure a mechanical license. Grant of the mechanical license is compulsory. The rates are set by the Copyright Royalty Board. The maximum statutory rate for a mechanical license through the end of 2007 is 9.1 cents per musical work or 1.75 cents per minute of playing time or fraction thereof, whichever is greater, although it may be possible to negotiate a lower rate. The podcaster needs to obtain a mechanical license directly from the owner of that copyright or obtain one through the Harry Fox Agency (HFA). HFA offers licensing for various digital formats, including full-length permanent digital downloads. See <http://www.harryfox.com/public/licenseeServicesDigital.jsp>.

For the right to reproduce the sound recording, a podcaster needs to secure a master use license directly from the record company. The liner notes for commercially-released CDs usually list the name of the relevant record company. The record label can charge what it wants and is not required to grant a master use license.



Video Rights

To reproduce an audiovisual work, the podcaster needs to obtain a license for the digital transmission. To perform an audiovisual work, a podcaster would obtain an exhibition license. Typically, the owner of the motion picture copyright will license both rights together. The owner of the copyright in the audiovisual work can charge what it wants and is not required to grant any license.

The right to reproduce the musical work contained in a motion picture requires a synchronization license. The podcaster will need to determine whether the synchronization right obtained by the producer of the video authorizes the digital transmission of the work. If not, the podcaster will need to obtain a videogram reproduction license directly from the music publisher or its licensed agent, such as the Harry Fox Agency. This license is not compulsory but is based on voluntary negotiations between the parties.

There is no separate public performance right for a sound recording included in video because the work is considered a single audiovisual work. A producer of a video needs to obtain a master use license from the record company to reproduce the sound recording as part of the video. Again, a podcaster needs to determine if the master use agreement the producer of the video obtained covers the digital transmission of the recording. Otherwise, the podcaster will need to obtain a separate license from the sound recording copyright owner (e.g., the record label).



Display Rights

Any podcast containing artwork, film, a slide, a TV image, or a still picture or photograph will need an electronic print reproduction license. If the podcast file posted on the website is identified on the site with a "thumbnail" photograph of a record album cover, artwork, a movie poster, or a print from an audiovisual work, display rights need to be cleared.

Right of Publicity

Most states grant individuals the right to control the commercial use of his or her name, image, likeness, or some other identifying aspect of identity, which is known as the right of publicity or personality rights. The scope and duration of the right vary considerably from state to state. As a result, this right may give the program host or other talent, whose voice or likeness are on the podcast, the right to license his or her voice or image on a podcast.

The best course of action for the broadcast station is to have a written contract with talent that specifies that their on-air work is a "work made for hire." The contract would provide the station the right to use the work in perpetuity in all media. Without a written contract, it may be difficult to clear materials that include the voice or likeness of former employees. In the case of archived materials, the station may need to obtain the permission of the former program host before including the material in a podcast.



Note, too, that additional fees may need to be paid to members of trade unions, such as AFTRA (www.aftra.com) or SAG (www.sag.org), for use of on-air materials that are re-purposed for on-line transmissions such as podcasts.

Conclusion

Because clearing the rights for every song from various copyrights owners is time-consuming and not always successful, it is tempting to post copyrighted material in podcasts without securing the necessary permissions first. In weighing the risks of doing so, be mindful of the cost of copyright infringement. The copyright owner may enjoin the use of such materials and, in effect, shut down the site. In addition, it may recover actual damages, profits made by the infringer, or statutory damages, plus attorneys fees and costs. For willful infringement, statutory damages can run as high as \$150,000 per infringement. Where the infringer proves it had no reason to believe its acts infringed on copyrights, the court has the discretion to reduce damages to \$200 per infringement. For a public broadcasting entity, the court can also reduce damages if the court finds that the public broadcasting entity had no reason to believe that its acts constituted a violation. Each time a podcast is downloaded may infringe multiple copyrights –the reproduction rights held by the sound recording and the musical work copyright owners, respectively, the audiovisual rights held by the motion picture copyright owner and the owner of the display rights. Even minimal statutory damages of \$200 can quickly mount up.

Melodie Virtue is a member of the law firm of Garvey Schubert Barer. She can be reached at 202-965-7880 or mvirtue@gsblaw.com. The material presented here is intended solely for informational purposes and is of a general nature that cannot be regarded as legal advice. Please consult an attorney if you have specific questions.



Copyright Licenses Relevant for Streaming and Podcasting
May 2007

Type of Copyright	<u>Public Performance</u> -needed for streaming. -not needed for podcasting.	<u>Reproduction & Distribution</u> -not needed for streaming (except for ephemeral copy of sound recording included in CRB rates). -needed for podcasting.
Musical Work	ASCAP, BMI, & SESAC – represent composers and songwriters -usually blanket license -commercial fee negotiations overseen by federal court pursuant to consent decree -public broadcasting fees set by CRB unless separately negotiated.	Mechanical (Digital Phonorecord Delivery) – compulsory license. -fees set by CRB unless separately negotiated.
Sound Recording	SoundExchange – applies to non-interactive digital audio transmissions - fees set by CRB unless separately negotiated.	Master Use – directly license with record company; not required to grant license and can charge what it wants.
Audiovisual Work	Exhibition License – direct license from owner. -Musical Work in AV licensed by ASCAP, BMI, & SESAC. -Sound Recording in AV work has no separate public performance right.	Reproduction License – direct license from owner. -Musical Work in AV requires synchronization license. If digital use not included in license producer obtained, may need videogram license. -Sound Recording in AV requires Master Use license. If digital use not included in license producer obtained, need separate license from record company.
Photograph, TV image, slide, artwork, etc.	Electronic Print Display License	Electronic Print Reproduction License