

A Guide to Copyright Law for Noncommercial Radio Stations



BY: JOHN CRIGLER AND MELODIE VIRTUE

*January
2017*



This *Guide* was commissioned by Native Public Media and the National Federation of Community Broadcasters, who have approved of its publication by Garvey Schubert Barer. The Guide contains information of a general nature that should not be regarded as legal advice on particular situations.



About NFCB

As the sole national membership and service organization for community radio, the National Federation of Community Broadcasters (NFCB) is a national alliance of stations, producers, and others committed to community radio. NFCB provides advocacy on the national level and empowers community stations on the local level.

The National Federation of Community Broadcasters is a grassroots organization of noncommercial, educational, public radio stations, distinguished by their community support, control, and programming. Community broadcasting invigorates local communities and adds local voices to the media environment.

The National Federation of Community Broadcasters carries out its mission and philosophy through a series of programs aimed at benefiting its members as well as the public broadcasting field itself by representing the members and the field to national policy and funding organizations, and providing technical assistance to improve the quality of community radio.

Sally Kane, CEO, NFCB

About NPM

Native Public Media (NPM) is a national Native organization dedicated to serving Indian Country in our right to connect and communicate.

Native Public Media works directly with the 567 American Indian and Alaska Native Villages in assisting with broadcast licensing and providing media opportunities across all platforms including radio, television and the Internet.

Native Public Media through its national and international policy program advocates for Native American advancements in communications and telecommunications, funding, tribal consultation, policy fellowships, infrastructure deployment, and services.

Native Public Media through its station support services provides core services to Native stations including regulatory compliance intervention, legal services, digital literacy, youth media camps, network training and education, community engagement, resource development, and capacity building.

An organization by and for Native Americans, Native Public Media since 2004, has grown the Native radio network to 58 stations and includes Native television stations and Native media makers as part of its alliance.

Native Public Media works with local, national and international allies in carrying out its mission to promote engaged, healthy, and independent Native communities through media access, control, and ownership.

Loris Taylor, President & CEO, NPM



What is copyright?

The answer used to be much simpler. Before the advent of digital technologies with their capability of making near-perfect copies, before streaming and podcasting, before YouTube, Spotify, Vimeo, Pandora, Twitter and iTunes, before SoundExchange ... well, you get the idea. Now, the starting point for understanding current copyright law is to realize that it encompasses a multitude of different rights, in different kinds of creative works, in different forms of media.

Because these rights are largely created by federal statute, they change, sometimes radically, over time. One of the complexities of copyright law is deciding *which* Copyright Act applies. Is it the Copyright Act of 1909, which still applies to many historic works, the Copyright Act of 1976, or the 1998 Digital Millennium Copyright Act (“DMCA”)? Unless otherwise indicated, statutory references in this Guide are to the Copyright Act of 1976, 17 U.S.C. § 101, et seq.

Copyrights created by statute revolve around definitions. To understand basic principles of copyright law, you need to understand the definition of terms such as “work,” “derivative work,” “sound recording,” “perform,” “reproduce,” “display” and “fair use.” These and other terms are explained in the discussion that follows. Most of these definitions are also featured in the questions around which this guide is organized.

Just as there are multiple copyrights in multiple kinds of works, there are multiple organizations that police those rights and collect royalties on behalf of the rights owners. ASCAP, BMI, SESAC and now Global Music Rights (GMR) (known collectively as the performance rights organizations or PROs) represent the owners of musical works. SoundExchange collects royalties for streaming copyrighted music and distributes the royalties to owners of sound recordings (usually the record labels) and featured artists.

Different kinds of copyright are subject to different licensing schemes. Some licenses are created by the Copyright Act itself. These are called “statutory” or “compulsory” licenses because they are granted to

anyone who complies with certain conditions and pays the relevant royalty fee. Another kind of license is a “direct” license. This kind of license is negotiated directly with the copyright owner.

The legal sources of copyright law are Article 1 of the Constitution, various copyright statutes, regulations established by the Copyright Office of the Library of Congress, judicial decisions and decisions of the Copyright Royalty Board (“CRB”), which establishes royalty rates for streaming copyrighted music. The glory and bane of copyright law, however, is that it has not been prescribed by law so much as driven by reality. Copyright law may hold the leash, but the law has been unpredictably jerked and dragged by a large, rambunctious young dog named Digital.

Before the explosion of digital technologies, copyright law was an arcane field that could safely be left to experts. New media have exploded traditional concepts and littered the law with questions relevant to anyone involved in those media. Who is the “author” of a video created by a host of collaborators? Is a database laboriously compiled by a brilliant computer geek an “original” work or a collection of factoids not worthy of being called “creative”? Is a rap song that samples a few bars of a traditional R & B tune a new work or an unauthorized “derivative work”? Where is the line between a private and a public “performance,” a Spotify song downloaded to party in your living room and the same song broadcast at 4:00 a.m. when even fewer people may be listening? What’s the difference between a podcast and a broadcast of the same work? This Guide will help you answer these questions.

This Guide is not a treatise on copyright law. It will introduce you only to portions of copyright law that are relevant to broadcasting and streaming music to U.S. listeners. It barely touches on copyright protection for photographs, art work, literature, architecture, software and dance, or of the relationship between U.S. copyright law and the laws of other countries.

Let’s start with some basic concepts and definitions.



What is a Work?

Copyright law protects original works of authorship fixed in a tangible medium of expression. Protection arises automatically from the moment of fixation. No registration or other filing is required. Protected types of works include the following:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;
- (7) sound recordings; and
- (8) architectural works.

[Section 102 of the Copyright Act.]

What rights does copyright law confer?

The owner of a copyright has the exclusive right to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly;



- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and
- (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.

Note that some copyrights adhere to all works and some only to particular kinds of works. Also note that not all rights have the same effective date. For example, as discussed later, under federal law the right to perform sound recordings applies only to sound recordings created on or after February 15, 1972.

Anyone who violates any of these exclusive rights is an “infringer of copyright,” but an oddity of the Copyright Act is that it does not define an “infringement.” That definition has largely been left to the courts.

[Section 106 of the Copyright Act.]

What’s the difference between a musical work and a sound recording?

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

Copyrights in the musical work confer the right to reproduce, distribute, and publicly perform the work. Copyrights in the sound recordings confer the right to reproduce and distribute the work, but the right to publicly perform the work is limited to digital transmissions. Thus, for now, a license fee is required to stream a sound recording, but not to broadcast it. Unless rights are covered by a statutory license, they must be “cleared” – i.e., licenses or permissions to use the music must be obtained – before music can be used on the Internet. As discussed later, podcasts require specific licenses for reproduction and distribution rights.



What's a “work made for hire”?

A work made for hire is a work:

- (1) prepared by an employee within the scope of his or her employment; or
- (2) specifically ordered or commissioned, which the parties agree, in writing, is a work made for hire.

Stations that wish to commission and own copyrighted musical works, such as original compositions or theme music, may do so with those who are not employees, but a written agreement should clearly indicate that the resulting work will be a work for hire.

What is a public performance?

To perform or display a work “publically” means –

- (1) to perform or display it at a place open to the public or at a place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or
- (2) to transmit or otherwise communicate a performance or display of the work ... to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.

[Section 101 of the Copyright Act]

Regardless of the number of actual listeners, a broadcast or digital stream will be deemed to be a “public” performance because it is inherently “capable” of being received by members of the public.

What is a “public performance” of a digital sound recording?

Copyright Office regulations define a public performance of a sound recording as “each instance in which any portion of a sound recording is publicly performed to a Listener” but excludes:

- (1) a sound recording that is not copyrighted (e.g., because of its age, it is in the public domain);
- (2) a sound recording for which the licensee has a direct license from the copyright owner; and
- (3) an incidental performance that both:
 - (a) makes no more than incidental use of the music (e.g., “brief musical transitions in or out of commercials or program segments, brief performances during news,



- talk or sports programming, brief background performances during disk jockey announcements, brief performances during commercials of sixty seconds or less in duration, or brief performances during sporting or other public events”), and
- (b) “other than ambient music that is background at a public event, does not contain an entire sound recording and does not feature a particular sound recording of more than thirty seconds” (e.g., theme song).

What is the duration of copyright?

The duration of a copyright depends on when the work was created, under which copyright act, and (sometimes) on when or whether it was published. For a work created on or after January 1, 1978, copyright in the work exists from its creation for the life of the author plus 70 years after the author’s death. When the work is “a work for hire,” the copyright exists for a term of 95 years from its publication or 120 years from its creation, whichever occurs first. Under federal copyright law, any work created prior to 1923 is in the public domain, but state laws may protect the work for longer if federal copyright law does not apply.

A useful chart for determining when federal copyright expires can be found at <http://copyright.cornell.edu/resources/publicdomain.cfm>.

Determining which works are in the public domain can be a complex task, particularly for works created before 1978. For example, one state court held that although pre-1972 sound recordings were not protected by federal law, they were protected in perpetuity under state law.

Works may be donated to the public domain before the expiration of the copyright or may be licensed under private licensing schemes. For instance, some works are licensed under Creative Commons licenses, in which authors select the terms of how their works may be used, such as for noncommercial use only. See <https://creativecommons.org/>. Other similar sources for music can be found at freemusicarchive.org, ccmixter.org, and jamendo.com.

What is fair use?

Fair use is a defense to a claim of copyright infringement. It permits reproduction of portions of copyrighted work, *without* the copyright owner's consent, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research.

Four statutory factors guide courts' application of the doctrine. Specifically, courts look to:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;



- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

Because fair use is an "equitable rule of reason," courts have discretion to honor a fair use defense based on the facts of a particular case.

[Section 107 of the Copyright Act.]

The Copyright Office has developed a fair use index of cases that is searchable by court and category of use at <http://www.copyright.gov/fair-use/fair-index.html>. The cases show how courts apply the four fair-use criteria to particular facts.

What licenses does a station need to broadcast musical works and sound recordings?

Public performance licensing of musical works in the U.S. historically has been handled by three major performing rights organizations (PROs) - ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music Incorporated), and SESAC (Society of European Stage Authors and Composers). As of January 2017, however, a new PRO launched – GMR (Global Music Rights) – which is trying to extract higher royalties for high profile artists such as Adele, the Beatles, the Eagles, Pharrell Williams, Katy Perry, Usher and other popular artists. The PROs collect royalties from radio stations, restaurants, concert venues, and others that publicly perform music and distribute the royalties to the owners of the musical work, typically the songwriters/composers and the music publishers who manage rights on their behalf. A broadcast station must buy licenses from these PROs. A license allows the station to broadcast music within that organization's repertoire. Go to the specific PRO's website or contact the PRO to obtain a list of compositions in its repertoire.

Although commercial stations often negotiate royalty rates directly with the PROs, the rates for NCE stations are usually set by the Copyright Royalty Board in a ratemaking proceeding every five years. The rates are then published in the Code of Federal Regulations, 37 C.F.R. Section 381 et seq.

http://www.ecfr.gov/cgi-bin/text-idx?SID=7a6fc9be5a0e2f5a12a01425653fb95d&mc=true&node=pt37.1.381&rgn=div5#se37.1.381_16

CAUTION: Some artists have not signed with or have withdrawn from one of the PROs. Other organizations are trying to compete with the major PROs by developing their own repertoire. So, be sure that any music your station airs is licensed by the appropriate PRO.



What licenses does a station need to stream musical works and sound recordings?

To stream music, a station or pure play webcaster needs public performance licenses from ASCAP, BMI, and SESAC *and* must be covered by a royalty agreement with SoundExchange or must pay SoundExchange royalty rates set by the CRB. Royalties for streaming rights to perform sound recordings are *in addition to* the royalties owed to perform musical works over the air.

Radio stations have historically been exempt from license fees for broadcasting sound recordings, on the theory that if radio did not play the songs, no one would buy the records. This exemption does not apply to digital transmissions, i.e. music streamed on the Internet.

Based on the fact that digital technology allows flawless copying, sound recording copyright owners secured the right to “perform” sound recording by digital audio transmissions in the Digital Performance Right in Sound Recordings Act of 1995. The exemption for over-the-air performance of sound recordings was preserved, but was not extended to the simultaneous transmission of sound recordings via the Internet.

The 1995 Act created new rights for sound recordings, but not a mechanism for collection of royalties. It was left to the Digital Millennium Copyright Act of 1998 (the “DMCA”) to create a statutory license for performances of sound recordings over the Internet. Eligibility for the statutory license requires adherence to a number of programming and technical restrictions, compliance with recordkeeping and reporting requirements and payment of royalties, all of which are discussed below.

If a station is not eligible for the statutory license, or if it wants to provide an interactive digital music service, it must obtain direct licenses from copyright owners of the sound recording. Identifying individual copyright owners can be difficult. Multiple band members may hold interests in a particular song; some owners may have assigned their rights to third parties; some may have died; and some may simply be impossible to locate. Regardless of these difficulties, all rights must be cleared to be sure the use is non-infringing.

An entity called SoundExchange is charged with collecting sound recording royalties and distributing them to copyright owners and artists. Now an independent organization, SoundExchange was initially a creation of the Recording Industry Association of America (“RIAA”), which represents record companies. SoundExchange handles only royalties for streaming. It does not administer royalties for broadcasting, podcasting, RSS feeds, or interactive streaming.



What is the sound recording performance complement?

The statutory license for sound recordings comes with certain restrictions. One restriction is the “sound recording performance complement” on each channel streamed. What is that?

During a three hour period one may:

- Play no more than three songs from a particular album;
- Play no more than two songs consecutively from a particular album;
- Play no more than four songs by a particular artist;
- Play no more than four songs from a boxed set; and
- Play no more than three songs consecutively from a boxed set.

If, in addition to streaming the over-the-air broadcast programs, the station wants to stream “side” channels, those additional channels must also comply with the sound recording performance complement. The sound recording performance complement also applies to archived and looped programs, discussed below.

What other restrictions apply to the statutory license for sound recordings?

The statutory license for sound recordings contains limitations on advance notice. Advance program scheduling or prior announcement of song titles may not be transmitted by text, video or audio, although it is permissible to announce the name of a song immediately before it is performed or to announce that a particular artist will be featured at an unspecified future time. One or two artists, or a particular genre of music, may be identified to illustrate the type of music on a particular channel, but a prior announcement that a sound recording will be played at a particular time is prohibited because such an announcement facilitates copying of that recording.

The song, artist and album must be identified. During the performance of a sound recording, one must identify, in textual data, the sound recording, the album and the featured artist, if receivers are capable of displaying the information.

Transmission of copyright management information is required. If technically feasible, digital transmissions must be accompanied by information encoded in the sound recording that identifies the title of the song, the featured artist and any other related information.

A sound recording may not be performed in a way that falsely suggests a connection between the copyright owner or recording artist and a particular product or service.



One must disable copying by a transmission recipient if the technology used can be disabled, and may not induce or encourage copying by transmission recipients.

One must accommodate technical protection measures widely-used by sound recording copyright owners to identify or protect copyrighted works if those measures do not impose substantial burdens on the transmitting entity.

The transmitting entity must cooperate with copyright owners to prevent recipients from automatically scanning transmissions in order to select particular recordings, if such cooperation will not entail substantial costs or burdens.

The statutory license is limited to transmissions of lawful sound recordings. Transmissions of bootlegs or unauthorized, pre-released recordings are not covered by the statutory license.

The transmitting entity cannot allow automatic switching of channels. Digital transmissions may not automatically and intentionally cause a device receiving the transmission to switch from one program channel to another.

The statutory license does not cover interactive services which allow the consumer to select the songs.

Are waivers of the DMCA restrictions possible?

Yes. It is possible to obtain a waiver of the conditions to the statutory license, such as the sound recording performance complement. Some stations have been successful in getting record companies to waive some of the DMCA programming restrictions.

The National Association of Broadcasters (NAB) negotiated partial waivers from Sony Music Entertainment (“Sony”) and Warner Music, Inc. (“Warner”). The Sony waiver, which expires December 31, 2020, requires that broadcasters opt-in to the agreement. It applies to both commercial and non-commercial broadcasters. Stations wishing to opt-in to the Sony waiver can do so at http://www.mmsend61.com/link.cfm?r=a3By1qsTMCpNtLER3iAmGg~~&pe=-okITg871FUxg_iQD9rIQSfMBq1eaKWApSAyHVYUtTjzgnzFrjUIIAdJaUZ5wJj8U7NR5VuCAv9sBGwYiOO014Q~~>.

The Warner agreement, which expires September 30, 2019, does not require that a broadcaster opt-in, but applies only to commercial stations.

Each Waiver is slightly different, but, here are key provisions:

- Despite the restrictions in the “sound recording performance complement,” the Waiver Agreements allow broadcasters to transmit consecutively up to one-half of an entire album of sound recordings and permit the transmission of certain classical musical works in their entirety, regardless of duration.



- The Waivers allow prior aural announcements, but not prior publication of a written or visual advance program schedule that identifies the particular artists or sound recordings that will be featured at specified future times. Classical music broadcasters, however, can publish a schedule of classical music programming in accordance with their standards and practices as of September 30, 1998.
 - The Sony waiver allows broadcasters to announce in written or visual form, that a program featuring a particular artist or artists will be aired at a specified future time if (a) the station airs a recurring program that features the music of that artist(s) and the program was on the air as of August 1, 2016, or (b) the station airs a tribute or documentary for special occasions, such as the death of an artist or to honor a commemorative milestone in music history or career of an artist.
- To the extent that music-intensive stations use third-party programming over which the broadcaster does not have the right or ability to control music selection, or programming not performed using a digital music file system, the Waivers waive the requirement that textual data must identify the artist, song title, and album while the song is streamed.
 - Sony requires that stations which opt-in to its Waiver Agreement and that have more than 80,000 music ATH per month provide a “buy now” link to purchase a download of a sound recording through a Sony-authorized store, such as iTunes or Amazon.
- The Waivers lift the 6-month limitation on retaining ephemeral copies of recordings (such as songs from a CD copied onto a station’s hard drive music system).

Although the Waivers do not apply to all webcasters or to all the major labels, some webcasters have obtained waivers directly from labels. Contact the labels directly to ask for those waivers in writing.

What are archived and looped programs?

An archived program is one posted on a website for listeners to hear repeatedly, on demand, in the same order. It may not be less than five hours in duration. Such archived programs may reside on the website for no more than a total of two weeks and must otherwise meet the terms of the statutory license described above. Merely changing one or two songs does not make the program a different program, nor can programs be taken off for a short period of time and then made available again.

The limitations on archived programs do not apply to recorded events or broadcast transmissions that make no more than an incidental use of sound recordings, so long as the transmissions do not contain an entire sound recording or feature performances of a particular sound recording.



Looped or continuous programs are those that are performed continuously so that the program automatically starts over when it is finished. They may not be less than three hours in duration. Again, merely changing one or two songs does not create a new program.

The ability to repeat other programs is also limited. Programs that are retransmitted at publicly-announced times in advance can be repeated only if:

- The repeats of a program are limited to three times in a two-week period for programs under one hour in duration.
- The repeats are limited to four times in a two-week period for programs over one hour.

What are the royalty rates for streaming?

CRB Rates. Under rates adopted by the Copyright Royalty Board (“CRB”) for 2015-2020, music streamers (“Statutory Licensees”) must pay a minimum annual fee of \$500 per channel. The CRB statutory license rates effective through 2020 are:

- \$0.0017 per performance for nonsubscription services
- \$0.0022 per performance for subscription services

Royalty rates are recouped from that minimum annual fee for commercial webcasters. Noncommercial webcasters’ payment of a minimum annual fee of \$500 per channel, however, covers up to 159,140 Aggregate Tuning Hours (“ATH”) (defined below) per channel, per month. That averages out to 218 online listeners per hour each month. Performances over that ATH threshold must be paid at the commercial “per performance” rates listed above.

The rates are adjusted each year based on changes in the cost of living determined by the Consumer Price Index.

Noncommercial Educational Stations Covered by CPB Agreement. CPB and SoundExchange reached an agreement whereby CPB pays a lump sum to cover specified noncommercial stations and other non-profit entities (“Covered Entities”) that distribute noncommercial programs. The current agreement covers the period 2016-2020. To be covered, a non-profit entity must be a noncommercial terrestrial radio station that receives funding from the CPB; an affiliate of NPR, American Public Media, Public Radio International or Public Radio Exchange; or a member of the National Federation of Community Broadcasters.

Eligible public stations must elect to participate by registering through CPB’s website at <http://www.cpb.org/stations/musicrights/>. Registered stations do not have to pay a minimum annual fee to SoundExchange, but do need to provide data regarding performances of music (i.e., song title, featured artist, album title, marketing label, play frequency, and start time and duration for transmitted sound recordings) so that CPB can provide system-wide reports of use to SoundExchange. If a station is



not a Covered Entity, it must abide by the CRB rates and terms applicable to noncommercial webcasters or elect an alternative deal for which it is eligible.

Accredited Educational Institutions. Noncommercial radio stations that are not CPB-funded but that are operated by accredited educational institutions and staffed by enrolled students may elect to participate in the College Broadcasters deal. A \$500 minimum annual fee covers 159,140 ATH per month and is paid to SoundExchange directly. If that monthly ATH is exceeded in a given month, the additional performances are paid on a per performance basis at the commercial webcaster rates listed above. If the educational institution is unable to calculate actual total performances however, it can calculate royalties using ATH figures and assume that 12 songs per hours are played if it is not subject to full census reporting described in the Recordkeeping Section below.

PRO Streaming Fees. In addition to paying royalties to stream sound recordings, webcasters must obtain non-interactive Internet licenses from ASCAP (<http://www.ascap.com/weblicense/> - minimum annual fee was \$288), BMI (<http://www.bmi.com/licensing/webcaster/> - minimum annual fee in 2015 was \$351), and SESAC (<http://www.sesac.com/Licensing/internet.aspx> - minimum fee is \$301 per six months per web page in 2016). These fees cover the on-line performance of musical works in the PRO repertoires. Information about licensing from GMR is available at <http://globalmusicrights.com/>.

What is an “Aggregate Tuning Hour”?

“Aggregate Tuning Hours” (“ATH”) are the total hours of programming the Statutory Licensee transmits to all “Listeners.” A “Listener” is defined as a player, receiving device or other point capable of receiving the digital sound recording. A Listener is thus a device, not a person. For example, if the station streamed for one hour to 10 simultaneous Listeners, the ATH would be 10. A Statutory Licensee may deduct from the ATH the time during which it transmitted a song for which it obtains a direct license from the copyright owner.

What information must a station report?

Under the CRB rules, for each sound recording streamed, the following records must be kept and sent periodically to SoundExchange:

- (1) Name of Service (e.g., XYZ Broadcasting, Inc.).
- (2) Transmission Category (e.g., “Eligible nonsubscription transmission of broadcast simulcast programming not reasonably classified as news, talk, sports or business programming” defined in the rule as category code “B”).
- (3) Featured Artist (the full name of the individual or band).



- (4) Sound Recording Title (the song title).
- (5) Sound Recording Identification – either:
 - (a) Album Title and Marketing Label (if a particular sound recording has been released for promotional purposes before the album title is available, the information must be kept only if it is available before or at the time of the performance, but must be supplied if it is available for subsequent performances), or
 - (b) International Standard Recording Code (ISRC) (imbedded in promotional and commercially released sound recordings which can be read by software).
- (6) Actual Total Performances (the number of times a sound recording is “performed” – *i.e.*, each time a sound recording is accessed by a computing device represents a separate performance of the sound recording).

If a webcaster qualifies as a minimum fee webcaster (defined below), instead of reporting based on actual total performances, it may, instead, report Aggregate Tuning Hours, Channel (for broadcasters, call sign or FCC facility ID number) or Program Name, and Play Frequency (the total times a sound recording is “played” during the reporting period – *i.e.*, offered or transmitted by the service, regardless of the number of listeners).

A “minimum fee webcaster” is a webcaster that does not owe streaming royalties in excess of the minimum annual fee for the statutory license and that is (1) owned and operated by an AM or FM station licensed by the FCC or (2) operated by an educational institution primarily staffed by students. For noncommercial webcasters, the \$500 minimum annual fee covers 159,140 ATH (approximately 218 listeners per hour).

Stations covered by the CPB royalty agreement must supply the data listed below to NPR Digital Services, which submits aggregated music usage information to SoundExchange on behalf of all Covered Entities:

For each song played on each stream, stations covered by the CPB license provide the following data:

- (1) Song title.
- (2) Featured artist/group/orchestra.
- (3) Album title.
- (4) Marketing label.
- (5) Start date and time of song play.
- (6) End date and time of play or duration of song.



What is a track?

SoundExchange considers each track, on a CD for instance, to be one song. For example, each track or movement on a classical album must be reported separately.

Who is a featured artist?

The featured artist is the performing artist, such as the band, an individual, or orchestra, as distinguished from the songwriter or composer. For example, it would not be appropriate to identify Mozart, the composer, as the featured artist.

How often do webcasters need to submit Reports of Use to SoundExchange?

Webcasters must submit to SoundExchange Reports of Use that identify the featured artist, the song title, album title, marketing label, and number of performances (*i.e.*, number of listeners per song, for minimum fee webcasters the ATH, or for Covered Entities under the CPB deal the start and end times and server logs). Reports of Use must be submitted to SoundExchange each month within 45 days after the end of the reporting month. Webcasters must file monthly Reports of Use on a full “census” basis – *i.e.*, every song streamed. Minimum fee webcasters, however, and Covered Entities under the CPB Agreement, can file quarterly based on a two-week survey per quarter. The two weeks can be consecutive or two separate 7-day periods within the quarter. The 7-day consecutive period may start on any day of the week.

The precise file format for most reports other than for Covered Entities under the CPB deal is set forth in Copyright Rule 370.4 found at <http://www.loc.gov/crb/laws/title37/>. SoundExchange also posts an Excel spreadsheet, at <http://soundexchange.com/service-provider/reporting-requirements/>, that statutory licensees can complete and convert to a properly formatted file.

Under the College Broadcasters Agreement, a noncommercial educational webcaster that did not exceed 159,140 ATH per channel for more than a month in the prior year must prepare Reports of Use that cover two 7-day periods per quarter, filed annually by January 31 each year. If the noncommercial educational webcaster is unable to calculate actual total performances or ATH, it may report channel and play frequency. If it exceeded 159,140 ATH for more than a month in the prior year, the noncommercial educational webcaster must file full census Reports of Use each quarter. During the first, year the channel reports on a full census basis, it will have a 1 year grace period to include ATH or total performances in its Report of Use.



The College Broadcasters deal provides an exemption from preparing Reports of Use if the webcaster qualifies for the exemption and pays an additional \$100 annual fee (called a “Proxy Fee”). Remember that this deal applies only to an educational institution that operates a streaming service staffed primarily by students. Under this deal, a noncommercial educational webcaster can pay the \$100 Proxy Fee and avoid filing Reports of Use if it has no more than 80,000 ATH per channel per *month*. The ATH limit represents an average of 109 listeners per hour.

The election to be exempt from reporting must be made each year by January 31. With the election, a small noncommercial educational webcaster must provide SoundExchange with ATH numbers, music genre, and other information SoundExchange needs for creating a proxy for distributing royalties.

If an exempt webcaster unexpectedly exceeds the ATH limit in a year, it may still qualify if it takes steps reasonably calculated to ensure that it will not exceed the applicable ATH limit during the following year.

Are sound recordings created prior to February 1972 covered by the streaming license administered by SoundExchange?

No. The public performance right in digital sound recordings and the related statutory license are based on federal copyright law, which does not cover sound recordings made prior to February 15, 1972. Court decisions have split on the issue of whether such sound recordings are protected under state common law. A recent decision by a federal appellate court illustrates how tricky copyright distinctions can be. The appellate court reversed a lower court which had protected pre-1972 analog recordings under New York State law. The higher court concluded that digital remastering of old analog recordings created after the 1976 Copyright Act went into effect created new “derivative” works that were subject to the federal Copyright Act that preempted state law. The owners of the pre-1972 copyrights lost the infringement claim they initially won. Others have been more successful. A class action suit brought against Sirius XM by The Turtles and other artists resulted in a settlement agreement that could pay the claimants up to \$100 million, depending on the outcome of other lawsuits brought under state law.

Recording Live Music

The Copyright Act requires that performers consent to the recording of their live performances and to the distribution or transmission of that recording. Stations that record live in-studio performance must get consents or releases from all performers involved in the performance.

[Section 1101 of the Copyright Act]



What does a station need to do to stream sound recordings?

In addition to complying with the restrictions built into the statutory license and paying royalties, a webcaster must file a Notice of Use with the Copyright Office in Washington, DC. The form is available at <http://www.copyright.gov/forms/form112-114nou.pdf>. The filing fee is \$40 at the time of this writing. For current fee schedule, go to <http://www.copyright.gov/licensing/fees.html>.

Alternatively, if a station is eligible, it must register with CPB so that it can be included in the list of Covered Entities CPB provides to SoundExchange.

Stations that qualify under the deal negotiated by College Broadcasters, Inc., must be noncommercial educational webcasters ("NEW") owned by educational institutions and run by students. Such webcasters must elect the NEW license by January 31st each calendar year.

Does the statutory music license cover operas and musicals?

No. The statutory license covers only non-dramatic musical works. It does not cover public performances of dramatico-musical works, such as an opera or musical. These performance rights are sometimes referred to as "grand rights." Musical works written to tell a story fall into this category. Licenses with the PROs and statutory license with SoundExchange cover a single song from an opera or musical, but not the performance of the entire opera or musical.

To perform an entire opera or musical, either over-the-air or on the Internet, a station must obtain a direct license for the "dramatic" performance rights. Although an opera as a musical work may be in the public domain, the sound recording of the work may not be. A station must obtain a direct license to use sound recordings of the work if the sound recording is played in sequence in its entirety.

What licenses does a station need to use music in a podcast?

There are no blanket or statutory licenses for use of music in a podcast. As a result, each copyright in each piece of music must be directly licensed from the owner of the copyright or licensed indirectly through an agreement with organizations such as Creative Commons. The download of a podcast does not require a public performance right, but does require a mechanical license to reproduce and distribute the musical work and a master use license to reproduce and distribute the sound recording.



Podcasts may contain audio, video, images, text, PDF, or other types of files. Although there is much debate about podcast copyright issues, one should assume that a podcast is a reproduction and distribution of a copyrighted work. Before posting a broadcast program for podcast, have permission to use all copyrighted materials included in the program. A podcast program that uses copyrighted material such as songs and video will need one or more licenses in order to reproduce and distribute the work. Program hosts and celebrity guests may also have “publicity” rights (discussed below) that need to be secured.

What’s the difference between a reproduction right and performance right?

When a song is included in a podcast, that song is “reproduced” when the podcast is made available for download. Reproduction rights in the musical work and the sound recording must be individually secured for the podcast.

For the right to reproduce a musical work, a podcaster must secure a mechanical license. The mechanical license is compulsory. That is, the copyright owner must grant the license based upon rates set by the Copyright Royalty Board. As prescribed by regulation (37 C.F.R. § 385.3), the maximum statutory rate for a mechanical license is 9.1 cents per musical work or 1.75 cents per minute of playing time or fraction thereof, whichever is greater, although it may be possible to negotiate a lower rate directly from the copyright owner. The podcaster can obtain a mechanical license through the Harry Fox Agency (HFA). See <http://www.harryfox.com/>.

Public broadcasting entities can reproduce and distribute musical works at the rates published in 37 C.F.R. Section 381.7, although licenses at lower rates can be separately negotiated. The information required to be included in cue sheets which must be filed with the Copyright Royalty Board are set forth specifically in that rule. For the rule and rates, go to: <https://www.gpo.gov/fdsys/pkg/CFR-2013-title37-vol1/pdf/CFR-2013-title37-vol1-sec381-7.pdf>.

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

How are video rights different from audio rights?

To reproduce an audiovisual work, a podcaster must obtain a digital transmission license. To perform an audiovisual work, a podcaster must obtain an exhibition license. Typically, the owner of the motion



picture copyright can license both rights together. The owner of the copyright in the audiovisual work can charge what it wants and is not required to grant a license.

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

Because the integration of sound and image make movies and other audiovisual works unified works, the producer of a video must obtain a master use license from the record company to reproduce the sound recording as part of the video. A podcaster must determine if the master use agreement the video producer obtained covers the digital transmission of the recording. Otherwise, the podcaster will need a separate license from the sound recording copyright owner.

What's a display right?

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

What's a right of publicity?

Rights of publicity are not federal copyright interests, although they are often closely entwined with those interests. Most states grant individuals (and sometimes their estates) the right to control the commercial use of their name, image, likeness, or some other identifying aspect of identity, generally known as the right of publicity or personality. The scope and duration of the rights vary considerably from state to state. As a result, a program host or other talent, whose voice or likeness are on the podcast, may have the right to license his or her voice or image on a podcast.

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

Note, too, that additional fees may need to be paid to members of trade unions, such as SAG-AFTRA (<http://www.sagaftra.org/>), for use of on-air materials that are re-purposed for on-line transmissions such as podcasts.



Is a station allowed to make copies of its CDs or vinyl albums to put on its hard drive so DJs can program the station from a computer?

Converting a music library from CDs or vinyl to a computer music vault involves reproduction of both the sound recording and the music composition. There are no rulings on the question whether such an unlicensed reproduction violates copyright law.

The Copyright Act allows noncommercial broadcasters to make copies of musical compositions and sound recordings in limited situations. Section 114(a) of the Copyright Act provides an exemption for a sound recording included in educational radio programs distributed by NCE stations. This exemption gives public broadcasters the right to make copies of programs that incorporate sound recordings, provided that copies of the programs are not commercially distributed to the public. Note, however, that this right applies to programs, not individual works or sound recordings.

Other exceptions for reproduction of a musical work are narrower in scope. If the public performance of a musical work is licensed pursuant to the statutory license or a direct license, Section 118(c)(2) of the Copyright Act allows public broadcasting entities to reproduce and distribute programs containing licensed works solely for the purpose of allowing other NCE broadcast stations to broadcast the programs. Copies of those programs must then be destroyed within 7 days. This provision also applies to the copying and distribution of programs. Thus, it does not explicitly cover copying individual works on vinyl or CDs to a musical vault.

Section 112(a)(1) of the Copyright Act allows a broadcaster that has a license to perform copyrighted musical works to make one copy of programs that include a copyrighted work, provided that the copy is used only for the broadcaster's own purposes within its service area and that it is destroyed within 6 months of the date of first transmission unless it is preserved solely for archival purposes. Other elements to consider:

- To be licensed to publicly perform means the station has its ASCAP, BMI and SESAC licenses in place for the musical works.
- A "transmission program" is "a body of material that, as an aggregate, has been produced for the sole purpose of transmission to the public in sequence and as a unit." Thus, the copying needs to be in the context of a program, not a copy of an individual album or CD.
- The limit is one copy of the transmission program, which must be destroyed after 6 months. Although no time limit applies if the program is kept for archival purposes, that program could not be transmitted again after the 6 months expired. The 6 months runs from the date of first transmission of the program.



- The copy made pursuant to this section could not be used by affiliates. The exemption applies only to the original transmitting organization.
- The Sony and Warner waivers lift the 6 month limit on the use of a server copy during the term that the Waiver Agreements are in effect.

Conversion of a music library to a music vault for convenience of programming a radio station is not one of the fair use purposes cited in Section 107 of the Copyright Act (listed above), although an argument can be made that such conversion would be a fair use if it were undertaken to preserve deteriorating recordings that would be accessed for future research or comment. The non-profit nature of a noncommercial station does not necessarily make all copying noncommercial. Copying in order to avoid buying commercially available digital substitutes may directly affect the commercial market for the work.

Can DJs use music from YouTube, Pandora, Spotify or other digital services?

Using YouTube content is no different from copying anything else from the web. The station's ASCAP/BMI/SESAC licenses and the statutory license cover over-the-air performance of musical works, but do not cover reproduction of those works or the creation of bootleg or derivative works. A copy of a sound recording played on someone's YouTube video is a derivative work, and unless whoever uploaded the YouTube video first obtained a synchronization license to use the music with the video, the derivative work is unauthorized.

A different question arises when the content is a live performance of an artist at a musical venue. In this situation, a station is performing a recording of a live performance, possibly transmitted on someone's iPhone. The person shooting the video may own the copyright to the sound recording, but that person probably did not obtain a mechanical license from the owner of the musical work or receive permission from all the performers to record the live performance in the first place.

Playing a digital download would be covered by ASCAP/BMI/SESAC if the work was included in their repertoires, but what if a DJ plugs his iPad to the board and broadcasts directly from his online music services, such as Pandora? Again, ASCAP/BMI/SESAC and statutory licenses cover broadcast and streaming of non-dramatic musical works and sound recordings, but the situation is murkier when one reviews the Terms of Service for Pandora, or other online music services. Those terms of service limit usage to personal non-broadcast use. Thus, a DJ using his Pandora subscription to broadcast his "channel" is probably violating Pandora's terms of service. In fact, Spotify and Pandora cannot authorize broadcast use because these services do not have authority to license other businesses to perform works "publicly."



Another possible risk of liability is third party interference with contract (i.e., the Terms of Service for music channels). A station could become liable if it induced a breach of the terms of service for Pandora or Rdio or whatever the music service happens to be. Copyright owners are third party beneficiaries of those contracts. Bottom line: don't actively solicit volunteers or employees to plug in their music service channels or enable that activity unless they have consent from the service or the terms of service for those music services permit broadcast use.

Should the station allow a program host to post the show on his or her own website?

No. The station's licenses from the PROs and the statutory license administered by SoundExchange do not cover the performance of the program by anyone other than the licensee of the station. Hosts need to obtain their own licenses to transmit any copyrighted content on any server other than the station's. They are not covered by the station's licenses.

Can a station post any photograph it pulls from the Internet?

No. Anyone posting photographs or re-tweeting them must have a license from the photographer and possibly a publicity rights consent from the person photographed. Some professional photographers have made a cottage industry out of detecting unlicensed copies and suing, or threatening to sue, those displaying their work. The first step is usually a "cease and desist" letter in which an attorney for the copyright owner asserts the owner's rights and demands compensation for infringement. Consult with an attorney before responding to a photographer's "cease and desist" letter.

If a photograph is obtained from a Creative Commons site, be sure to follow the terms on which that photograph was posted. For instance, if attribution is required, do not strip the photographer's name. Licenses for stock photos can be obtained from sources such as Getty Images or Agence-France Press.

Can a station read a literary work, such as a children's book, on the air?

There is a no compulsory license for literary works. A direct license from the owner of the copyright is required. Quotations or short excerpts from literary works are generally permissible under the fair use doctrine, but an unlicensed recitation of whole works, even if they are short, runs the risk of



infringement. Unfortunately, there is no clearing house for performance of literary works, as there is for musical works, so stations must clear rights directly with the copyright owner.

What are the penalties for infringement?

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



About the Authors



John Crigler
Washington, D.C.
jcrigler@gsblaw.com
202.298.2521

John Crigler represents clients in all aspects of public broadcasting. His clients include public radio and TV stations, program producers, nonprofit internet distribution platforms, webcasters, satcasters, community groups, tribal Nations and trade associations. John provides representation before the Federal Communications Commission, the Copyright Office and Copyright Royalty Board, the Corporation for Public Broadcasting, the National Telecommunications and Information Administration and state and federal courts. He writes and speaks widely on public broadcasting topics and is a frequent panelist at conferences on noncommercial broadcasting and the internet.



Melodie A. Virtue
Washington, D.C.
mvirtue@gsblaw.com
202.298.2527

Melodie Virtue represents broadcast and online commercial and noncommercial educational radio and television companies before the Federal Communications Commission in Washington, D.C., as well as other federal agencies. Her experience includes proceedings before the FCC dealing with licensing, spectrum auctions, program content, forfeitures, and administrative hearings as well as drafting comments on proposed rules that impact her clients' businesses.

In addition to serving their regulatory compliance needs, she negotiates and drafts contracts on behalf of electronic media clients on various facets of their business, such as asset sales and stock transfer agreements, tower leases, local marketing agreements, programming agreements, and employment agreements. She also advises clients regarding copyright, music licensing, service marks, online digital streaming and podcasting, terms of use, privacy policies, and web site legalities.

About Garvey Schubert Barer

Since 1966, Garvey Schubert Barer has worked with clients in virtually all industry sectors, including communications and media, hospitality, technology, trade and transportation, healthcare, maritime/admiralty, real estate, entertainment, and manufacturing. The firm provides cost-effective, practical solutions to a broad range of businesses, including publicly and privately held companies, investment firms, financial institutions, not-for-profit organizations and individuals.

More information is available at www.gsblaw.com.



GSB:7798954.13