

# PODCASTING: LEGAL ASPECTS OF PODCASTING COPYRIGHTED MUSIC

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A new term, Podcasting, has surfaced as the next wave of digital audio sharing that has many industry officials worried and many people who create them confused. This paper and supplemental Podcast aims to define a Podcast in both common definition and as it pertains to the music industry and licensing, explain what the various licenses are and why they are needed, inform the reader of who to contact if they wish to use music in their audio files and discuss some of the problems associated with podcasting this copyrighted material. Before delving into the intricacies of licensing for a technology which the music industry has yet to catch up with it is necessary to define what exactly a podcast is and is not. This definition will have a direct effect on what sort of licenses one must purchase in order to use their favorite song in their own podcast.

In short, a Podcast is when the creator makes an audio file available through a subscription that allows software to download the file automatically to the subscriber's computer. The word Podcasting is derived from the Apple Corporation's popular mp3 player the *iPod*<sup>™</sup> and the word *broadcasting*. At the root of a podcast is the sound file, which is usually saved in the popular Mp3 format. The difference between a podcast and an audio file is in the transmission method and some would argue the content of the file. The file in a podcast is linked to a feed, or subscription model, which delivers the audio file to the user. Listeners subscribe to these feeds by using an aggregator, software that periodically checks for updates and automatically downloads the new file. Due to this format users are now able to time-shift information. Instead of having to listen to a complete radio broadcast a user can now listen to the program when ever they choose. The ease in which a podcast can be created and distributed opens a new outlet to communicating ones message with the masses.

Podcasting's content tends to be formatted in a radio broadcast style. Anyone with a microphone and a computer can create a podcast and become a Podcaster. The speaker creates his "show" on any topic he or she deems fit, adding background music, interviews or simply stating one's opinion. Content is only limited by the creator's imagination and the good sense of his or her friends. A podcast can be thought of as an audio blog. Blogging which gained popularity in early 2000 is a text based "diary" that is date and time stamped. It allows the author to discuss issues and their lifestyle in a text format. Podcasting is, in many cases, simply an incarnation of this text based blog.

Like many authors of blogs, Podcasters tend to shun the large corporations and business structures that force people to pay for a service which they believe should be free. Because of this most podcasts are available for free with the exception of some large news media organizations and other corporate podcasts. Most of the software needed to subscribe to a podcast can be downloaded free and all of the applications needed to create your own podcast are readily available as freeware on the internet. The challenges many people face when creating their own show is in dealing with the subscription protocol and, if music is used, in the legal aspects of distributing copyrighted material.

Podcasting is not currently regulated by an overseeing body. It is an open platform where anyone can create and listen to audio programs that contain the content of their choice. A few careful and deliberate steps must be taken to ensure that the creator of the podcast is legally distributing any music which they use. The three different licenses needed to podcast music are: a Mechanical Rights License, a Performing Rights License, and in many cases, a Master License.

### **Mechanical License:**

A Mechanical License grants a person the right to reproduce and distribute copyrighted musical material. The difference between a mechanical license and a Master License is that the Master Rights License grants you the right to use an **existing version** of the song, such as the Naxos Label's recording of Beethoven's 5<sup>th</sup> Symphony played by the Boston Symphony Orchestra. The Harry Fox agency, the agency responsibly for giving licenses and overseeing mechanical rights in the U.S., does not have a license that specifically includes podcasting. The closest license they have is one based on a digital download which **will work** for a podcast. This license is called the *New Media License*. Though the Harry Fox Agency is not granting licenses specifically for podcasting their digital download license covers all of the issues Podcasters must deal with. Since a podcast can be copied from one user's computer to another and can be considered permanent (i.e. it is not a web stream) a license for webcasting or streaming music cannot be used.

### **Performing Rights License:**

ASCAP, BMI and SESAC all collect revenue for the owners of copyrighted musical material. ASCAP and BMI have both recently unveiled licenses that include podcasting under their headings. ASCAP's *Non-Interactive 5.0* license for non-interactive services, non-interactive as defined by ASCAP means that a user cannot select the songs they wish to hear, is their podcasting license. A separate license is available for "interactive" media. "Examples of music that qualifies for the Non-Interactive 5.0 License includes:

- Webcasts
- Performances that are embedded in a site or service
- Samples not more than 60 seconds in length."(ASCAP Website)

BMI's license for Podcasting mimics that of ASCAP's. BMI's contract is titled "Web Site Music Performance Agreement" The Annual Minimum fee for 2005 is \$283.00 BMI will allow you to pro-rate the minimum fee when it is purchased. ASCAP's minimum license fee is \$288.00 per year and **cannot** be prorated. Unfortunately for the creators if they use many popular songs they will most likely have to purchase licenses from both companies as each organization has a different catalogue of songs. SESAC does not currently offer a license that fits the genre of podcasting.

### **Master License:**

A Master License allows a person to distribute a copyrighted music work for which you do not own the rights. Sound Exchange is a non-profit company in charge of licensing and collecting royalties on digitally transmitted music. As per the Digital Performance in Sound Recording Act of 1995 and the Digital Millennium Copyright Act of 1998 users are now required to pay the owner of the works for digital performance. Sound Exchange is unfortunately not the correct company to clear rights for podcasting because of their licensing structure and statues in the Copyright Act.

A **Compulsory license**, which legally states the owner of the recording must allow the song to be performed for a fee, is only applicable if the broadcast of performance falls within three statues of the revision. “The digital music covered by SoundExchange’s statutory license, according to section 114 of the copyright act, includes four classes of music: non-subscription services which includes webcasts that do not charge a fee, pre-existing residential services that transmit digital music (digital cable), new subscription services that charge a fee and pre-existing satellite radio stations. Section 112 of the Copyright Act includes ephemeral reproductions (temporary digital copies) which are made by digital music services covered by section 114”(Sound Exchange). Unfortunately for Podcasters their format does not fall under the auspices of the statutory license because a podcast can be copied, saved and transferred from computer to computer or device to device. The only option for Podcasters is to obtain a **voluntary license** from the record company. The record company can charge whatever fee they deem fit for the purpose or, they may not allow you to use the song at all. At the time of writing the only way to obtain a master license for podcasting is to approach the owner of the work one wishes to use, request permission and pay their fee. Sound Exchange does not cover downloads.

The costs of purchasing these licenses may prohibit many people from using copyrighted material in their programs, or as is the case now the works will be used illegally. With the industry making large public cases against piracy and downloads it will only be a short while before Podcasters become the target of industry lawyers. The cost of settling a case for all the copyright infringements one commits when illegally using copyrighted material will be much higher than any costs incurred while purchasing the licenses. All of the forms needed to license material can be found on the organizations websites, which are listed in the appendix.

For the podcast creator who still wishes to use music in his broadcast but does not wish to have the full force of the RIAA against them there are some options. The easiest way to not infringe on someone’s copyrighted works is to use your own original music which you have copyrighted. You own the rights to this music and it is your choice in how you use it. Another option is to use royalty free music which can be widely purchased on the internet. The creator must make sure that the license that comes with the royalty free music can be extended to the podcasting genre. A third option is to stream the podcast as a webcast, though this will technically not be a podcast because it cannot be downloaded. Licensing schemes which are easier to navigate and in many cases cheaper to purchase are available for podcasters who wish to forgo the problems of distributing a permanent downloadable file and instead only want to stream their show.

As podcasting becomes more popular larger numbers of people could presumably turn to podcasts as their main source of information. Traditional radio as we know it may slowly be replaced by downloadable mp3s. At the current time that is not a likely possibility since the costs of distributing and producing a podcast are extremely high. For the average Podcaster who wishes to distribute or use copyrighted material the numbers are heavily in favor of the artist/record companies. It is important to realize that no matter who uses the material, if it is given away, used as background music, or featured in a show, downloadable for free or pay, **everyone** needs to obtain the correct licenses to distribute the material of their choice. The innate problems associated with the podcast cause much confusion when trying to find information on the correct and legal way to license one’s creations. The fact that a podcast is not a webcast but more of a download confuses many people both in the industry and on the consumer side. The definition discrepancies of Podcasting coupled with the need to purchase and negotiate three different license types may cause many people to not attempt legally podcasting music. I have offered some suggestions and alternatives for using music in a podcast and hope that they may be of help to the reader. The future of consumer education, free speech and mass marketing are all changing at a dramatic rate and podcasting will be at the forefront of the revolution. .

*Any questions or comments can be directed to [Brad@bradrollans.com](mailto:Brad@bradrollans.com)*

*All knowledge contained here-in was current when the article went to press. I encourage the reader to make sure they have all of the correct materials and forms filled out before they broadcast music. I am not a lawyer and I make no assumptions as to the correctness of my conclusions. I hope this booklet can be of service to you and I encourage you to pass it along to anyone else interested in the topic. The Bibliography is filled with excellent resources and I employ you to explore them for yourself.*

*Sincerely,  
Brad Rollans*

*September 22, 2005*

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