



# PODCASTING LEGAL GUIDE: RULES FOR THE REVOLUTION

**Colette Vogele, Esq.**

Vogele & Associates  
Stanford Center for Internet and Society

**Mia Garlick**

Creative Commons  
Stanford Center for Internet and Society

**The Berkman Center  
Clinical Program in Cyberlaw**  
Harvard Law School



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Colette Vogele  
San Francisco, California  
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## Podcasting Legal Guide, v 1.0



## **FOREWORD**

**By Lawrence Lessig**

Federal law regulates creativity. That regulation is insanely complex. Indeed, the law is more complex today than at any point in our history. It seems the more the lawyers work on the law, the less useable the law becomes.

For the first time in our history, this complex regulation of creativity effectively regulates consumers, or users, as well as the businesses that support creativity. For the first time, its regulation reaches far beyond commercial creativity, and instead burdens noncommercial, or amateur creativity (where “amateur” means not second rate, or inferior creativity, but instead creativity done for the love of creating and not for the money). And that regulation now threatens one of the most important new venues for citizen speech — podcasting.

This Guide is an excellent resource for anyone who wants to figure out how best to follow the law. It is also an outstanding recommendation for the non-profit I run, Creative Commons, for as you will see as you work through the insanity that copyright law has become, Creative Commons is a simple alternative to this complex mess.

But my hope for this Guide (which in addition to copyright addresses publicity rights and trademark law) is that it will begin to make obvious what digital creators have been saying for some time — that it is time we update copyright law to the digital age. Something fantastic has changed: technology now invites the widest range of citizens to become speakers and creators. It is time that the law remove the unnecessary burdens that it imposes on this creativity.

“Copyright law” is essential in a digital age. But it ought to be a copyright law made for a digital age. Ours is not. And this fantastic Guide for those wanting to obey the rules should be evidence enough to convince anyone of that fact.

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## Podcasting Legal Guide, v 1.0



## INTRODUCTION

**Welcome to the Podcasting Legal Guide.** If you have suggestions, comments or questions about the Guide, please post your comments on the talk page of our wiki (located at [http://wiki.creativecommons.org/Podcasting\\_Legal\\_Guide](http://wiki.creativecommons.org/Podcasting_Legal_Guide)). These comments will be reviewed periodically and will help us when preparing future updates to the Guide.

### Purpose

The purpose of this Guide is to provide you with a general roadmap of some of the legal issues specific to podcasting. EFF has produced a very practical and helpful guide for issues related to blogging generally (<http://www.eff.org/bloggers/>). This Guide is not intended to duplicate efforts by EFF, and in many cases refers you to that guide for where crossover issues are addressed. Our goal is to complement EFF's Bloggers FAQ and address some of the standalone issues that are of primary relevance to podcasters, as opposed to bloggers.

### US-Law Only

This Guide covers only US-based legal questions. Since podcasts are typically distributed world wide, legal issues from other jurisdictions are relevant for you but we are unable to include them at this time. We have released this Guide under a Creative Commons license that permits derivatives works and so we hope that practitioners in other jurisdictions will translate and adapt this Guide for their jurisdictions. Please let us know if you do by emailing [podcasting@voegelelaw.com](mailto:podcasting@voegelelaw.com) so that we can link to your version of the Guide.

### This Guide Does Not Provide Legal Advice

This Guide provides general information about legal topics but it is not a complete discussion of all legal issues that arise in relation to podcasting nor is it a substitute for legal advice. Using this Guide does not create an attorney-client relationship. This general legal information is provided on an "as-is" basis. The authors and contributors make no warranties regarding the general legal information provided in this Guide, and disclaim liability for damages resulting from its use to the fullest extent permitted by the applicable law.

Please also note that this Guide attempts to provide an overview of how the law is likely to treat many of the issues that arise in relation to podcasting. At all times, you should bear in mind that this Guide does not advocate for how the law *should* treat podcasting, only what the law is likely to be currently.

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### Organization

The next section, Section 1 — "Legal Issues In Creating Your Own Podcast" — of this Guide jumps right into some of the legal questions that you may need to think about when incorporating different types of material into your podcast. Section 2 — "Legal Issues Surrounding How You Distribute Your Podcast" — discusses options for how you can deal with the output of your own podcast, e.g., your licensing options for when you distribute your work. For those of you who need a little background on how podcasting works from a technical standpoint, Section 3 — "Basic Background to Podcasting" — gives you some very basic technical background. (If you've stumbled on this Guide but have never heard of podcasting, then you definitely want to start at Section 3.) Finally, Section 4 — "Background & Further Resources" — provides you with a list of further resources.



## 1. Legal Issues In Creating Your Own Podcast.

### 1.1. Overview Of The Legal Issues You Need To Consider.

When creating your own podcast, it is important to make sure all necessary rights and permissions are secured for the material included in your podcasts. This is relatively easy if you create all of the material that is included in your podcast but can become progressively more complex the more you include material created by other people. If you do not obtain the necessary rights and permissions, you may get into legal trouble for incorporating third party material into your podcast and for also authorizing others to use that material as part of your podcast.

The main legal issues that you will likely face that are unique to podcasters are related to copyright, publicity rights and trademark issues.

Podcasters share similar concerns to bloggers in relation to defamation, privacy, reporter's privilege, media access, election and labor laws and adult materials. Consequently, if the content your podcast is likely to involve one of these issues, you should check the corresponding section of the EFF Bloggers FAQ (<http://www.eff.org/bloggers/lq/>).

#### 1.1.1. Why Is Copyright Law Relevant?

Copyright law is relevant to podcasts because it applies to creative and expressive works, which are most of the things that are included in a podcast. This includes, for example, performances, scripts, interviews, musical works and sound recordings. Under current US copyright law, copyright attaches automatically to creative, expressive works once they have been "fixed", i.e. written down or recorded. This means that when you come across such a work, you should, as a general rule and subject to some exceptions noted in Sections 1.2.2 — "The Goods News: 5 Instances Where Permission Is Not Required," 1.2.3 — "Special Rules for Librarians & Teachers" and 1.2.9 — "Fair Use Under Copyright Law And Its Application To Podcasts," assume that it is protected by copyright.

Copyright law gives the owner of copyright the exclusive right to control certain activities in relation to the work. For example, under US law, a copyright owner can control whether another person makes a copy of their work, makes changes to their work, distributes it to the public or makes a public performance of it. Consequently, any person other than the copyright owner who wishes to do any of the protected acts in relation to the work must secure permission from the copyright owner before doing so, unless an exception or exclusion applies.

When you make a podcast, you potentially invoke several of copyright's exclusive rights, such as:

- Copying the work to include it into a podcast;
- Adapting or changing the work to include it into the podcast;
- Making a work available as part of a podcast for transmission to members of the public;
- Authorizing members of the public to make a copy of the podcast and use it according to the terms you apply to the podcast.

This Guide sets out some of the issues that need to be considered to identify whether you own the necessary copyright and/or have the appropriate permission so that you do not infringe someone else's copyright. Learn more in Section 1.2 — "Copyright Issues."



### 1.1.2. Why Are Publicity Rights Relevant?

Publicity rights allow individuals to control how their voice, image or likeness is used for commercial purposes in public. These rights are relevant to podcasting because, in many instances, a podcaster will conduct audio or video interviews, perform plays, sing songs, and produce all sorts of other spoken or visual content. When transmitting this sort of content, including the voices or images of anyone other than yourself, you may need to get permission from those individuals if you are using their voice or images for commercial purposes. For example, if you have images from an interview with someone on your podcast and you use those images to promote your podcast, solicit advertising, or make other commercial uses, you may need consent from the individual appearing in the image. Learn more in Section 1.3 — “Publicity Rights Issues.”

### 1.1.3. How Is Trademark Law Relevant?

Trademark law is designed to protect consumers from being misled or deceived as to the source of goods and services, or the endorsement, sponsorship or affiliation of one good or service with another. In other words, trademark law works to ensure that you can rely on particular branding to equate to certain product features. So for example, Joe Citizen cannot use the name CNN and apply it in such a way as to suggest that his podcasts come from CNN, or are endorsed by or affiliated with CNN.

While there may be little risk that you are going to use someone else’s trademark to associate with your podcast (‘cause you want to establish your own reputation, right?), trademark law can be implicated in what you do and say in relation to your podcast in other ways. Because you may want to comment on a high-profile company or their branding, you should have some familiarity with trademark law so that you can minimize your risk of infringing trademark rights. Learn more in Section 1.4 — “Trademark Issues.”

### 1.1.4 What Other Issues Should I Be Thinking About?

As a podcaster, you will face many of the same legal questions that bloggers face. EFF’s Legal Guide to Blogging (<http://www.eff.org/bloggers/>) addresses many additional issues that you should consider. These include: rights related to the Digital Millennium Copyright Act (DMCA), the Communications Decency Act (aka “Section 230), on-line defamation, privacy, reporter’s privilege, media access, election law, and labor law.

## 1.2. Copyright Issues.

### 1.2.1. Using Written Content Created By Someone Else: Permission Is Generally Required.

As a general rule, if you incorporate text that has been written by someone else into your podcast—text that appears either on a blog, in a book, a journal, magazine or newspaper (or wherever)—you will need the express and specific permission of the person who owns copyright in that material (note that sometimes the copyright owner is different to the original writer).

Written works do not have to be full of flourish and artistic merit, like novels and poetry, to qualify for copyright protection. Textual works only need have minimal creativity to attract copyright protection; so, most textual works that are committed to paper (or computer), including those that lack literary merit such as, for example, institutional reports, newspaper articles and unimaginative blog postings, are likely to be protected by copyright.



There is no firm "rule" about how much of a work you may or may not copy to avoid infringement concerns. For example, it does not matter if you read the entire piece aloud without changing it or if you change it a lot and simply base your podcast loosely on the text—you cannot avoid copyright issues by, for example, changing the work by, say, 10% or 20%. Once you use the work, either in verbatim or altered format, you implicate copyright law.

Consequently, you need to think about copyright issues before you incorporate any of these materials into your podcast. In general, this means that you need to identify the copyright owner and ask them for permission to include their material in your podcast. You can often identify who the copyright owner is by checking for a copyright notice (usually in the form “© [year] [name]”) or you can ask the person who made the work available for the information. For works created in the United States, you can also search the US Copyright Office’s register available at <http://www.copyright.gov/records/>. For more information about investigating the copyright status of a work, check out the US Copyright Office’s Circular 22. (<http://www.copyright.gov/circs/circ22.htm>).

### 1.2.2. The Good News: 5 Instances Where Permission Is Not Required.

The good news is that you do **not** need to secure the separate permission of the provider of a work in five main instances. These are: (i) when the parts you record as part of your podcast are not protected by copyright (see below, Section 1.2.2.1 — “You Are Using A Fact, An Idea, A Theory Or Slogan, Title or Short Phrase”); (ii) when the text was protected by copyright but is in the public domain (see below, Section 1.2.2.2 — “You Are Using Works That Are In the Public Domain”); (iii) when you are using US Government works (see below, Section 1.2.2.3 — “You Are Using A U.S. Government Work”); (iv) when you are making a “fair use” of the work (see below, Section 1.2.9 — “Fair Use Under Copyright Law And Its Application To Podcasting”); (v) when you wish to make more than a “fair use” of the work and the work is under a Creative Commons license that authorizes your intended use (see below, Section 1.2.25 — “You Are Using a Creative Commons-Licensed Or “Podsafe” Content.”

#### 1.2.2.1. You Are Using A Fact, An Idea, A Theory Or Slogan, Title Or Short Phrase.

Although an entire textual work may be protected by copyright, there are elements of that work that may not be subject to the exclusive rights of the copyright owner.

It is a general principle of copyright law that copyright does not extend to *ideas*; that copyright law only protects the *creative expression*. As a result, you can discuss the ideas and theories that are discussed in a blog, an editorial or other opinion piece without asking the permission of the author or publisher (although you may want to think about defamation laws before you engage in especially harsh criticism of a theory or an author; see EFF’s Legal Guide for Bloggers, FAQ Online Defamation Law available at <http://www.eff.org/bloggers/lq/faq-defamation.php>).

Also, titles and short phrases or slogans will generally not be protected by copyright because they lack the necessary spark of creativity and so can typically be used without special permission. (But these items may receive trademark protection. See Section 1.4 — “Trademark Issues” regarding trademark questions.)



Finally, an idea is not protected by copyright. This is addressed by the Copyright Act which expressly **excludes** any "idea procedure, process, system, method of operation, concept, principle, or discovery regardless of form in which it is described, explained, illustrated, or embodied" from protection. This rule (called the "idea-expression distinction") means, for example, that you can include in your podcast a discussion of factual events reported in a newspaper—such as facts about historical or current events—without obtaining permission from the copyright owner of the newspaper. It also means you could describe and discuss cooking recipes in your podcast, because they do not generally receive copyright protection. Recipes (the mere list of ingredients and instructions for combining the ingredients to achieve an end product) are seen as "a system, process or method of operation". In practice, the distinction is often difficult to know. As the Copyright Office's notes: "Mere listings of ingredients as in recipes, formulas, compounds or prescriptions are not subject to copyright protection. However, where a recipe or formula is accompanied by substantial literary expression in the form of an explanation or directions, or when there is a combination of recipes, as in a cookbook, there may be a basis for copyright protection." (See <http://www.copyright.gov/fls/fl122.html> and <http://www.copyright.gov/help/faq/faq-protect.html>).

#### 1.2.2.2. You Are Using Works That Are In The Public Domain.

You can use any work that is in the public domain without obtaining permission of the original author or copyright owner.

A work is in the public domain in the US either when (a) the copyright term has expired or if copyright protection for that work was not maintained in the manner required prior to 1989, (b) the work is an unpublished work and special rules indicate it has fallen into the public domain, or (c) the author or copyright owner dedicated the work to the public domain. You will find helpful websites for determining public domain status of a work in Section 4 — "Background and Further Resources" of this Guide. We also explain below in part (d) of this section one wrinkle that arises when using public domain works that you need to consider to ensure that your use does not infringe anyone's copyright.

**(a) Published Works – Term**, the term of copyright protection in the US has varied considerably over the history of US copyright law. Currently, the copyright term is life of the author plus 70 years for content created by individuals. For works created in circumstances of employment or works known as "works for hire" the term of copyright is 95 years from the date the work was first published (for more discussion of what constitutes a "work for hire" see Section 1.2.4. — "Using Your Own Written Content").

In the US, as a general rule, the copyright term will only have expired in relation works published before 1923. Works published in 1923 or later have had their term of copyright protection extended and so will not join the public domain until 2019 or later unless copyright protection was not properly maintained.

It is also possible that a work has lost copyright protection because the affirmative steps that were necessary prior to 1989 under then-applicable US copyright law were not followed by the copyright owner. After 1989, copyright protection became automatic; no affirmative step was required to secure copyright. Consequently, a work can only have inadvertently fallen into the public domain prior to 1989 under these circumstances:



- For works published after 1923 and prior to 1964, copyright protection had to be renewed in the 28<sup>th</sup> year after publication of the work. If the work was not renewed, then the work joined the public domain.
- From 1964 to 1989, copyright could only be secured by publishing a work with the necessary copyright notice. Failure to do so meant that copyright protection was lost unless the lack of a copyright notice came within one of these exceptions.

As you can see, a fair amount of research may be required to determine whether a published work inadvertently joined the public domain.

**(b) Unpublished Works -- Term.** Some unpublished works are also part of the public domain. This is a new development in US copyright law. Like with published works, the general term is life of the author plus seventy years for individuals, or 120 years from creation for works for hire, but there is a transition period that can be a bit tricky.

Unpublished works, i.e. works that were created but not published or registered for copyright before January 1, 1978, regardless of when their author died, continued to be protected under copyright until December 31, 2002.

For unpublished works that were published after January 1, 1978 and on or before December 31, 2002, copyright protection was extended so that if the copyright holder of an unpublished civil war diary published the work by December 31, 2002, then, the new published version of the diary would gain copyright protection through December 31, 2047. After the December 31, 2002, deadline, the standard term for all unpublished works became life of the author plus seventy years. This means that as of January 1, 2003, all unpublished works that continued to be unpublished and not registered with the Copyright Office as of January 1, 1978 of authors who have been dead for more than seventy years are in the public domain. As of 2006, this means all unpublished works of authors who died before 1936 (and that were not published for the first time between 1978 and 2002) are part of the public domain.

If you are a podcaster thinking about using unpublished materials found on the Internet, here are a couple of tips on how to deal with unpublished works. First, make note that if the unpublished work you want to use was published between 1978 and 2002, to obtain the extended period of protection that is given to these kinds of works under US copyright law, it had to be published by the copyright holder. This means that some works that were published during that period did not gain additional protection because someone other than the copyright holder published the work on the Internet. Second, understand that this extended protection applies to both U.S. and foreign works. Every unpublished work from around the world of authors who died before 1936 is in the public domain in the United States. That means that the unpublished diary of an Australian who died in 1930 will be in the public domain in the U.S.; however, that same diary may still be subject to copyright under Australian copyright law in Australia. So, if you are marketing or targeting your podcast for a particular territory, you need to be aware of the copyright laws in that country as well as in the U.S. Moreover, because of the borderless nature of the Internet, you can't really stop your podcast from distributing to Australia, in which case you may be violating laws in another country (We raise this here as a flag, but please note that the scope of this Guide does not cover international copyright questions at this time). Third, often websites have not included when they posted a particular unpublished



work, and so one is not sure whether the unpublished work was considered published before the December 31, 2002 deadline. If you find yourself in that situation, the Internet Archive's Wayback Machine (<http://www.archive.org/>) is very useful to help determine what material was published on the Internet before the December 31, 2002. This tool tells you when a particular page or image was first put onto the web.

**(c) Dedication To Public Domain** -- Finally, a work may be in the public domain because an author or copyright owner has dedicated their work to the public domain, such as for example, by using the Creative Commons Public Domain Dedication (<http://creativecommons.org/licenses/publicdomain/>).

**(d) One Wrinkle** -- One additional wrinkle when using public domain works is that those public domain works may be incorporated into another work that is copyright-protected. When this happens, although the public domain portions remain unprotected by copyright, the author's new expressive content may be protected by copyright. For example, as a general rule, slavish photographs of public domain works such as the Mona Lisa are not considered to attract copyright protection because they are designed to replicate the original public domain work as much as possible. However, a photograph of a sculpture, even a public domain sculpture, may be protected by copyright because of the skill and creativity involved in setting up the shot.

Another example is of a book that is in the public domain. Although the text of a public domain work, say, Shakespeare's *The Comedy of Errors* (<http://www.gutenberg.org/etext/1504>), may be free to use (for example to record a reading of the text); an image of a recently published edition of the book -- e.g. [http://www.amazon.com/gp/product/0743484886/qid=1140144444/sr=2-1/ref=pd\\_bbs\\_b\\_2\\_1/002-2073566-5466404?s=books&v=glance&n=283155](http://www.amazon.com/gp/product/0743484886/qid=1140144444/sr=2-1/ref=pd_bbs_b_2_1/002-2073566-5466404?s=books&v=glance&n=283155)) -- may implicate the publisher's copyright in the layout and formatting of that text, the cover art, etc., thus necessitating the publisher's consent to use an image of that book in your podcast or a determination as to whether your use amounts to a fair use of the published edition.

### 1.2.2.3. You Are Using A US Government Work.

Works that are created by a US government employee or officer, as part of their official duties, are not protected by copyright. Similarly, federal and state statutes and judicial opinions are not protected by copyright. However, this extends only to federal officials and also, only to employees. This means that works created by state and local officials are usually copyright-protected and similarly, material created by private persons who are commissioned by the US government to prepare a work may be protected by copyright.

If you do incorporate government works into your podcast, you should also consider including in any copyright notice that accompanies the podcast a statement that identifies which portions of your podcast are protected by copyright and which are US government works. This is important for several reasons: (1) it allows people to know which works they can freely use and repurpose; (2) it removes the ability, if you bring an action against someone for infringement, for that person to argue that they did not have proper notice of the copyrighted status of your work.



#### 1.2.2.4. You Are Making A “Fair Use.”

You may make a “fair use” of a copyrighted text without obtaining permission of the copyright owner. We discuss “fair use” in more detail, and provide some examples, in Section 1.2.9 — “Fair Use Under Copyright Law And Its Application To Podcasts” of this Guide.

#### 1.2.2.5. You Are Using Creative Commons-Licensed Or “Podsafe” Content.

Creative Commons’ licensed content is generally “podsafe” (i.e. is pre-cleared for use in podcasts) when your use is consistent with the applicable license terms.

Creative Commons’ licenses clearly signal to the public which uses you may make under the terms of the license and which uses require separate and specific permission is necessary. This means that it is important to check the terms of the applicable Creative Commons license to identify the relevant uses that are authorized in advance. Compliance with the terms of the Creative Commons license is necessary because otherwise the license terminates and then your use will become infringing.

If you use Creative Commons-licensed work in your podcast, you will need to provide attribution in the manner specified by the author and/or licensor. In addition, you must keep intact any copyright notices that accompany the work; include the title of the work; and, any Uniform Resource Indicator that is provided by the licensor which also includes copyright or licensing information about the work. You also need to retain a notice or URL for the license and the warranty disclaimer that applies to the work with each copy you make and distribute of it.

Briefly, the common Creative Commons license conditions from Creative Commons core licensing suite may limit your use of a CC-licensed work in the following ways:

- **NoDerivatives** – this license requires that any copy of the work you make is verbatim; in other words, you may not change the work, such as, for example, translating a textual work into another language or dramatizing an existing work.

You can, however, still include a NoDerivatives licensed work as part of another, larger work (known as “collective works”). For example, you can include several pieces of music together to form a collective work, as long as the work itself is unaltered. You cannot, however, mash up a NoDerivatives-licensed recording with another recording because that would constitute a derivative work.

- **NonCommercial** – this license condition means that you cannot make money from the work. This would, for example, mean that you cannot include a Creative Commons licensed piece of music that was NonCommercially licensed in a podcast, where the music is the primary draw and/or a substantial amount of the podcast and then charge people money to download your podcast. You also cannot include advertising before or after the piece of music or as part of the podcast if the work is the primary draw and/or a substantial amount of the podcast.

***An important thing to note about Creative Commons NonCommercially licensed content*** is that, under the license, the licensor retains the right to



collect royalties through statutory and voluntary collective rights management schemes for commercial uses of their content. In other words, if you are a for-profit podcaster you will likely still need to obtain the necessary permissions for your use of Creative Commons NonCommercially-licensed music. Learn more about music-related rights in Section 1.2.7 — “Using Music” — of this Guide.

- **ShareAlike** – this license condition requires that, if you make a derivative work of a Creative Commons licensed piece of content, you license your own podcast under the same or similar Creative Commons license terms. For example, if you take a Creative Commons licensed book and read it aloud as part of your podcast, your podcast must then be licensed under a Creative Commons license that contains the same license elements (such as Attribution, ShareAlike etc.) The ShareAlike requirement is not, however, viral; in other words, you can include a mash up of a ShareAlike licensed musical track (provided it is licensed under the same CC-license terms) together with other tracks in a podcast to form a “collective work;” you do not have to release all of the tracks, that are not derived from the ShareAlike-licensed work, under the same CC-license terms.

If a Creative Commons licensed work is not licensed with one of these license restrictions, you are then free to use the work in one of the above manners. For example, a piece of content that is published under the Creative Commons Attribution license may be used for commercial and noncommercial purposes and can be used verbatim or adapted and turned into derivative works, without those derivatives needing to be “shared-alike” (so long as attribution is given). A Creative Commons Attribution-NonCommercial licensed work can be used to make derivative works (so long as attribution is given and the work is used noncommercially). A Creative Commons Attribution-NoDerivatives licensed work can be used for commercial and noncommercial purposes (provided attribution is given and the work is used only verbatim), and so on.

As part of Creative Commons customized licensing, the Creative Commons Sampling licenses permit you to make the following uses of content published under these licenses:

- **Sampling** – under this license you may only make a partial use of the original licensed content or, if you use the whole original, it must be insubstantial in proportion to the whole or transformed into something totally different to the original; this use can be for either noncommercial or commercial purposes. Mere synching (i.e., matching or “synching” audio with images) is not sufficiently transformative when you are using the whole work and no advertising and promotional uses not allowed (except for promoting your derived work).
- **Sampling Plus** – this license contains the same requirements as the Sampling license but also permits you to copy and distribute the entire licensed original in verbatim form for noncommercial purposes, hence the “plus.”
- **NonCommercial Sampling Plus** – this license contains the same requirements as the Sampling license but only permits the transformative use for noncommercial purposes. Similarly, noncommercial copying and distribution are allowed.



All of the Sampling licenses require that you attribute the original work and retain notice of the applicable license, similar to the corresponding requirements discussed in relation to the core CC-licensing suite (see the discussion above at the start of this section). One additional thing to note to ensure your compliance with the Sampling licenses' terms is that when you attribute the original work and its creator, you must acknowledge that your derived work is a remix or includes only a portion of the original work.

**One thing to note about Creative Commons licensed content generally** - you should be aware that all of the licenses contain a disclaimer of warranties, so there is no assurance whatsoever that the licensor has all the necessary rights to permit reuse of the licensed work. (*Note:* this applies to version 2.0 licenses and up; the version 1.0 CC licenses included a warranty of title). The disclaimer means that the licensor is not guaranteeing anything about the work, including that she owns the copyright to it, or that she has cleared any uses of third-party content that her work may be based on or incorporate.

This is typical of so-called "open source" licenses, where works are made widely and freely available for reuse at no charge. In open content licensing, warranties and indemnities are best determined separately by private bargain, so that each licensor and licensee can determine the appropriate allocation of risk and reward for their unique situation. One option thus would be to use private contract to obtain a warranty and indemnification from the licensor, although it is likely that the licensor would charge for this benefit.

As a result of the warranty disclaimer, before using a Creative Commons licensed work, you should satisfy yourself that the person has all the necessary rights to make the work available under a Creative Commons license. You should know that if you are wrong, you could be liable for copyright infringement based on your use of the work.

**Example:** Ron starts distributing the new Coldplay album under a Creative Commons Attribution-only license despite the fact that Ron does not have the authority from Coldplay or its record label to do so. You copy it into your podcast (giving attribution as required by Ron's license). Coldplay (or, more accurately, it's record company Sony) then sues you for copyright infringement. In this scenario, in the lawsuit you are liable directly to Coldplay; you cannot make a claim against Ron for indemnification or breach of warranties on the terms of the Creative Commons license. Of course, Coldplay may sue Ron separately, but as to your own use of the album or songs in it, you will have to pay Coldplay without being able to make any contractual counter-claim against Ron.

You should learn about what rights need to be cleared and when a fair use or fair dealing defense may be available. It could be that the licensor is relying on the fair use or fair dealing doctrine, but depending on the circumstances, that legal defense may or may not actually protect her (or you). You should educate yourself about the various rights that may be implicated in a copyrighted work, because creative works often incorporate multiple elements such as, for example, underlying stories and characters, recorded sound and song lyrics. If the work contains recognizable third-party content, it may be advisable to independently verify that it has been authorized for reuse under a Creative Commons license. In addition, you may need to think about what other rights may attach to the content you wish to use, such as trademark or publicity rights.



### 1.2.3. Special Rules For Librarians Or Teachers.

It should be noted that there are special rules for using copyrighted works in the context of teaching and for libraries. In general, these rules allow for performance and display of certain copyrighted works in the face-to-face classroom setting. Other rules apply (under the “TEACH Act”) for distance learning. Librarians also have special rights. The details of these case-specific rules are beyond the scope of this Guide at this time. Suffice it to say that if you are using a podcast in a classroom setting (either face-to-face or through distance learning), or if you’re a librarian, you should look into these special rules. For further information see sections 110(1) and 110(2) of the Copyright Act (17 U.S.C. § 110), <http://www.copyright.gov/title17/92chap1.html#110>, Copyright Office Circular 21 (<http://www.copyright.gov/circs/circ21.pdf>). Laura Glassway’s table found at <http://www.unc.edu/~unclng/TEACH.htm>, also helps to explain the various rules.

### 1.2.4. Using Your Own Written Content.

If you create your own creative, expressive material for use in your podcast, you should, as a general rule, have no issues in terms of copyright clearances. If you are the creator of a sufficiently original work, then you will generally also be the first owner of copyright in that work once you have committed pen to paper, hit “save” or “record” and thus, able to exercise any and all of copyright’s exclusive rights as you choose.

It is, however, important to be aware that there are circumstances in which, even though you are the creator of a copyrighted work, you are not the “author” or first owner of copyright. In the US, this split between first creator and first owner can generally occur in two instances: (i) if your work comes within the definition of being a “work for hire;” or (ii) if you sign an agreement transferring ownership rights to someone else. Additionally, you may not be the sole author or sole owner of copyright if you created a copyrighted work with someone else collaboratively.

Under US law, the first category of a “work for hire” is a work made in the circumstances of employment. As a general rule, an employer becomes the first owner of copyright in anything created by their employees so if you create your material as part of your job you need to consider whether you or your employer owns the copyright to the material you wish to include in your podcast.

In the US, there is an additional category of works made for hire that can apply to work created by non-employees. To qualify as one of these works for hire (outside of the employment relationship), the work must come within one of nine categories of works, be specially commissioned and be the subject of a written and signed agreement that the work is a work for hire. For more information about works for hire under United States law, check out information circular number 9 from the United States Copyright Office (<http://www.copyright.gov/circs/circ9.html>).

Someone other than you can also become the copyright owner of your work by an express written agreement, signed by you, transferring ownership of the copyright. Consequently, if you have signed away your rights to your work you may no longer be free to incorporate it in your podcast.

Finally, if you work collaboratively with another artist to create some expressive work, then you may be a joint author and owner (rather than a sole author/owner) of the work. In that case, you will need to check the terms of any agreement between you and your fellow collaborators to see if you are able to freely exercise your rights as a joint author/owner and incorporate it into a podcast or whether you need the permission of your co-author. As a general rules, each joint author has an independent right to use or



license the copyright without the permission of the other, subject only to a duty to account to the other co-owners for any profits; however this may be varied by an agreement between the joint authors.

### **1.2.5. Incorporating Pre-Existing Audio Voice Recordings.**

If you wish to incorporate pre-existing audio voice recordings that have been prepared by someone else, you need to think about both copyright and publicity rights issues. In at least California, you also need to consider the property interest in appropriating someone's voice. Copyright and the property right in one's voice are discussed here. For publicity rights, see the discussion in Section 1.3 —“Publicity Rights Issues” of this Guide.

As regards the copyright issues, in audio voice recordings there are generally two copyrights—one in the work being recorded (generally referred to as the “underlying work”) such as the text, script or performance and one in the actual recording, the fixation of sounds. To use an audio voice recording created by someone else, you need to make sure you have the necessary permissions to use both if you want to include it in your podcast. So for example, if the recording is Creative Commons licensed, you need to ensure that the license applies to both the underlying work and the recording.

Copyright protection of the recording as a general rule means that a person cannot, without the express permission of the copyright owner, duplicate or rearrange the actual sounds that make up the recording. Even taking a small amount of the original sounds will implicate a copyright right; in the words of one recent appellate court decision: “get a license or do not sample.” Consequently, even minor reproduction or arrangements require express permission of the copyright owner.

This does not prevent a person, however, from creating a new recording of independently fixed sounds, even if the end result sounds the same as a pre-existing copyrighted recording—but copyright in the underlying work may still need to be cleared. So, for example, if you come across a recording of a person reading aloud a chapter of a recently published book, you can record yourself reading that chapter aloud without infringing the first person's copyright in their recording; but you may need to get permission to use the book chapter from the book's author or copyright owner. (Note that permission to record the book chapter should not be necessary if the book is in the public domain.)

In California, there is also a tort of misappropriating identity. For example, if you imitate the voice of a “widely known” professional singer, you need to be concerned about violating that singer's property interest in her or his voice. This is the result of a court decision from 1988 involving Bette Midler. In that case, Ford Motor Company used a sound alike singer to sing “Do You Want to Dance” (a song made famous by Midler) for a commercial, after Midler had declined to allow her rendition of the song to be used. The court found that although there were no copyright or right of publicity interests in the voice, Ford had nevertheless “appropriated what is not theirs” – Midler's identity. The take home lesson for podcasters is this: if you're going to (1) imitate the “distinctive voice of a professional singer” which is “widely known” and (2) you “deliberately imitate” the voice “in order to sell a product”, you may run into a misappropriation of identity problem.

### **1.2.6. Interviewing Someone Or Asking Someone To Join You In Conversation As Part Of Your Podcast.**

If you interview someone for your podcast, you need to consider both copyright and publicity rights issues. For publicity rights, see the discussion in Section 1.3 — “Publicity Rights Issues” of this Guide.



As regards, copyright there may be two different owners of copyright in one interview – you as the interviewer and the interviewee in their response to your questions – depending on how the interview is presented.

In general, an interviewee will likely own copyright in their verbatim responses. As an interviewer, you will likely own copyright in your questions and any commentary you make during the interview and in any version you create of the interviewee’s conversation or any organization and arrangement of interview responses. As an interviewer, you may also own copyright in the overall compilation of an interview that incorporates different answers to multiple interviewees.

As an interviewer, you should make sure the interviewee agrees to the interview, your adaptation of their responses (assuming you intend to adapt them) and to the inclusion of their responses in your podcast and the circulation of your podcast on the terms you choose. In many interview scenarios, you may have an implied license to use the materials, but it is safest to get your interviewee’s written consent or (at minimum) record the interviewee’s verbal consent before you use the interview in your podcasts. (See discussion about the legal terms on which you can distribute your podcast in Section 2 — “Legal Issues Surrounding How You Distribute Your Podcast”).

### 1.2.7. Using Music.

Using music in your podcast opens up many specific copyright issues that we will address in this section. If the music you use is created by someone else and does not fall within one of the 5 types of content for which you don’t need permission (see Section 1.2.2 — “The Good News: 5 Instances Where Permission Is Not Required”), then these rules will apply to your use of that music. If you write and/or record all of the music you wish to use in your podcast, then you should consider the issues outlined in Section 1.2.4 — “Using Your Own Written Content” of this Guide to make sure you own the rights to your music. If you do, then you should be able to include it in your podcast without having to traverse the issues laid out in this section.

To understand the complex web of copyright issues in relation to music, you need to understand four basic principles: (i) that two types of copyright protected works are incorporated in most pieces of music; (ii) that two types of rights attach to each of these works and attach in different ways; (iii) what kinds of licenses you may need to obtain and from which entities; and, (iv) when and whether your use of music can constitute a fair use. You can see why music needs its own section. This section is split into four parts.

#### 1.2.7.1. Two Types Of Works Involved In A Copyrighted Song.

When you use copyrighted music in a podcast you are implicating two different types of copyrighted works: the *musical composition* and the *sound recording*. Although the practical distinction between these types of works is not obvious when you listen to a recording (i.e. when you listen to and use a piece of music, you are typically listening to and hearing both intertwined), it is nevertheless important because each of the two types of work is protected by its own copyright and is subject to its own rules. This means that a podcaster may need to approach multiple different rights holders just to obtain permission to use a single recorded song. The different entities that may own rights in that song will be discussed in Section 1.2.7.3 — “Licenses You Will Need”. First, however, it is worth taking a moment to explain the differences between the two types of copyright protected works that exist in most recorded music.



**(a) Musical Composition.** A copyright in a musical composition encompasses a song’s music and lyrics. It can be helpful to think of this work as what would appear in a sheet music arrangement of the song (the notes, score, markings, etc.). Copyright protects compositions from the moment a songwriter fixes the work in a tangible medium, such as writing the sheet music or by hitting “save” in a software program that creates music.

In practice, most songwriters do not retain the copyrights in their musical compositions, but instead assign the copyright to a publishing company — a business entity that specializes in commercially exploiting musical compositions. Most publishing companies, in turn, authorize collective rights management agencies to license and collect royalties for certain specific uses of their compositions. In the US, the Harry Fox Agency is typically authorized to issue so-called “mechanical licenses,” that is, the ability to reproduce and distribute the musical composition. The publishing company then also authorizes one of the performing rights organizations (e.g., ASCAP, BMI, or SESAC) to issue licenses for “non-dramatic public performances” of the composition (“non-dramatic” performances generally means performances other than for opera or musicals and would include broadcasts). For more on the Harry Fox Agency and the performing rights organizations, as well as on the reproduction/distribution and public performance rights, see the discussion in Section 1.2.7.3 — “Licenses You Will Need,” of this Guide.

**(b) Sound Recording.** A copyright in the sound recording protects the recording of a musical composition as it was performed and recorded by an artist or group. Think of this work as what you would actually hear when you play your favorite CD: the singer’s voice, the sound of the musical instruments, and all of the engineering that goes into making the recording. It is important to note, however, that federal copyright protection of sound recordings only attaches for recordings created after 1971.

Under state common law, copyright may attach to sound recordings created on February 15, 1972 or earlier. Use of pre-1972 sound recordings is subject to protection under state common law copyright. To determine who has the rights to a pre-February 15, 1972 sound recording and what rights they are entitled to exploit exclusively, you will need to look at the applicable state law – usually the law of the place where the recording was made.

As with musical compositions, the recording artist generally does not hold the sound recording copyright. Instead, whatever rights the artist has (and they usually are not copyright rights) are assigned to a record company in return for a share of the royalties from the sale and/or licensing of the sound recording. If you want to obtain permission to use someone else’s sound recording, however, you face a more complex situation than you do in relation to musical compositions and the permission you need to secure depends on how you are distributing the recording. For example: (1) no license is required to use a sound recording in an *over-the-air* radio broadcast; (2) *digital transmissions* that are considered *non-interactive* digital streams (in other words, listeners can’t pick the songs they hear) may be eligible for a statutory (non-negotiated) license (depending on whether they meet the statutory requirements), with royalties payable to SoundExchange (performance rights organization designated by the Copyright Office to collect and distribute statutory royalties to sound recording copyright owners and others); (3) digital transmissions that are considered *interactive* digital streams (such as an on-demand service where users can pick the songs), and *digital downloads*, require permission be obtained from the record company



that owns the copyright in the sound recording. Unfortunately for podcasters, it is not always clear into which of these categories a podcast fits; as a result, it is not certain to whom you should turn for licenses. These complications are discussed in Section 1.2.7.3 — “Licenses You Will Need.”

### 1.2.7.2. Two Types Of Copyright “Rights”.

In addition to appreciating that there are two types of *works* (the musical composition and the sound recording) at stake in any recorded song (and therefore, potentially, two copyrights), the use of a song in a podcast might implicate two or more different *exclusive rights* that copyright owners are granted under the Copyright Act in different ways, specifically: the right to *reproduce and distribute* copies of a work, and the separate right to *perform the work publicly*. Because, as noted above in Section 1.2.7.1 – “Two Types of Works Involved In A Copyrighted Song”, these rights also are frequently owned by different rights-holders and licensed by different entities and may or may not be implicated in the making and delivery of a podcast, it is worth taking a moment to explain the differences between them.

**(a) The Reproduction Right.** Copyright holders in both musical works and sound recordings (see Section 1.2.7.1 — “Two Types of Works Involved In A Copyrighted Song”) hold the exclusive right to “reproduce,” or make copies of, the copyrighted work. If you create a new copy of someone else’s song, for example, by downloading an MP3 file, burning it to CD, or causing it to be transferred to an iPod or other MP3 player, you may violate the copyright holder’s exclusive right to reproduce the work.

The simplest case of copying music involves reproducing an entire song. If you take an entire music track of someone else’s song from a CD and use a CD burner to make a copy of it, you might violate the rights of reproduction in *both* the musical work and the sound recording – absent fair use (see Section 1.2.9 — “Fair Use Under Copyright Law And Its Application To Podcasts”). However, if you record your own rendition of a song, based on a song you heard, you *only* violate the right of reproduction in the musical work, but not in the sound recording. This is because the reproduction right in a sound recording only extends to copying the actual sounds included in the sound recording; it does not extend to the independent creation of similar sounds.

If your podcast includes all or part of someone else’s recording of a copyrighted song, you may infringe the reproduction rights in *both* the musical work and the sound recording. So if you create an audio file that contains the music (whether ripped from a CD or taken from a downloaded music file) you make a reproduction of two copyrighted works and, unless any of the exceptions described in Section 1.2.2 — “The Goods News: 5 Instances Where Permission Is Not Required” apply, you need to have express permission from the rightsholder(s) (this means permission *in writing*, such as, an email giving you permission from a source you can confirm is indeed the person with authority to give the right, followed by a confirming letter from you noting the specific rights granted in the email, and the right-holder’s signature on the letter). This would be true even if you never post the podcast online. If you do in fact post the file for others to download and you have not obtained the copyright holders’ permission, in addition to direct infringement you could be also be secondarily liable for copyright infringement (under theories of “contributory” or “vicarious” infringement”) each time someone downloads it, because your act of putting it online enables others to create unauthorized copies. Copyright infringement



lawsuits potentially could result in thousands or even millions of dollars in damages and attorney's fees. Therefore, the only truly safe course under current law is to secure express permission to use, in your podcasts, any copyrighted music and sound recordings that are created by others unless you are sufficiently certain that it falls under the so-called "fair use" exception (discussed in Section 1.2.9 — "Fair Use Under Copyright Law And Its Application to Podcasts") or otherwise falls within an exception (see Section 1.2.2 — "The Goods News: 5 Instances Where Permission Is Not Required").

**(b) The Public Performance Right.** In addition to controlling reproductions of their music, the holders of copyrights in musical works, and in sound recordings that are transmitted digitally (e.g., over the Internet), also have the exclusive right to publicly perform their works. This right is less straightforward than the reproduction right, and courts have not resolved the question of whether it applies to podcasting. In this context, "performance" does not have its usual dictionary meaning; instead, it is defined in the Copyright Act to include essentially anything that allows music to be heard. "Performing" a song can include singing it, broadcasting or webcasting it, or just having a radio turned on and music playing. But in order to infringe the public performance right, a performance must also be "public." A performance is public if it takes place where many people are gathered (except in a home among family and friends) or if it involves transmitting a work either to a place where many people are gathered or generally to the public (as with a radio broadcast). The "public" requirement means that playing legitimately acquired music at home, like on your iPod or stereo, does not infringe the public performance right.

A podcast is probably "public" within the meaning of the Copyright Act (since it can be freely downloaded by all), but it may not be a "performance." Although normal Internet "streaming" webcasts plainly constitute "performances" because the transmissions from the webcasting server are immediately made audible by the listener's computer (just as songs broadcast over the air immediately are emitted as sounds by the radio), the way in which music included in a podcast is made audible is at least one-step less direct. In the ordinary case, a podcast is first downloaded as a copy onto the user's computer; the user, acting on his own initiative and timing, then plays the podcast and any music in it on her computer, iPod or other portable player.

Although your actions in creating a podcast ultimately enable a willing listener to hear the music (and other contents) contained in your podcast, it is currently still an undecided question whether you are therefore "publicly performing" a work merely by making it available for download; the US Copyright Office has declared this "an unsettled point of law that is subject to debate." (U.S. Copyright Office, *DMCA Section 104 Report*, August 2001, available at <http://www.copyright.gov/reports/studies/dmca/sec-104-report-vol-1.pdf>, xxvii.) No court has yet squarely addressed the issue, which means that podcasting is currently operating in a realm of considerable uncertainty.

Some of the leading copyright law commentators have suggested that non-simultaneous transmissions, such as podcasts, probably do not implicate the public performance right. (See Bruce P. Keller & Jeffrey P. Cunard, *Copyright Law: A Practitioner's Guide*, 2004 ed., § 14.2(E). Cf. Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, August 2005 ed., § 8.14(B)(1) (noting that internal operations of a computer do not seem to constitute a performance).) Performance rights organizations, by contrast, have asserted that "[e]very Internet transmission", streaming or download, is a public performance. For



example, ASCAP's Internet license FAQ (<http://www.ascap.com/weblicense/webfaq.html>) states that ASCAP's view is that "every Internet transmission of a musical work constitutes a public performance of that work."

There are three main performing rights organizations in the US -- ASCAP, BMI, and SESAC -- who own and license the public performance rights for the majority of commercially available musical works. BMI has recently created a license specifically designed for the podcasting of music (<http://www.bmi.com/licensing/forms/Internet0105A.pdf>), and ASCAP (<http://www.ascap.com/weblicense/release5.0.pdf>) and SESAC (<http://www.sesac.com/licensing/internet/licensing.asp>) have general Internet licenses which cover podcasting.

If you want to use commercially released music that BMI, ASCAP and SESAC or a large corporate entity control and you are concerned and want to eliminate any uncertainty, you may wish to obtain a public performance license either from BMI, ASCAP or SESAC or the individual artist or composer.

The person or entity who owns the copyright in a sound recording also enjoys the exclusive right to publicly perform that sound recording by means of digital audio transmission. The Copyright Act defines "digital transmission" very broadly (any "transmission in whole or in part in a digital or other nonanalog format"). If you want to provide a podcast with a copyrighted sound recording on an interactive basis (the user can select and download the podcast), then, that may be regarded as a digital audio transmission. If you need to secure a license for that use, then, ordinarily, you must approach the copyright holder of the sound recording directly.

### 1.2.7.3. Licenses You Will Need.

**(a) Licenses For Reproduction And Distribution Of Musical Works.** You can obtain a license to reproduce and distribute copies of the musical composition from the Harry Fox Agency (<http://www.harryfox.com/public/index.jsp>); most uses of other people's copyrighted music in podcasts will require that you obtain such a license (unless an exception applies Section 1.2.2 — "The Goods News: 5 Instances Where Permission Is Not Required"). Note that you can access the Harry Fox Agency's "Songfile" database, which allows you to search to find titles and authors of songs in relation to which Harry Fox licenses the reproduction rights (<http://www.harryfox.com/public/songfile.jsp>). One thing to be sure to do is search both on the title of the song you want over the author/song writer's name. The reason for this is that the singer (e.g. Britney Spears) who performs a song (e.g. "Oops!...I Did It Again") is often not the author/song writer (e.g. Max Martin, Rami). By searching on title, you will be more likely to find the title you intend to find.

Remember -- the licenses obtained from the Harry Fox Agency cover only the right to *reproduce and distribute copies* of the musical composition in a musical work and do **not** cover the right to *perform publicly* the musical work (see the preceding discussion for a description of licenses for public performances) or the right to reproduce, distribute copies of or perform the *sound recording* (see part (c) below).



The current rate for a license from the Harry Fox Agency is 9.1 cents per song per download for songs up to 5 minutes. If the song is longer than 5 minutes, the rate per download is 1.75 cents times the number of minutes (or fraction thereof). In either case, what you would have to pay is based on this rate times the total number of downloads. So, a podcast including one song of less than 5 minutes in length downloaded by 1000 users, for example, would result in fees of \$91 ( $\$.091 \times 1000$ ). A podcast that is 6 minutes and 18 seconds long downloaded 500 times would cost \$61.25 (7 minutes  $\times$   $\$.0175 \times 500$ ). Licenses from the Harry Fox Agency are available at <http://www.harryfox.com/public/licenseeServicesDigital.jsp>. There is also a per-song "processing fee" of \$8 to \$10. Details of these costs are found in Harry Fox Agency's FAQ (<http://www.harryfox.com/songfile/faq.html#faq1>). If you want to distribute more the 2500 digital downloads of the work, you need to contact Harry Fox Agency and set up an "HFA Licensee Account" (for more information see <http://www.harryfox.com/songfile/faq.html#faq3>)

Alternatively, podcasters can obtain licenses similar to the one available from the Harry Fox Agency by following the procedures of section 115 of the Copyright Act. This license is known as a "compulsory license" and requires notifying either the music publisher or the Copyright Office (if the publisher cannot be located) for every musical work desired (Information on notifying the Copyright Office is available at <http://www.copyright.gov/carp/m-200.pdf>). The usage fees are the same for the compulsory license as for a license with the Harry Fox Agency.

**(b) Licenses For Public Performance Of Musical Works.** If you decide to secure a public performance license from ASCAP, BMI, and SESAC based on the discussion in Section 1.2.7.2 — "Two Types of Copyright 'Rights,'" you need to remember that this license will not grant any rights to reproduction and distribution of copies of the musical works (for that you will need a Harry Fox license, discussed in part (a) above). Since the creation of a podcast and podcasting to the public inherently results in creating copies, public performance licenses alone would not be sufficient to obtain all the rights to podcast copyrighted music.

In addition, the ASCAP, BMI and SESAC licenses do not grant the right to perform publicly (through digital audio transmission) or the right to reproduce or distribute copies of any copyrighted *sound recordings* (as distinguished from musical works). For example, under the ASCAP license, you can publicly perform by podcast your own kazoo rendition of the musical composition of Britney Spears' song "Oops!... I Did it Again" (so long as you have also obtained the rights to reproduce the underlying lyrics and score from Harry Fox (see part (a) above), but if you publicly performed (by digital audio transmission) the original Britney Spears' recording from a CD you would also need a separate license to record and perform publicly the sound recording of Britney's performance.

The typical rate schedule for the current ASCAP license charges podcasters 1.85% of revenue plus 0.06 cents per session, with a minimum payment of \$288 a year (<http://www.ascap.com/weblicense/release5.0.pdf>). In addition, ASCAP requires quarterly reporting of music usage. Similarly, the current minimum fee for the BMI license is \$283 a year (<http://www.bmi.com/licensing/forms/Internet0105A.pdf>), and the minimum fee for the SESAC license is \$168 a year (<http://www.sesac.com/licensing/internetLicensing.asp>). Separate licenses from each organization may be necessary if you wish to use different songs in your podcast because each organization holds the rights to different musical works.



Once you have obtained a license from ASCAP, BMI, or SESAC for the performance of a composition, and from the Harry Fox Agency for the reproduction and distribution of copies of the composition, you can then legally podcast *your own renditions* of those compositions. However, if you want to podcast copyrighted *recordings* made by others (e.g., a song ripped from a CD or copied from a legal download), then you need to think about obtaining a license for reproduction and public performance (by a digital audio transmission) of those sound recordings (which is discussed in the next section) unless one of the exceptions discussed in Section 1.2.2 — “The Goods News: 5 Instances Where Permission Is Not Required” applies to your situation.

**(c) Licenses For Reproduction, Distribution, And Public Performance (By Digital Audio Transmission) Of Sound Recordings.** All of the rights to a sound recording are usually owned by the record company that produces the sound recording. Unfortunately, this means that you may be required to negotiate separately with multiple record companies for the right to reproduce and distribute their respective sound recordings as part of your podcast. Dealing directly with the record company that owns the rights to a particular song may be preferable, because the record company likely has the legal power to grant licenses for *all* the types of rights discussed above — to reproduce and distribute copies of the sound recording and to publicly perform the sound recording (by digital audio transmission)

**(d) Licenses For Use Of Music Together With Images (or Audiovisual Works).** This section deals with additional licenses you need to consider if you are using music with images in your podcast. Therefore, this section only applies to video podcasters. If your podcasts are limited to audio-only, then the good news is that you need not worry about the following three licenses.

If you are a video podcaster, then the possible licenses you will need to include a musical work with images in your video podcast fall into three categories: (i) synchronization (or “sync”) licenses (ii) “master use” licenses, and (iii) “videogram” licenses. Like the licenses for reproduction and public digital transmission of sound recordings (see previous section), these licenses do not fall within the mechanical licensing schemes and must be individually negotiated. Also, it should be noted that these licenses stem from “traditional” practices in a world pre-podcasting and pre-internet (e.g., many of these licenses relate to movie-releases and television broadcasting) and their specific application to the podcasting/digital world is not obvious.

(i) Sync License. The sync license is negotiated with the copyright owner (likely the music publisher) directly. The Harry Fox Agency discontinued sync licensing in 2002 (see <http://www.harryfox.com/public/licenseSynchronization.jsp>). Traditionally, the sync license allows you to “synchronize” a musical work with an audiovisual work, such as a motion picture or television program, and to make copies of the resulting audiovisual work. Also traditionally, these licenses came in only two flavors: a theatrical sync license and a television sync license. This means that under a traditional sync license, you may only distribute the licensed copies for the specific purpose of either exhibiting the audiovisual work in motion picture theaters or broadcasting the work on television. It is not clear how exactly these licenses will be applied in the podcasting context. To date, no specific sync license scheme exists for podcasts or other digital transmissions.



Given this ambiguity, the most conservative route in protecting yourself from legal attack is to consider your video podcast as a “theatrical release” or a “television broadcast.” Doing so means that you may be required to obtain a sync license when you want to include a musical work with the images in your podcast. If you are required to do so, then you should contact the copyright owner (likely the music publisher) directly to get permission to synchronize the musical work with the video track of your podcast.

(ii) Master Use License. The master use license is negotiated with the record company. It applies **only** if you want to use **a particular recording** of a musical work with a video image that you are putting into your video podcast. For example, it applies when you want to use Madonna’s recording of “Sorry” in your video podcast. When you do that, you will be required to get permission from the record company to use the “master recording” of the song for inclusion in your video podcast. The “master use license” does not apply if you make your own recording of “Sorry” for your video podcast.

(iii) Videogram License. Traditionally, a videogram (= “video” + “program”) license is used to describe a license for programs contained in audiovisual devices -- like videotapes, laser discs or DVDs – primarily intended for sale to the public for in-home use. Whether a podcast is considered legally the same as a videotape, laser disc or DVD remains to be determined. Viewing the risks conservatively, you may need a separate “videogram” license from the music publisher and the record company if you plan to distribute your podcast to the public (which, of course, is how most podcasts are distributed). The videogram license is necessary because the music publisher’s permission under the traditional sync license may not extend to copies of your podcast that you distribute to the public. Likewise, the record company’s permission under the master use license to use the recording of a song in the podcast may not authorize releasing the podcast for distribution to the public. The important notion here is that the trigger for this requirement is that your content is made available to the public generally, and not merely for a specific purpose like theatrical release or television broadcast.

#### 1.2.7.4. The “Fair Use” Exception.

For a discussion of how the fair use exception may apply to your inclusion of other people’s music in your podcast, please check out Section 1.2.9 — “Fair Use Under Copyright Law And Its Application To Podcasts” where we discuss fair use.

#### 1.2.8. Using Video/Images.

If you are interested in video podcasting, vlogging or otherwise including images or video with your podcast, you need to think about potential copyright issues and publicity issues. For publicity rights, see the discussion in Section 1.3 — “Publicity Rights Issues.” You should also generally consult the EFF Legal Guide for Bloggers if the content of your video podcast will likely touch on issues relevant to defamation, election and labor laws or adult material: <http://www.eff.org/bloggers/lq/>.

As regards copyright, the issues that arise are similar to those that arise in relation to the use of text or music except that there are more of them because a greater number of copyrighted works may be included in an image or video. You need to isolate and think about each type of work that may be included in an image or video and identify whether you need to clear each of those works. For example, you will need to identify each piece of music you use and any still images or video footage created by other people and



consider whether copyright applies and if so, whether your use requires the copyright owner's permission or whether your use falls within an exception to copyright. Using music together with images in a video podcast also raises special licensing issues. These are addressed in Section 1.2.8 — "Using Video/Images."

One final thing to consider that is not addressed above, although architects have no right (under copyright law) to prevent a public building from being photographed or sketched, you may want to think before including other artwork in your video or image collage and go through the exercise of identifying whether your use likely constitutes a fair use or whether separate permission is needed.

### 1.2.9. Fair Use Under Copyright Law And Its Application To Podcasts.

A "fair use" is copying any protected material (texts, sounds, images, etc.) for a limited and "transformative" purpose, like criticizing, commenting, parodying, news reporting, teaching the copyrighted work. Under the US copyright laws, fair use "is not an infringement of copyright." Judges typically consider four factors that are set forth in the Copyright Act. These factors are non-exclusive, so judges are permitted to consider other facts in addition to these. However, in the vast majority of cases, courts limit their analysis to these factors (you can read more detail about these factors at [http://fairuse.stanford.edu/Copyright\\_and\\_Fair\\_Use\\_Overview/chapter9/9-b.html](http://fairuse.stanford.edu/Copyright_and_Fair_Use_Overview/chapter9/9-b.html). The Brennan Center's excellent public policy report entitled "Will Fair Use Survive?: Free Expression in the Age of Copyright Control" provides a analysis of how fair use has played out in numerous scenarios over recent years: <http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>):

- the purpose and character of your use (this is sometimes called the "transformative factor");
- the nature of the copyrighted work (e.g., is the work highly creative fiction warranting broader protection, or is it highly factual warranting narrower protection?);
- the amount and substantiality of the portion taken, (as compared both to the underlying work and the work in which the copying is used); and
- the effect of the use upon the potential market (e.g., did the copyrighted work lose market share or potential market share?).

In addition, some commentators refer to a "fifth fair use factor" which hinges on good faith -- whether your conduct might be considered "morally offensive." Judges and juries are human, and their decisions can be swayed by whether they think you are a "good or bad" actor (see <http://bgbg.blogspot.com/2005/10/search-or-seizure.html>).

#### 1.2.9.1. Two Misconceptions About Fair Use.

**(a) Acknowledgement Is Not Enough.** Some authors have the erroneous belief that an *acknowledgement* will immunize a copyright infringement as "fair use." This is a myth. Including an acknowledgement may be considered in analyzing the four statutory factors, but it is by no means is a clear defense to a claim of infringement.

**(b) Disclaimers Are Not Enough Either.** Another point of confusion is whether an upfront *disclaimer* that denies any association between the podcast and the copyrighted material can protect the podcaster from liability. For example, assume your podcast is a parody of "The OC" television show. You include a disclaimer at the beginning of your podcast in which you state: "This podcast is not associated with or endorsed by Fox Television." This sort of disclaimer will



not, by itself, protect you from a claim of copyright infringement, or act as a clear defense to such a claim. It will, however, be considered among the factors the court considers, and in a very close case, a court may look positively on a clear statement of disassociation. (Note, however, that including a clear disclaimer can help with potential trademark infringement situations. See section 1.4 – “Trademark Issues” -- for further information about trademark law.)

### 1.2.9.2. Examples Of Fair Use That May Apply In Podcasting.

To help illustrate the way these factors may play out in the podcasting context, it may help to consider a few examples:

- **Example 1:** A book group organized by a high school teacher podcasts its meeting discussing J.D. Salinger's *Catcher In The Rye*. The members discuss the book, read short portions of it aloud, and criticize and comment on the author's style, the storylines, and the like. The podcast is posted on the book group's blog site, which is hosted by the high school. The site includes no advertising and generates no revenue. **Conclusion:** This would likely be a fair use.
- **Example 2:** A podcaster uses the copyrighted music of pianist George Winston for the intros and outros of her podcast that is about yoga and meditation. The podcast has nothing to do with commenting or critiquing the music played. **Conclusion:** This is likely not a fair use.
- **Example 3:** A 10-minute podcast includes a group of music fans discussing a recent copyrighted article in *Rolling Stone* magazine about a new band. One fan reads 4 paragraphs of the 6-paragraph article and comments on its analysis of the band. Another fan plays a 1-minute segment of the band's copyrighted song, which is 2 minutes in length. The fan then discusses the music as it compares to other music in the genre. The fans post the podcast on a fan website where advertising is sold, and the fans receive revenue for their podcast. **Conclusion:** This commentary/criticism by the fans in response to the article and song suggests a “fair use”, but the commercial/profit aspect of the site where the podcast is being distributed raises concern, as does the amount of the article and song taken in comparison to their overall length. Any negative effect on *Rolling Stone* magazine's market or the band's market for its music could cut against the fair use argument, though the podcasters might argue that the podcast promotes the *Rolling Stone* magazine article and band's song, and that it is not a replacement for either (of course, this would likely be costly and difficult to prove in a trial setting). Given the flexible application of the fair use doctrine, and that the burden lies on the podcaster to prove fair use, podcasters in this situation could be found to infringe.

## 1.3. Publicity Rights Issues.

A claim of right to publicity generally arises if you use another person's image, likeness or voice in a podcast without their consent and for commercial purposes, which results in injury to the individual. (See EFF's Bloggers FAQ for some recent cases where the right of publicity was at odds with the Constitution: <http://www.eff.org/bloggers/lq/faq-ip.php>). This means that if you use another image, likeness or voice as a way of advertising or soliciting your podcast, you will need the individual's consent. First amendment (freedom of speech) rights allow uses of a public figure's name or likeness so long as it is done (1)



in a truthful way and (2) does not imply a false endorsement of you or your podcast by the public figure.

Right of publicity is governed by state law, which means that it can vary state to state. For example, in California, a plaintiff would need to show that your podcast (a) used the individual's name, voice, signature, photograph, or likeness in your podcast (b) for purposes of advertising or selling, or soliciting, the podcast (or any other products or services), (c) without the individual's consent. If the plaintiff proves her case, she is entitled to payment of damages (of at least \$750), profits from the unauthorized use, and her attorney's fees and costs.

The good news is that that law in California includes an important exception to the general rule that consent is required. In situations where the name, voice, signature, photograph or likeness of an individual is used "*in connection with any news, public affairs, or sports broadcast or accounts, or any political campaign,*" consent is not required. So, to the extent your podcast can be construed as "news, public affairs, or sports broadcast or accounts", you do not need to obtain consent of the individuals. The language of this section is deliberately broad, so it is likely to apply equally to bloggers and podcasters as it would to traditional media, though this question has never been tested by California courts.

In California, if you use the name, voice, signature, photograph, or likeness of a "deceased personality" in your podcast, you still need to consider right of publicity issues. California law permits the heirs of that deceased personality to control the use of the personality for up to 70 years after the personality's death.

Moreover, on a related note, in California, you need to consider risks associated with misappropriating the identity of a well-known celebrity. For more information on this issue, see the discussion in Section 1.2.5. — "Incorporating Pre-Existing Audio Voice Recordings" regarding the Bette Midler case.

## 1.4. Trademark Issues.

### 1.4.1. Infringement And Dilution.

Generally, you can violate a trademark in at least in two ways: by direct infringement, and by dilution.

Direct infringement occurs when you use someone else's trademark (often a competitor's trademark) in a way that is "likely to cause consumer confusion" as to the source, affiliation or sponsorship between you and the trademark owner. This might occur if you use a trademark to describe your podcast, and the trademark owner thinks that your podcast is sufficiently related to their product or service, that a listener might conclude that the podcast comes from or is endorsed by the trademark owner, when that is not the case. For example, if you named your music-review podcast "The Rolling Stone Music Hour", you may find that Rolling Stone magazine will be unhappy with you and perhaps send you a cease and desist letter (among other possible unpleasant things). If however, your podcast had to do with gardening instead of music (e.g., Rolling Stone Gardening Hour), your risk of infringement would be much smaller, because listeners are unlikely to think that the well-known music magazine was sponsoring your gardening-related podcast.

Dilution can occur if the character of the trademark becomes clouded by an unwanted association, either through **tarnishment**, which occurs when a famous mark is used to



promote a product that is considered offensive (e.g., the mark "DISNEYLAND" being used to market an X-rated podcast), or through **blurring**, which means the use of a famous trademark causes consumers to blur the two companies in their minds (e.g., naming your podcast the "Nike Hemorrhoid Discussion Group"). In a dilution claim, a trademark owner must prove actual dilution, not merely the likelihood of dilution. Note that dilution does not occur from a "nominative" or informational use of a trademark, such as a critical review or what is known as a "descriptive" use of a trademark (i.e., using it in a sentence to discuss Nike). But even if consumers are not at all confused about the source, a trademark owner can have a claim for dilution.

#### 1.4.2. When Do I Need Permission?

Generally you do **not** need permission to make an informational (also called "editorial" or "nominative") use of a trademark. You also do not need permission if you're making a comparative advertisement (however, comparative ad situations often provoke trademark owners into legal action even when their trademark claims are weak especially if your statements about their product and your claims regarding your product are not wholly accurate). You will need permission if you're making a commercial use of the mark.

You may also identify the trademark of another (such as your employer or former employer) if the reference is accurate and does not cause confusion. For example, "I am Sobert Roble, and I work for SicroMoft" is acceptable if the context does not falsely suggest that the employer (here, SicroMoft) endorses the podcast. But using a title for a podcast such as "SicroMoft's Sobert Roble Speaks Out On The Issues" may suggest endorsement by the employer, and should therefore be avoided if that is not the case.

One other thing to remember is that you are not under an obligation to identify each and every trademark as a "registered" trademark. You can even use a trademark in the title of your podcast as long as it is not the title of series of podcasts. So, for example, you can title a single podcast "TRADEMARK ATTRIBUTION FOR DUMMIES" and not violate the trademark in the "For Dummies" books (see [http://www.schwimmerlegal.com/archives/2006/02/trademark\\_attri.html](http://www.schwimmerlegal.com/archives/2006/02/trademark_attri.html)).

EFF's Bloggers FAQ discussing intellectual property questions, <http://www.eff.org/bloggers/lq/faq-ip.php>, addresses the basic questions about when you may use a trademark without permission (nominative or informational uses) and when you need permission (commercial uses) in your blog. Those same rules apply equally to your audio or video podcast. You should just think more broadly about how trademarks will appear in your podcast (e.g., as sounds and images), which might be unique from the written text of a blog entry. You will still need to consider if your use of the mark is informational (informing, educating, or expressing opinions protected under the First Amendment) or commercial (like advertising, promotion, or marketing). See also the Chilling Effects website's trademark FAQ available at <http://www.chillingeffects.org/trademark/faq.cgi>.

#### 1.4.3. A Note About Using Trademark Disclaimers.

If you use a trademark in a commercial context in your podcast, it is a good practice to include a reference to registered trademarks of others in your show notes (if you have them) as well as in the podcast itself. A statement along these lines would suffice:

"[YOUR TRADEMARK] is a trademark of  
[YOUR NAME]. All other trademarks mentioned  
are the property of their respective owners."



You may also check with the company whose trademarks you reference and read its trademark use policy typically found on its website. While using a disclaimer does not immunize you or clear your rights to use a particular trademark in a commercial context, it can help to show your good faith.

### 1.5. Finding “Podsafe” Content To Include In Your Podcasts.

Finding good content to use in your podcast and individually negotiating permission to use it can be a time-consuming task and may also be daunting if you are unsure if the rights-holder will agree to authorize the use of their content in your podcast.

One way to reduce the time and hassle of individually seeking permission from each rights-holder is to search for Creative Commons licensed material. CC-licensed material is “pre-cleared” for use in accordance with the terms of the applicable Creative Commons license. We explain at section 1.2.2.5 – “You Are Using Creative Commons-Licensed Or ‘Podsafe’ Content” – about the different types of Creative Commons licenses. Below we explain how you can find and identify CC-licensed content that you may be able to use in your podcast.

#### 1.5.1. Finding CC-Licensed Materials.

Creative Commons licenses are expressed in three formats: the human readable summary of the key terms (Commons Deed); the actual license (Legal Code); and, finally Resource Description Framework metadata that describes the key license elements in machine-readable format.

You can identify Creative Commons licensed content in two ways: either by looking for a human-readable statement that a piece of content is licensed under a Creative Commons license. This can include, for example a statement to the following effect:

“This work is licensed under a Creative Commons Attribution 2.5 license <http://creativecommons.org/licenses/by/2.5/>.”

And/or this may be indicated by the use of one of the Creative Commons logos or license buttons, such as our “some rights reserved” button:



Or the CC license buttons:



You can also find Creative Commons licensed content through the customized Yahoo! and Google searches that are available in the “Advanced Search” pages for both search engines. The Yahoo! Advanced search (<http://search.yahoo.com/search/options>) page



clearly illustrates how you can limit your search results to Creative Commons-licensed works. In the Google Advanced Search page ([http://www.google.com/advanced\\_search](http://www.google.com/advanced_search)), by limiting your search according to “Usage Rights”, this will restrict your searching to find CC-licensed materials only.

There are also various content aggregator sites that offer a large amount of Creative Commons licensed works. These are listed at this page: [http://wiki.creativecommons.org/wiki/Content\\_Curators](http://wiki.creativecommons.org/wiki/Content_Curators).

**One thing to note about Creative Commons licensed content generally** - you should be aware that all of the licenses contain a disclaimer of warranties, so there is no assurance whatsoever that the licensor has all the necessary rights to permit reuse of the licensed work. (*Note:* this applies to version 2.0 licenses and up; the version 1.0 CC licenses included a warranty of title). The disclaimer means that the licensor is not guaranteeing anything about the work, including that she owns the copyright to it, or that she has cleared any uses of third-party content that her work may be based on or incorporate.

This means that you should satisfy yourself that the person has all the necessary rights to make the work available under a Creative Commons license. You should know that if you are wrong, you could be liable for copyright infringement based on your use of the work.

You should learn about what rights need to be cleared (such as for example publicity rights) and when a fair use or fair dealing defense may be available. It could be that the licensor is relying on the fair use or fair dealing doctrine, but depending on the circumstances, that legal defense may or may not actually protect her (or you). You should educate yourself about the various rights that may be implicated in a copyrighted work, because creative works often incorporate multiple elements such as, for example, underlying stories and characters, recorded sound and song lyrics. If the work contains recognizable third-party content, it may be advisable to independently verify that it has been authorized for reuse under a Creative Commons license.

### 1.5.2. Other Sites That Offer Podsafe Content.

See Section 4 – “Background And Further Resources” – of this Guide for a listing of podsafe content providers.

## 2. Legal Issues Surrounding How You Distribute Your Podcast.

You may license your work through either an “implied” or an “express” license. An “implied license” in copyright is a license created by law based on the circumstances that surround how the work is made available when there is no actual agreement between you and the licensee. An “express license” means you have expressly stated the terms of the license in some written form.

### 2.1. Implied Licenses.

An implied license might occur when your actions indicate that you (the copyright owner) extended a license to those using your podcast, but you never created a written license. In an implied license, you may never have agreed on specific terms of the license. The purpose of an implied license is to allow the licensee (the party who is using your podcast) some right to use the podcast, but only to the extent that you would have allowed had you negotiated an actual agreement. Generally, the custom and practice of the community are used to determine the scope of the implied license. There are no clear definitions or established legal rules to handle the



situation of an implied copyright license in all cases, especially as it relates to new technology like podcasting.

One area where implied licenses have been found is when a work was created by one party at the request of another. For example, if you hired someone to create some music for your podcast, a court may rule that you had an implied license to include the music in your podcast, reproduce and distribute it as you'd like, even if you and the musician never came to any specific agreement about the ownership of the copyright in the work. Alternatively, if someone hired you to produce an entire podcast, they may have a right to reproduce and distribute the podcast even if you never came to specific terms of an agreement.

Because implied licenses leave many open questions about copyrights, it's best to be express about the terms under which you wish to license your podcast. Specific options to consider for express licenses are discussed in next Section 2.2 — “Express Licenses.”

## 2.2. Express Licenses.

You have many options in terms of the exact type of express license you choose to apply to your podcast. If you are a lawyer or know a lawyer, they can generally prepare a license or terms of use that reflect your specific preferences as to how other people use your podcast. Below, we mention two of the currently most common forms of express licensing for podcasts — a Creative Commons license and an “all rights reserved” license.

### 2.2.1. Applying A CC License To Your Podcast.

Before you apply a Creative Commons license to your podcast, you first need to consider the legal issues outlined in this Guide. You can only apply a Creative Commons license to your podcast if you are the creator of all of the materials included in your podcast or if you have the express permission of the creator or copyright owner of materials included in your podcast to license their materials under a Creative Commons license. It is possible for example, to apply a Creative Commons license to some elements of your podcast (e.g. your interviews and general talking) but not others (e.g. third party music to which you only have a limited license). In that case, it is important that you clearly identify which components of your podcast are under a Creative Commons license and which parts are not. In addition, this page provides you with an overview of some of the issues you may wish to think about before you apply a Creative Commons license to your podcast: <http://creativecommons.org/about/think>.

Some of the benefits of applying a CC license to your podcast include providing clear signaling of and clarifying the permitted terms of use to your listeners, for example, whether you are happy for them to mashup your podcast or not; and also, if you include the Creative Commons metadata, your podcast can be readily found through Yahoo! and Google customized CC-searches if incorporated properly.

Creative Commons metadata can be incorporated in a podcast in one or all of three different locations:

- Incorporation in the webpage(s) that host the podcast. This will enable uses of the Yahoo! and Google Creative Commons-customized search and other CC-enabled search engines to discover your podcast.
- Incorporation in the podcast syndication feed(s), which will enable those services that are eager to promote curated and fully legal audio feeds, of which there are many, to do so.



- Embedding in the podcast mp3 files. This practice, outlined at <http://creativecommons.org/technology/embedding>, allows users of CC-enabled filesharing programs such as LimeWire and Morpheus to find and spread legal content.

### 2.2.2. Using the “All Rights Reserved” Model For Your Podcast.

One method of marking your podcast before distribution is to use the “All Rights Reserved” model. Under this model, you would “reserve” all your copyright-related rights in your podcast by marking it with the © symbol. The traditional way to mark your podcast is:

© [owner] [year]

You can also include a statement that you “reserve all rights” in the podcast and specifically the content created and distributed by you. You can also include the © [owner] [year] language on your website’s homepage and on any page where copyrighted podcast content appears. If you include only a statement that you “reserve all rights” then you are likely giving people who listen to your podcast only a limited, implied license to use and listen to your podcast based on the circumstances of how you are making it available.

### 2.3. Using A Service To Distribute And/Or Promote Your Podcasts.

We are reviewing “terms of use” agreements offered by many podcast service providers and will update this section of the Guide to address legal issues related to these “terms of use” agreements of which podcasters should be especially aware.

For now, suffice it to say, that before you agree to use any podcasting services, you should, at a minimum, read the provider’s terms of service, privacy policy and copyright policy. This ensures, first, that such policies exist (which can tell you a bit about who you are dealing with), and second, informs you of the terms and policies to which you may be bound. It is a best practice for service providers to make these policies clearly available through a link on the service provider’s home page, as well as on any page on the website where you sign up for the service. If these policies are not obvious and clearly available, write to the provider and ask for details before you move forward. If the provider is reluctant or refuses to provide the terms up front, it would be better to hold off doing business with the provider until their policies are in order and in writing.

## 3. Basic Background Of Podcasting

### 3.1. A (Very, Very) Brief History.

Podcasting’s roots reportedly date back to 2001, and are closely tied to the development of blogs (or web logs). It developed from the desire to have downloadable audio and video content delivered automatically to your digital media player (e.g. your iPod). In addition to people interested in providing content for podcasts, many technologies had to be in place for this to work including generally available high-speed Internet access, MP3 formats, software that automatically tells you when a podcast/blog update has occurred, and digital media players. According to Wikipedia, the term “Podcasting” was first used as a synonym for audioblogging or weblog-based amateur radio in February 2004. One marker of podcasting’s astronomical growth is that in September 2004 a Google search on the word “podcasts” resulted in 24 hits (see <http://www.itgarage.com/node/462>). Today, that same Google search results in 115 million hits (January 16, 2005) (see



<http://www.google.com/search?q=podcasts>). So, with the fast growth of this technology, legal issues are ripe for consideration.

### 3.2. What Is Podcasting? What Are Podcasts?

Generally speaking, podcasting is the technology that allows for distributing audio or audio/video programs automatically over the Internet through a “publish and subscribe” model. (See <http://en.wikipedia.org/wiki/Podcasting>). A podcast is the program that is distributed using the podcasting publish and subscribe model. The key common ingredients of a podcast are: (1) an audio and/or audiovisual file that is (2) archived and available on the Internet, (3) such that it is accessible by a computer automatically (via RSS or other feeds with enclosures), and (4) is downloaded and (5) transferable to a portable media player.

Important to this understanding is that a podcast is *not* just a downloadable audio or video file. What makes it unique is its “subscription model” which uses feeds (like RSS or Atom) to deliver the enclosed file. (See <http://en.wikipedia.org/wiki/Podcasting>; [http://www.micropersuasion.com/2005/08/when\\_is\\_a\\_podca.html](http://www.micropersuasion.com/2005/08/when_is_a_podca.html)). Additionally, even though many people may subscribe to a given podcast, it is not clear that every person who *subscribes* will actually *play* the podcast or copy it to a portable media player. This distinction can have an impact on certain legal questions discussed in this Guide (see performance rights discussion in Section 1.2.7.2 – “Two Types Of Copyright ‘Rights’”).

### 3.3. How Does It Work?

The steps to creating and distributing your podcast are simple:

- record your content (audio or video);
- edit your content (for example, add an introduction or segues using podsafe music);
- upload the audio/video content to your web server;
- create your RSS feed which points to your content (the feed include “tags” like your file’s full address, its title, length, and type, and a short description of the content);
- (optional step) validate your feed (using, e.g., <http://rss.scripting.com/> or <http://validator.w3.org/>);
- submit your podcast (sometimes called an “episode”) to podcast directories.

### 3.4. What Is RSS? How Does it Work With Podcasts?

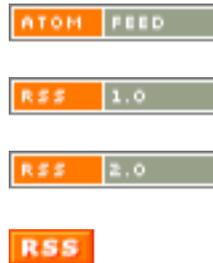
In a nutshell, RSS is the technology that allows for the “publish and subscribe” model to work in podcasting, blogging, and other websites that change or add to their content regularly. It has undergone several releases since its earliest incarnation, and the most current standard is called “Really Simple Syndication (RSS 2.0)”. Presently, most RSS subscriptions are free.

There are two primary steps required for RSS feeds to work with the podcast: First, the podcaster must place the podcast (typically an MP3 file) on a web server, so it is available for download. The podcaster also then posts an RSS file pointing to the web location of each podcast’s MP3 file along with the relevant metadata. To do this, the podcaster must have the appropriate software that presents the new podcast in machine-readable XML format, giving a line or two of the podcast’s description, and then a link to the full podcast. This is called the podcaster’s RSS Feed. Usually, an orange colored [XML] or [RSS] feed button signifies that the podcast is available through the feed. The



“official” RSS feed for a program is that feed that the podcaster establishes, or contracts with a third party to establish.

Second, the user (podcast listener) wishing to obtain the podcast feed, will go to the site and click on one of the feed buttons which may look like any of these:



Some podcast service providers help create the feeds and may have special icons like, for example, the icon used by FeedBurner.

By clicking on the feed button, you will add the feed to your podcast aggregation (aka “podcatcher”) software, like iTunes. You can set the podcatcher to check back automatically for any new podcasts that have been posted through the feed. If new podcasts exist, the podcatcher will automatically download the new feeds to your computer. If you wish to take the podcasts on the go, the podcasts may then be transferred to your portable media player (e.g., your iPod).

#### 4. Background and Further Resources.

This section of the Guide offers some resources you may find helpful. By including these resources here, we do not “endorse” them, but hope that you find these as useful places to get more information. There is, of course, a wealth of information in addition to these resources, and this is not intended to be an exhaustive list at all. Many other resources are available on-line and in your local library or bookstore.

From time to time we may update this list on the on-line version of this Guide located at [http://wiki.creativecommons.org/Podcasting\\_Legal\\_Guide#Background\\_and\\_Further\\_Resources](http://wiki.creativecommons.org/Podcasting_Legal_Guide#Background_and_Further_Resources):

- 4.1. General Information.  
Podcasting: <http://en.wikipedia.org/wiki/Podcasting>  
RSS: [http://en.wikipedia.org/wiki/RSS\\_%28file\\_format%29](http://en.wikipedia.org/wiki/RSS_%28file_format%29)
- 4.2. “How To” Podcast.  
[http://www.castwiki.com/index.php/Make\\_a\\_podcast](http://www.castwiki.com/index.php/Make_a_podcast)  
<http://www.how-to-podcast-tutorial.com/>  
<http://www.podcastingnews.com/articles/How-to-Podcast.html>  
<http://help.ziepod.com/index.php?pid=050811091346> (this link has is a great diagram and description of the basic steps of how a podcast works)  
[http://www.makezine.com/blog/archive/2005/07/how\\_to\\_make\\_enh.html](http://www.makezine.com/blog/archive/2005/07/how_to_make_enh.html) (making enhanced podcasts in iTunes)  
[http://www.jakeludington.com/project\\_studio/20051004\\_windows\\_media\\_enhanced\\_podcast.html](http://www.jakeludington.com/project_studio/20051004_windows_media_enhanced_podcast.html) (making enhanced podcasts using Windows Media Player)



- 4.3. Open-Source Podcast Players.  
<http://ipodder.sourceforge.net/index.php>  
<http://amarok.kde.org/>
- 4.4. Search Engines And Directories For Podcasts.  
<http://www.podcast411.com/page2.html> (reflects numerous directories)  
<http://www.vodstock.com/vodstock/vodcast-directories.php> (listing video podcasts and “vlog” directories as of Nov. 10, 2005)  
<http://podcasts.yahoo.com/>  
<http://www.podcast.net/>  
<http://www.podscope.com/>  
<http://search.singingfish.com/sfw/home.jsp>  
<http://www.podcastalley.com/index.php>  
<http://www.digitalpodcast.com/>
- 4.5. Podcatcher Programs.  
A list is available at: [http://en.wikipedia.org/wiki/List\\_of\\_Podcatchers](http://en.wikipedia.org/wiki/List_of_Podcatchers)
- 4.6. Finding Podsafe Content.  
<http://creativecommons.org/>  
<http://www.audiofeeds.org/>  
<http://music.podshow.com/> (the podsafe music network)  
<http://www.podsafeaudio.com/>  
<http://www.ipodarmy.com/2005/06/how-to-find-podsafe-music/> (how-to article)  
<http://www.magnatune.com>  
<http://promonet.iodalliance.com> (a service from IODA (Independent Online Distribution Alliance) that offers podcasters, and others access to thousands of pre-cleared tracks from independent record labels)  
<http://www.pumpaudio.com/index.html> (proper licensing of independent music for use in advertising, television, film and the web)  
<http://www.garageband.com/htdb/feed/partners.html> (music supplier with large catalog of CC music)  
<http://www.gcast.com> (free and simple service that provides entire GarageBand catalog that is podcast safe)
- 4.7. Websites With Legal Information On The Issues In This Guide.  
<http://www.creativecommons.org>  
<http://cyberlaw.stanford.edu>  
<http://cyber.law.harvard.edu>  
<http://www.eff.org>  
<http://www.chillingeffects.org>  
<http://www.publicknowledge.org>  
<http://www.copyright.gov>  
<http://www.uspto.gov>  
<http://www.schwimmerlegal.com>
- 4.8. Public Domain.  
For published and unpublished works, there are a number of helpful charts to help determine the duration of a copyright and when a work enters the public domain:  
  
Peter Hirtle, Copyright Term and the Public Domain in the United States:  
[http://www.copyright.cornell.edu/training/Hirtle\\_Public\\_Domain.htm](http://www.copyright.cornell.edu/training/Hirtle_Public_Domain.htm)



Mary Minow's chart is very helpful for the math-challenged. She also includes other useful copyright expiration dates by year. See Mary Minow, "Library Digitization Projects and Copyright," <http://www.librarylaw.com/DigitizationTable.htm>.

- 4.9. IP Law (Copyright, Trademark, Publicity Rights, Etc.).  
<http://www.chillingeffects.org>  
<http://www.eff.org>  
<http://www.creativecommons.org>  
<http://www.fairuse.stanford.edu>  
<http://www.kasunic.com>
  
- 4.10. Books About Podcasting.  
*Podcasting for Dummies: A Reference for the Rest of Us*, Tee Morris, Evo Terra, Dawn Miceli, Drew Domkus (For Dummies, 2005)  
  
*Podcasting Hacks: Tips & Tools for Blogging Out Loud*, Jack D. Herrington (O'Reilly, 2005)  
  
*Podcasting Solutions: The Complete Guide to Podcasting*, Michael W. Goeghegan and Dan Klass, (Apress, 2005)  
  
*Podcasting: The Do-It-Yourself Guide*, Todd Cochrane (Wiley, 2004)  
  
*Secrets of Podcasting: Audio Blogging for the Masses*, Bart G. Farkas (Peachpit Press, 2005)
  
- 4.11. Other Resources About Copyright Law.  
*Understanding Copyright Law*, Marshall Leaffer (Lexis Nexis 1999).  
*Kohn on Music Licensing*, Al Kohn and Bob Kohn (Aspen Law & Business)  
*Getting Permission: How to License and Clear Copyrighted Materials Online & Off, 2nd Edition*, Richard Stim (Nolo, 2004).  
*Clearance & Copyright: Everything the Independent Filmmaker Needs to Know*, Michael C. Donaldson (Silman-James Press)
  
- 4.12. Other Resources About Trademark Law.  
*Trademark: Legal Care for your Business and Product Name*, Stephen Elias (Nolo 2003).
  
- 4.13. Other Resources About Digital Rights, Copyright, Free Expression.  
<http://www.chillingeffects.org>  
<http://www.eff.org>  
<http://www.creativecommons.org>  
<http://www.fairuse.stanford.edu>  
<http://www.fepproject.org/policyreports/WillFairUseSurvive.pdf>



**NOTES**



## ABOUT THE AUTHORS

**Colette Vogele** is the founder of Vogele & Associates, a San Francisco-based firm that advises businesses, non-profits, and individuals on a range of intellectual property issues related to new media and internet technologies. Vogele is also a fellow with Stanford's Center for Internet & Society (<http://cyberlaw.stanford.edu>) and writes and speaks internationally on intellectually property issues. For more information, please visit <http://www.vogelelaw.com>.

**Mia Garlick** is the General Counsel for Creative Commons, a not-for-profit organization, founded in 2001, that promotes the creative re-use of intellectual and artistic works—whether owned or in the public domain. Creative Commons licences provide a flexible range of protections and freedoms for authors, artists, and educators that build upon the "all rights reserved" concept of traditional copyright to offer a voluntary "some rights reserved" approach. It is sustained by the generous support of various foundations including the John D. and Catherine T. MacArthur Foundation, the Omidyar Network Fund, the Hewlett Foundation, and the Rockefeller Foundation as well as members of the public. For general information, visit <http://creativecommons.org>.

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