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Take Care Before You 'Cast

Navigating copyright law when using music in your podcast.

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After percolating for a decade or so, podcasts have grown wildly popular as a communication medium. This is a result of a confluence of factors, not the least of which is the emergence of a certain story about a murder in Baltimore. We are now living in a post-*Serial* world. And just like with any other form of media, there's some confusion about the rules of the road. All of which brings me to the copyright question at hand: Can I play prerecorded music on my podcast?

Let's start with this: Under U.S. copyright law, you can't just play any recording you want, whenever you want, through whatever medium you want. So what are the rules? What follows is a simplified version of how music copyright works.

MUSIC COPYRIGHT 101

When you hear a recording of a song, there are, most likely, two separate copyrights embodied in that song: the copyright in the musical composition

(the words and music) and the copyright in the sound recording. We all know that there are often many different versions of the same song, sometimes recorded by different artists at different times. Well, each of those versions contains the same underlying musical composition (the "song"), but each also comprises a unique sound recording.

Sometimes the songwriter owns both copyrights. If I write a song today and record it, I own the copyright to the musical composition and the sound recording. Often, those rights will end up being owned by separate people or entities. For example, a record company may own the rights to the recording (the "master") while a music publishing company may own the rights to the musical composition. It can get more complicated from there, but this is enough for now.

BACK TO PODCASTS

Every time you download or stream a podcast, you're making a copy of the audio file containing that podcast. The word "copy" in the previous sentence should provide a clue why that matters. *Copyright* includes, among other things, the right to prevent others from making copies of your work.

OK, let's say I understand all this, and I just really want to play my favorite song on my podcast. In order to do so, I'll have to obtain the necessary rights for both the musical composition and the sound recording.

The right to reproduce and distribute copies of a musical composition (remember, that's the "song" as written by the songwriter) falls under what's called a "mechanical license." This doesn't mean you have to call up Bruce Springsteen himself if you want to play "Glory Days" on your podcast. For most well-known songs, these rights are administered by an agency that acts as the middleman. The most well known is the Harry Fox Agency. Contact them and see how much the rights are (I'll wait right here).

It's also a bit of an unresolved legal question whether or not including a song in a podcast is a "public performance" for the purpose of copyright law. I'm trying not to let this all get too out of hand, but suffice to say that if the law was to consider my podcast a "public performance," then I would also need a license from another agency entirely, such as the American Society of Composers, Authors and Publishers, Society of European Stage Authors and Composers, or Broadcast Music Inc.

One more point before I move on—let's say you want to record your own version of a popular song and use it on your podcast (or you want to have a friend record her version, you get the idea). In that case, you'd still need the rights from Harry Fox, and, presumably, one of the performance licensing agencies listed above.

All right, so what about the sound recording—meaning, the well-known,

popular version of the song? That's even more complicated. There's a company called SoundExchange that handles licenses for sound recordings—but it only does so for webcasting services (think online radio stations, Pandora, etc.). SoundExchange explicitly says on its website:

If you are offering podcasts that include sound recordings, then you may need to obtain a direct license from the relevant copyright owners. SoundExchange does not administer licenses for podcasting.

So, what you'd need to do is identify the record company that owns the rights to the master recording and contact them directly. Sony Music is Springsteen's record company, so you can go ahead and contact them now (I'm still waiting).

What if I just say, "The heck with that, I'm playing 'Glory Days' on my podcast, and nobody can stop me. It's a free country!" Well, in that case, I'd be looking at statutory damages of up to \$150,000 per song. Ouch.

WHAT ARE THE ALTERNATIVES?

For most folks starting out in the podcast world, it's not going to be feasible to license your favorite Springsteen song, and even if you record your own version, the licenses for the musical composition might be out of the average podcaster's price range.

There are a variety of free or low-cost alternatives out there. Some of them, such as PremiumBeat, operate much like stock photo companies. Other songs are made available under a variety of different Creative Commons licenses. Always be sure to review the terms, whether it's through Creative Commons or an online service provider. You want to make sure that you're complying with the license for podcasts specifically and not for other forms of digital media.

What if you're part of a podcast network? Congratulations, you've moved up to the big time. But you should still

double-check to be sure that the company you're working with has all the licenses worked out. If you're doing a podcast for an established entity like NPR or Slate, one would hope that they've gone through all this with their lawyers and have provided you with a set of best practices. If it's a smaller, newer podcast network, be extra careful. You don't want to get hit with a copyright lawsuit only to find out your podcast network didn't really know what it was doing, and the legal (and financial) liability might just fall on you.

WHAT IF I'M A DJ AND MY PODCAST CONSISTS OF MIXES I'VE MADE FROM PRE-EXISTING SONGS?

Tough luck, the same rules apply.

It's OK, my podcast is fair use!

Excuse me while I bang my head against the desk. OK, that's better. Fair use is an extremely complex and misunderstood aspect of copyright law. Just because you think it's fair use doesn't mean it is. Just because you're a nonprofit or your podcast is for educational purposes doesn't mean you're entitled to a fair use defense to copyright infringement.

If you think you just might have fair use on your side, start out by reading my presentation, *What Is Fair Use?*, at lizerbramlaw.com/2014/04/29/what-is-fair-use/, and then contact an attorney to advise you on what to do.

I wish using music in podcasts was easier and more affordable, but this is where we are right now. Happy podcasting, everybody! **TBJ**

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