LEGAL ISSUES AND DEVELOPMENTS IN PODCASTING

GORDON P. FIREMARK
Law Offices of Gordon P. Firemark
10940 Wilshire Blvd., 16th Floor
Los Angeles, CA 90024
310-443-4185

TAMERA H. BENNETT
Bennett Law Office, PC.
132 W. Main Street
Lewisville, TX 75057.
972-436-8141

Originally presented to:

State Bar of Texas
ENTERTAINMENT LAW INSTITUTE
November , 2020
Austin

TABLE OF CONTENTS

LEGAL ISSUES AND DEVELOPMENTS IN PODCASTING

INTRODUCTION

Podcasting is the fastest-growing form of media in the world today. It is a disruptive digital media technology that has made high-quality content-creation and worldwide distribution trivially easy. Content marketers have enthusiastically adopted this exciting tool, and to date, they have encountered few legal stumbling blocks.

As of 2020, podcasting has become a $1 Billion business and continues to grow at a remarkable rate. Of course, as any medium grows, it begins to cause friction. Especially when it encroaches into the arenas historically occupied by traditional media. Legal issues abound in this environment, and with this increasing friction, legal hurdles will arise with increasing frequency.

NOT A DISTINCT FIELD OF LAW

Like entertainment law, podcast law is not a separate, distinct field. It is instead really an application of existing entertainment and media law principles to this young medium. Principles of contract, intellectual property, rights of privacy and publicity, defamation and, of course, free speech principles predominate.

This article surveys the legal frameworks in which podcasters operate, and highlights some of the cases and controversies which have arisen in the podcasting environment. To date, however, there is strikingly little case-law addressing this medium specifically. So, in advising podcasters, we are forced to refer to general media and entertainment law principles by analogy.

WHAT PODCASTING IS AND HOW IT WORKS

Podcasts are media files, usually in mp3 format but sometimes in others, including video, that are recorded and uploaded to a media server, and then linked in a special type of syndicated feed so that so-called "podcatchers:" software and hardware devices can be used to listen, can find, download and play them. The most common way this syndication feed is created is by using blog software,[1] which has this functionality built in.

So, the way most independent podcasters do things, is to host the podcast on a blog, include show notes describing the episode content (for search-engine discoverability), and an embedded player so listeners can consume episodes directly from a web-page. Podcasts are played using both these embedded players (a streaming use), and using downloads handled by the aforementioned podcatcher software. (This dual-channel method of distribution presents an interesting legal wrinkle we discuss later.)

More recently, platform services such as Spotify, Amazon and others have entered the podcasting arena, essentially serving as additional distribution channels. Some, e.g., Apple, Spotify & Amazon's Audible, have also begun offering platform-exclusive programming available only to their subscribers through their mobile and desktop software.

BASIC PODCAST CREATION WORKFLOW

The basic workflow for creating and publishing a podcast is as follows:

1. Record a media file. This can be done using sophisticated recording equipment, or something as simple as your mobile phone using a voice-recorder app.

2. Edit and assemble the media file by embedding artwork, and some meta data (title, host, description, etc.)

3. Upload to a media hosting server (this is NOT usually the same as your web hosting server)

4. Create a blog post which includes a reference link to the media file. This is usually handled by a plugin that automatically creates the so-called "enclosure" and RSS feed[2] used by iTunes and other tools to retrieve episodes as they are released.

5. Publish the blog post.

If the podcast has been registered with iTunes and other podcast directories (a trivially easy process), it is then easily found by keyword searching. Then, in addition to listening on a web page, users can subscribe using a computer or mobile device. Subscribers automatically receive new episodes which are automatically downloaded as soon as they're published.

The emergence of new podcast hosting providers is changing this landscape, making podcast production and distribution easier than ever before. Several of these providers are offering exciting monetization options for their customers as well.

---

[1] The most common and favorite among podcasters being Wordpress.

[2] RSS stands for "Really Simple Syndication" or "Rich Site Summary", depending on whom you consult.

ABOUT PODCASTERS

Because of the simplicity in creating and publishing episodes, podcasting has been adopted by people from a myriad of backgrounds. Though podcasting has been adopted as a business strategy by many, including those in traditional media, a majority of producers pursue podcasting as a hobby. Few of these people have had any formal media production trading, and as a result, they often operate on assumptions drawn on their experience as media consumers. Sadly, this often leaves them without the knowledge required to operate within the law, and too often these podcasters find themselves unprepared for the issues that can arise.

LEGAL ISSUES FACED BY PODCASTERS

OWNERSHIP

In my practice representing content creators, it is striking to me that podcasters, who are often frequently focused on creating media as an income-generating strategy, are among the least cognizant of the issues that can arise between and among collaborators. As a consequence, podcasters frequently move into working relationships as co-producers, co-hosts, and guests, without consideration for the legal consequences of their actions. Podcasting involves a relatively small, but still significant investment of capital, and that capital typically comes from those launching the podcast.

Like teams working together to write songs, screenplays and books, podcasters may be viewed as collaborators, and thus as co-owners of the fruits of their work together.

But in many instances, one or the other of the team views him- or herself as the sole- or primary force behind the creation, development and production of the show, with co-hosts as essentially, guests, serving at the pleasure of the creator. Inevitably then, when relationships between podcasters deteriorate, they are confounded by questions of ownership, both of the tangible, physical assets of the venture, and of the intangibles, such as the show itself, the title, and the back-catalog of episodes.

As with most collaborations, it is wise that podcasting teams prepare some form of written agreement outlining their respective rights and responsibilities. Unfortunately, instances of podcasters preparing written agreements or of forming business entities are the exception, rather than the rule.

THE NEED FOR WRITTEN AGREEMENTS

Because of the nature of the medium, and the informal character of the production process, I recommend that podcasters enter into formal, written agreements with their collaborators, guests, vendors and advertisers. Agreements between co-producers and co-hosts should specify in the greatest possible detail which party will be responsible for things like branding, licensing third party content to be included in the program, financial responsibility for ordinary and extraordinary expenses; providing studio resources, editing facilities and services, and who will handle the artistic, technical, and logistical aspects of the development, production, post production and distribution process. Similarly, the agreement should include specifics regarding how and when revenues will be recognized and distributed, so there are no misunderstandings.

In many cases, a fairly simple collaboration, co-production, or partnership agreement will suffice. Forming limited liability companies has recently become more popular for podcasters, particularly those producing multiple shows, or managing “networks” of shows produced by others.

Agreements between networks and program producers should also clearly outline the full nature and scope of those relationships.

Ownership questions quickly become mired in uncertainty without some kind of written agreement to light the way.

GENERAL PARTNERSHIP RULES REGARDING OWNERSHIP

When two or more persons come together to operate a business for profit, the law considers them to be “partners”, and in the absence of evidence to the contrary, they are deemed to have equal rights and authority in the business and its revenues, as well as joint responsibility for the liabilities attaching to the business and its operations.[3] So, it stands to reason that team members who come together to produce a typical “homegrown” podcast will be treated as partners.

This, however, may be rather distant from the true intentions of the partners.

It is for this reason that we counsel podcaster clients regarding the formation of business entities, or at least to prepare formal partnership agreements manifesting their true intentions with respect to the business.

[3] Revised Uniform Partnership Act (1997) http://www.uniformlaws.org/shared/docs/partnership/upa_final_97.pdf

IS A PODCAST A WORK MADE FOR HIRE?

There are two ways that a business can acquire ownership of the intellectual property (copyrights and trademarks) that it creates.

First, the business can acquire ownership from the work's author by written contractual assignment, and;

Second. The business can own copyright in material from its inception, if the work is a "Work Made For Hire".[4]

The Copyright Act limits the work made for hire doctrine to two specific situations:

1. a work prepared by an employee within the scope of his or her employment; or

2. a work specially ordered or commissioned for use

   - as a contribution to a collective work,
   - as a part of a motion picture or other audiovisual work,
   - as a translation,
   - as a supplementary work,
   - as a compilation,
   - as an instructional text,
   - as a test,
   - as answer material for a test,
   - or as an atlas,

If the parties agree in writing that the work is a work made for hire.

While a video podcast (relatively rare) would certainly qualify as a "motion picture or other audiovisual work", there is little support for the notion that an audio podcast, without some visual component, could so qualify. Nor is it likely that a podcast would qualify as a work made for hire under any of the other enumerated kinds of works.[5]

Realistically, then, a podcast (individual episodes, or entire series) is likely to belong to a partnership, corporation or LLC only if the producers, hosts, and other personnel involved in the show's creation are bona-fide employees, whose job duties include creating media content, or if they assign the copyrights after creating the works. For some businesses using podcasts as a marketing tool, this will indeed be the case, but for most "homegrown" podcasts, it will not.

AGENCY AND EMPLOYMENT

Even where the podcasters have formed a partnership, LLC or corporation, the mere existence of a business entity is probably insufficient to secure ownership of intellectual property created by the owners of the businesses. In the absence of formal employment agreements, and other indicia of an employer-employee relationship, partners are not necessarily employees of their businesses.[6] Similarly, even in member-managed LLCs and closely held corporations, the members, shareholders, and directors, as the case may be, will not automatically be treated as employees.[7]

As such, the intellectual property they create "for" the business may still be treated as separate, and where multiple creators are involved, tricky issues of ownership abound.

So, assuming multiple participants in the creation of podcast episodes, and the absence of evidence in support of true employee status, we are confronted with the challenge of Joint Authorship.

JOINT AUTHORSHIP

"Joint work" is defined by the Copyright Act as:

> "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[8]

---

[4] United States Copyright Act, 17 USC 101 http://www.copyright.gov/title17/92chap1.html

[5] Though there is some support for the argument that a podcast, being episodic in nature, could qualify as a "collective work", which is defined in the code as "a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." United States Copyright Act, 17 USC 101 http://www.copyright.gov/title17/92chap1.html

[6] https://www.irs.gov/help-resources/tools-faqs/faqs-for-individuals/frequently-asked-tax-questions-answers/small-business-self-employed-other-business/entities/entities-1

[7] Internal Revenue Service Bulletin 2007-39 https://www.irs.gov/pub/irs-irbs/irb07-39.pdf

[8] 17 USC § 201 http://www.copyright.gov/title17/92chap2.html#201

Under this definition, all authors must intend that their contributions be combined, and this intention must exist at the time the contribution is created.[9]

It is not necessary, however, that the contributions be equal in effort or value. Nor is it necessary that the joint authors work in the same physical area or at the same time. As defined in the statute, the only requirement is a mutual intention that the works are to be "merged into inseparable or interdependent parts of a unitary whole."

The determination of whether a joint work is created can be crucial in determining each party's rights to the created work. The authors of a joint work are co-owners of copyright in the work.[10] If a joint work exists, then all authors hold an undivided interest in the entire work. Any of the authors can thus exploit the entire work as they please without seeking permission from the other joint author(s). This, of course, is subject to a duty to account to the other author(s), and to share any revenues derived from exploitation of the work.

But where there is no "joint work," then the combined efforts of multiple authors are considered separate works temporarily joined together. In the example of a lyricist and a composer who created their respective works without intending them to be combined, the authors can still agree to combine their works into a single song. But, neither party can use the work of the other party without the others' permission. Any disposition of the complete combined work would be limited to whatever is agreed between the authors.

WHEN THINGS GO BAD

What happens between podcasters when disputes arise, or when one member of a podcasting team wishes to stop podcasting, while other(s) want to continue?

Perhaps a partnership agreement, operating agreement or corporate bylaw provision exists that can address the question. But perhaps not.

If the team is considered joint authors, then any member can continue to exploit the works they created together, subject to duties to account and pay the other authors. But this is both undesirable and impractical, since having the same content available from multiple purveyors can create marketplace problems.

Those continuing the podcast will want to retain the exclusive rights in the content created prior to the separation. While a departing participant may wish to exploit that material him or herself. Or, as is often the case, may wish to have the podcast cease production, and old episodes "taken down".

Another vexing issue relates to control of the podcast's website, email, hosting and social media accounts, and most importantly, the RSS feed itself (which essentially is the connection to the podcast's audience). Without control of these assets, continuation of the podcast after a team member's departure will be difficult or impossible.

It is for all of these reasons that I typically recommend podcasters enter into a comprehensive agreement to address ownership issues with respect to the business as a whole, and to the specific episodes they create together. I have taken to referring to this agreement as a "Podcaster's Prenup™".

BUSINESS AND TAXATION OF PODCASTS

Among the issues that arise for content creators is whether they're treated as businesses or not. Because the work of these creators is often performed entirely within the confines of one's home, the line between hobby and business enterprise is often blurry.

So, when is a podcast a business?

Obviously, a podcast producer who forms a business entity, employs various vendors and personnel, has a comprehensive monetization strategy and generally behaves like a business, is appropriately treated as such.

But what of the home-based podcaster whose show is prepared mainly as a hobby, for the love of the subject matter, and without a deliberate business purpose (at least at the outset)?

In 2010, the City of Philadelphia made headlines when it ramped up efforts to collect a "Business Privilege Tax" from bloggers residing within the city. [11] Although it was dubbed the "Blogger Tax" at the time, the tax applied to any city resident who received 1099 income. The issue arose after the IRS shared information about 1099 recipients in the city. Because bloggers who had placed google AdSense ads on their sites in hope of generating a little revenue received 1099 forms, they found themselves in the crosshairs of Philadelphia's tax collectors.

A similar situation arose in Los Angeles where freelancers, including independent screenwriters, who often create "spec" screenplays, were targeted for

[9] Childress v. Taylor 945 F.2d 500, 2nd Cir. (1991)

[10] 17 USC § 201 http://www.copyright.gov/title17/92chap2.html#201

[11] https://www.wired.com/2010/08/five-myths-about-philadelphias-blogging-tax/

business license tax enforcement for the revenues they earned from their work.[12]

In truth, most major cities have some form of business license tax in place, and it is likely that such taxes would apply to blogs, podcasts or other online businesses that generate revenues. While many such cities have minimum earnings thresholds below which not tax is due, Philadelphia had no such minimum … which led to certain bloggers being billed hundreds of dollars in "minimum" tax against miniscule earnings.

Obviously, a hobbyist podcaster who incorporates Adsense on her show's web pages might find herself in a similar situation. For podcasters that occasionally recommend products under affiliate programs (discussed later in this article), or who incorporate paid advertising messages within their programs, it is likely that they'll be deemed "in business", and thus subject to taxation at the local, state and federal level.

Consequently, podcasters should consider tax rules and plan to comply before setting out to monetize their shows.

RELEASES FROM GUESTS

Like most attorneys in the entertainment industry, I prefer that clients use written contracts with the people they include in their productions. Podcasters are no exception.

In the feature film arena, it is rare that a person who appears in the film hasn't signed a contract, or at least, an appearance release.[13] Likewise, in television (reality as well as scripted programming) contracts and releases are customary. In the world of radio, however, signed releases are much less commonplace.

Many podcasters, who often fancy themselves radio hosts, have eschewed the use of appearance releases with their guests, relying, it seems, on a theory of implied consent (from the act of showing up and giving the interview). But this approach overlooks serious distinctions between broadcasting and podcasting.

Not the least of these is the practical one. Once a live broadcast has "aired", it is complete, and only in rare instances will the material be re-run, or available for repeated performances. Complaining after-the-fact is unlikely to have any effect but to republish the offending material in a new public forum.

But a podcast is not ephemeral. Quite the opposite, a podcast is by its very nature "evergreen", a recorded, downloadable, and repeatable program. So, a guest who is unhappy with her performance might reasonably wish to have the episode deleted, and may do so by simply revoking his or her informal consent to appear, or for the use of name, likeness, etc., in promoting the program.

Moreover, casually obtained consents may also be incomplete. Where a radio guest may reasonably expect that the interview will be broadcast in its particular context and little else, a podcast episode might be reused, and repackaged in another medium or configuration, sold for a profit, or included as part of a paid membership or course. Needless to say, unless the full scope of possible uses was discussed at the time of consent, it could be argued that a subsequent use was not authorized. And, while estoppel arguments might indeed be effective, their application would require the time and expense of court proceedings with all that they entail. Obviously, a relatively simple release agreement provides a more desirable solution.

A recent example is instructive: Following a somewhat controversial shift in its editorial perspective, a popular family-health oriented podcast had a prominent early guest (who held strong views on one side of an issue) demand that the episodes in which she had appeared be erased completely from the podcast's website, RSS feed, archive and any directory entries that used her name or likeness. This despite having consented to the interviews and providing biographical sketch and photos for use by the podcaster. When the podcaster, while agreeing to take-down the episodes, imposed the condition that a statement of explanation take their place, the disgruntled guest filed suit, alleging various privacy, right of publicity, fraud, and unfair competition, as well as copyright (in her "performance" as well as in the photographs[14] and the biographical sketch she'd provided) claims.

For the podcaster, the prospect of a costly lawsuit with an uncertain outcome informed the decision to accede in to the guest's demands. Eventually, the case was dismissed. But had the host required guests to sign a simple appearance release, there'd have been little or no basis for claims. (For a simple Podcast Guest Release, see Exhibit A)

---

[12] http://www.laweekly.com/news/did-you-just-get-a-500-freelance-assignment-the-city-might-bill-you-30-000-6040715

[13] A notable exception in recent years involved the film "Innocence of Muslims", and the case of Garcia v. Google, Inc., 786 F. 3d 733 - Court of Appeals, 9th Circuit 2015

[14] Raising obvious questions about authorship of the photograph, of course.

DEFAMATION

As with any type of media production, concerns may arise in the area of defamation embodied within blogs and podcasts. Like journalists, when bloggers write, and podcast hosts speak of real people, they must use caution to avoid liability for the harmful effects of disseminating false information.

Though the subjects are frequently public-figures, such as sports-figures, politicians, and entertainers, and thus subject to the higher *actual malice* standard of proof,[15] there will be times when people mentioned are ordinary citizens, and podcasters liable under a more relaxed *negligence* standard.[16]

The defenses of truth, opinion, and fair-report privilege will figure prominently in these cases. Ultimately, however, the best practice is to avoid publishing unfounded assertions in the first place. Unfortunately, the vast majority of podcasters have no training in the fields of media law or journalism. So, they are often unaware of the boundaries until it's too late.

Though claims to date in the fields of social media, blogs and podcasts have been few, they do exist, and have led to some interesting, outcomes.

Most notable is the case of Obsidian Finance, Inc. v. Cox,[17] in which a blogger, Crystal Cox, was held liable for $2.5 Million in defamation damages. Although the District Court had held that Ms. Cox was not a journalist under Oregon's Reporter's Shield Law, and thus was required to disclose her sources, the Ninth Circuit disagreed. The panel extended the principle held in *Gertz v. Robert Welch, Inc.*[18] that the First Amendment required only a "negligence standard for private defamation actions", is not limited to cases with institutional media defendants. The panel further held that the blog post at issue addressed a matter of public concern, and the district court should have instructed the jury that it could not find the blogger liable for defamation unless it found that she acted negligently.

"The protections of the First Amendment" the Court states, "do not turn on whether the defendant was a trained journalist, formally affiliated with traditional news entities, engaged in conflict-of-interest disclosure, went beyond just assembling others' writings, or tried to get both sides of a story. As the Supreme Court has accurately warned, a First Amendment distinction between the institutional press and other speakers is unworkable: "With the advent of the Internet and the decline of print and broadcast media . . . the line between the media and others who wish to comment on political and social issues becomes far more blurred."[19]

We can, therefore, conclude that podcasters (and for that matter, every other citizen) may expect to be held to the same standard as journalists and for that matter.

But in a very recent development, Fox News and its Tucker Carlson could not be liable because the "general tenor" of the show should then inform a viewer that he is not "stating actual facts" about the topics he discusses and is instead engaging in"exaggeration" and "non-literal commentary."[20] This supports the notion that many podcasts, too, could avoid defamation liability if their presentations are similar in tenor.

PRIVACY

As with defamation, bloggers and podcasters may find themselves defending privacy claims of various flavors.

While, the tort of intrusion seems rather unlikely, (except perhaps where recordings may have been made surreptitiously and then incorporated into a podcast), claims of false-light, public disclosure of private embarrassing facts, and misappropriation of name and/or likeness seem far more likely.[21]

Again, where a guest appears willingly on a show, the use of a properly crafted release will go a long way toward sheltering the podcast from liability, But when it comes to discussions of others, content producers

---

[15] New York Times Co. v. Sullivan, 376 US 254 (1964)

[16] Gertz v. Robert Welch, Inc., 418 US 323 (1974)

[17] Obsidian Finance Group, LLC v. Cox, 740 F. 3d 1284, 9th Cir. (2014)

[18] Gertz v. Robert Welch, Inc., 418 US 323 (1974)

[19] Obsidian Finance Group, LLC v. Cox, 740 F. 3d 1284, 9th Cir. (2014)

20 Karen McDougal v. Fox News Network, LLC, 1:19-cv-11161 (MKV) SDNY, 2020)

[21] See our earlier discussion of a recent case involving such claims by a disgruntled former guest, for example

must take steps to assure that they information they share is public, truthful, and that people's names and likenesses are not used in overtly commercial ways.[22]

RIGHT OF PUBLICITY

Because rights of publicity vary widely in their scope, application, and duration from state to state, it is important that podcasters exercise extreme caution when using names and likenesses, especially those of celebrities and public figures. Generally, however, where rights of publicity do exist, those rights are limited to the right of a person to control commercial uses of name, likeness or other unique identifying characteristics.[23]

Non-commercial uses, such as discussing a person's latest performance in a television program or in a sports contest, will likely be deemed protected under the First Amendment. But trouble can arise when the same material is used in an advertisement or to suggest an endorsement for sponsorship.

The world of social media recently saw an interesting case. Actress Katherine Heigl was photographed in public on a New York street, carrying a bag imprinted with the logo of Duane Reade drugstores. The image was distributed on Twitter with the caption:

"Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore http://bit.ly/1gLHctI"

Heigl quickly sued the drug chain, and the case was settled nearly as quickly, with settlement proceeds in an undisclosed amount going to a charity designated by the actress.

It's easy to see how a blogger or podcaster might cross an unseen line into territory where a celebrity might feel slighted, or deprived of the valuable right to control how his name or likeness gets used. And, if the podcast is sponsored, it's entirely likely that the sponsor will find itself in the crosshairs, too.

INTELLECTUAL PROPERTY

While copyright issues in media are fairly well understood, it bears repeating that podcasters must not use copyright protected material belonging to others without express permission, preferably in writing.

MUSIC ISSUES IN PODCASTING

Podcasting's closest relative in the media world is traditional terrestrial radio. A typical podcast may have the feel of a talk radio show. Podcast topics run the gamut from news, sports, health, the law, politics, religion, technology, entertainment and much more. Like talk radio, music can play an integral part in the feel and presentation of a podcast. The podcast might be solely focused on music such as a "count down" of this week's hits, or music may be a little "icing on the cake" for transitions during the podcast.

Just like the podcast is protected by copyright, so are any songs or sound recordings that you may include in an episode of the podcast.

EXCLUSIVE RIGHTS OF COPYRIGHT OWNER

The owner of a copyright has a bundle of exclusive rights:

(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

[22] See Restatement of the Law, Second, Torts, §652

[23] For a list of U.S. States recognizing a Right of Publicity, See https://en.wikipedia.org/wiki/Personality_rights

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.

17 U.S.C. § 106.

These rights can be licensed by the copyright owner individually or as a whole; exclusively or non-exclusively.

SONG COPYRIGHT AND SOUND RECORDING COPYRIGHT

Whether you're talking intro and outro bumper music, or a whole podcast dedicated to music, you have to understand the different rights attached to a music copyright along with the different music licenses that may be involved.

When discussing the music and who owns what rights, it's important to note that there are two copyrights involved in each musical recording. 17 U.S.C § 102. The copyright that attaches to the song covers the words, music, and the arrangement. Sound recordings are defined as "works that result from the fixation of a series of musical, spoken, or other sounds, but not including the sounds accompanying a motion picture or other audiovisual work." 17 U.S.C. § 101. The song copyright is owned by the songwriter or a music publisher who was assigned the copyright. The copyright in a particular version of a recording is owned by the artist or record label who was assigned the copyright.

As an example of the difference between owning the song copyright and the master/sound recording copyright, recall that Dolly Parton is the songwriter of the hit song "I Will Always Love You." Neither Dolly Parton nor the music publishing company that owns the song copyright for "I Will Always Love You," have any ownership in the sound recording copyright for the version of the song recorded by Whitney Houston for the movie "The Bodyguard." Nor does the record label or Whitney Houston's estate have any ownership in the song copyright. The song and the sound recording are two distinct copyrights with different owners.

STREAMING VS DOWNLOAD

Because podcasts can be delivered to consumers in two different manners - streaming or download – multiple rights are triggered and need to be licensed. These multiple rights and licenses apply separately and distinctly to the song and sound recording.

SONGS – MUSICAL COMPOSITIONS

A song copyright encompasses the words, music, and the arrangement. The copyright owner of a song has an exclusive right to license the public performance of the song as well as the mechanical reproduction of the song. A public performance of a song occurs when it is streamed as part of the podcast. This is analogous to listening to the song on the radio. If the podcast can also be accessed by download, the exclusive right of reproduction – or mechanical right – is also triggered. In traditional media, we think of a mechanical license being needed when a music compact disc or music download is purchased.

What does this mean for the podcaster who wants to include music in her podcast? In short, if the podcast can be consumed by both streaming and download, the podcaster needs both a public performance license and mechanical license whenever a song or a portion of a song is included in the podcast.

PUBLIC PERFORMANCE RIGHT

A public performance of a song occurs when the song is transmitted to the public; for example, radio or television broadcasts, music-on-hold, cable television, and by the internet -- podcasting

In the United States, we have four societies that collect all of the public performance payments for the various different licensees of music. Radio stations, TV networks, and nightclubs are a few of the types of businesses that publicly perform music and need a license. What is nice about the public performance licensing scheme is that you can secure a blanket license which will allow you to publicly perform all songs in the performance right society's catalog. You don't have to go back for individual song licenses. If you have a variety of music in your podcast, and are unable to limit your music selections to those licensed by one performance rights society, you will need web licenses from ASCAP, BMI, GMR, and SESAC. While license fees will vary, you can estimated a minimum annual license around $300.00 for each society.

As discussed, most podcasts are embedded or streamed from a blogging or website platform. When you go to license the rights for public performance in the United States, the licenses are not typically named a "podcast license." At ascap.com the licenses are labelled for "website and mobile apps." Search

bmi.com under the "digital licensing center." Search sesac.com for "website or app." And visit globalmusicrights.com and request a license.

MECHANICAL REPRODUCTION RIGHT

Potentially two different mechanical uses are triggered when a podcast is accessed. If a podcast that contains music is downloaded, a permanent digital download (PDD) occurs with each individual digital delivery transmission resulting in a reproduction made by or for the recipient which may be retained and played by the recipient on a permanent basis. PDDs are sometimes referred to as full downloads or untethered downloads. Even though the song is part of and incorporated into the podcast, the use is considered a PDD and requires a mechanical license and mechanical royalty.

The second mechanical right is triggered by interactive streaming. Streaming means listening to the podcast (which contains music) in real time, instead of downloading a file to your computer or mobile device and listening to it later. There are two types of streaming: interactive and non-interactive. Streaming of content is considered interactive, or on-demand, when the listener can request the specific recording they wish to hear and the digital file is transmitted electronically to a computer or other device contemporaneously with the user's request. 17 U.S.C. § 114(j)(7). Because the end user can control when they stream the podcast, the action is considered interactive. Other examples of interactive streaming include services such as Spotify, and Apple Music,.

Both the PDD and interactive streaming of the songs require a mechanical license. Does it matter how much of the song is used? Probably not. Unless the podcaster is able to fit within a fair use exemption for using the song, a mechanical license will be required. (*See* 17 U.S.C. § 107 for more on fair use). The leading collective for securing mechanical licenses is the Harry Fox Association (HFA). It is very important to realize HFA does not have the rights to every song a podcaster might want to include. Unlike a public performance license, there's no ability to secure a blanket mechanical license for the podcast. Individual licenses must be secured for each song. Visit songfile.com (a service of Harry Fox) for more information on mechanical licenses for songs in podcasts. Songfile can be used to secure a mechanical license for up to 2,500 units of physical recordings (CDs, cassettes, vinyl), permanent digital downloads and ringtones made and distributed in the U.S. and/or Up to 10,000 interactive streams per song. Because HFA does not have the rights to license every song, the podcaster may have to contact individual music publishers for the rights needed.

The current mechanical rate for a PDD is 9.1 cents per song per download. The rates for interactive streams are determined by a number of factors. These include service offering type, licensee type, service revenue, recorded content expense, and applicable performance royalty expense.

Keep in mind the rights, licenses and rates are only for the United States. Each country has its own licensing procedures. As an example, in the UK and Australia, podcasters can license the public performance right and mechanical rights from a single organization in each respective country.

SOUND RECORDINGS OR MASTER RECORDINGS

If securing the rights for the song wasn't tough enough, a podcaster must also secure the rights for the version of the song – the recording – she wants to use. Performing the song in the podcast is a "digital audio transmission" of the sound recording. 17 U.S.C. § 106(6). With the master, two different rights are triggered. A digital public performance right and a reproduction right – more commonly known as a master use.

A podcast is considered an interactive stream because the consumer can select when they play the podcast. A podcast is not the same thing as internet radio. Internet radio is non-interactive meaning the user cannot choose the track or artist they wish to hear. The Digital Performance in Sound Recordings Act of 1995 created a statutory license for subscription-based, **non-interactive digital audio transmissions**. 17 U.S.C. § 114. In 1998, Congress passed the Digital Millennium Copyright Act, which expanded the statutory license to include non-subscription, **non-interactive digital audio transmissions**. License fees for non-interactive uses are pre-determined by a rate determining body called the Copyright Royalty Board, are non-negotiable, and paid by the internet radio stations, webcasters and satellite radio stations to SoundExchange (the entity designated to collect the royalties) as a digital performance royalty. 37 C.F.R. Part 380.

SoundExchange was not originally designed to help you license sound recordings for a podcast. In fact SoundExchange states the following:

> "Interactive streaming and downloads: In addition, the statutory license administered by SoundExchange does not cover interactive streaming or downloads of any kind, including downloadable "podcasts" of archived programming. If you are offering podcasts that include sound recordings, then you may need to obtain a direct license."

(SoundExchange Memo to All Commercial Broadcasters dated Nov. 21, 2014).

Because of the interactive nature of on-demand services, there is no statutory scheme or Copyright Royalty Board determining licensing rates. The on-demand services must secure direct sound recording licenses from the owners of the sound recording copyrights in order to stream. Royalty rates for on-demand services are negotiated between the sound recording copyright owner and the podcaster.

What does this mean for the podcaster? It means you have the obligation to secure a direct license for each sound recording that is in an episode of a podcast. You will have to negotiate direct licenses that will cover the digital public performance right and the reproduction/master use right. There are some companies that provide clearing house licenses for interactive sound recording uses.

While I do not endorse or recommend any particular services, MediaNet (mndigital.com) is used by many large interactive streaming services for clearing popular music rights. Their pricing may or may not be practical depending on the reach and scope of your podcast.

POSSIBLE SOLUTIONS FOR MUSIC IN PODCASTS

Don't give up hope yet. You may still be able to have music in your podcast.

PodcastMusic.com launched in 2020. It's a one-stop shop for clearing all of the rights in the song and sound recording for podcasts. SoundExchange is working in partnership with PodcastMusic.com. The catalog of pre-cleared content is limited.

The easiest solution to using music in your podcast is to secure music from a stock music library that has already pre-cleared all the necessary rights. It's your job to read the license from the stock music library to determine if you have the rights for digital interactive public performance of the song, permanent digital download of the song, interactive digital public performance of the sound recording, and master use/ reproduction of the sound recording. Keep in mind, that most choices from a music library will probably be original music tracks created for the library. This means, using the latest Beyoncé track is probably not an option.

Another option is to hire musicians to record original music and sound recordings for you. Again, you need to secure in writing all of the appropriate rights.

You might also hire musicians to re-record some popular songs for you. Make sure you secure in writing the ownership and all copyrights in the re-record. In this situation, you would only need the public performance licenses from ASCAP, BMI, GMR, and SESAC; and a mechanical licenses from HFA. By re-recording the popular songs, you've eliminated the need for any negotiated licenses for using the original sound recordings.

TRADEMARK ISSUES IN PODCASTING

A number of the most successful podcasts have been fan-oriented shows built on the success of popular television shows. Typically, this involves a host or hosting team giving a summary, recap, and analysis of a program shortly after each episode has been broadcast, much akin to the next-morning office water-cooler conversation one might experience in the workplace.

It is certainly permissible for a podcast host to mention a film or TV program by its title in the course of discussing the plot, characters, and story line of the show as it unfolds.[24] These fan-driven programs have in fact been well received by the networks and producers of popular shows, since they generate free publicity, and provide opportunities for cast members to appear and promote the shows, driving viewership and thus, advertising revenues.

But trouble can arise when the title of the podcast is too similar to that of the program. Because trademark protection requires vigilant policing of trademark use by third parties, these networks and producers may have little choice but to demand program name changes and the like. Podcasters are often able to avoid those problems by clearly designating their shows as "fan podcast" or "unauthorized" or by otherwise distinguishing themselves and minimizing likelihood of consumer confusion.

But one recent situation involved Disney/ABC's "Once Upon A Time" and the fan-driven podcast about the show. The podcast's title wasn't the problem. It seems instead that the network took issue with the cover art design for the show. The podcaster, also an accomplished graphic artist, had sought not to copy the TV Show's logo, but to evoke the spirit and tone of the TV show by using similar typestyle, color scheme, and starry-sky background. Fortunately, after Disney/ABC lawyers contacted the podcaster with a cease-and-desist demand, they were able to negotiate a few changes to

---

[24] See 15 USC §115(b)(4) (Descriptive Fair Use), and see 15 U.S.C. § 1125(c)(3)(A) (Nominative Fair Use) and 15 U.S.C. § 1125(c)(3)(B) (immunizing News Reporting and Commentary from liability for dilution of trademark) BidZirk, LLC v. Smith, 2007 WL 3119445 (D.S.C. Oct. 22, 2007) (applying that section to a blog.)

the artwork and ultimately receive the network's blessing to continue the show.

Podcasters' failure to conduct name and trademark availability searches before selecting their program titles results in the rather common situation of two or more podcasts adopting titles that are easily confused with each other. In many instances, this occurs because the show titles are fairly descriptive, and wouldn't be eligible for trademark protection. The major podcast directories and platforms (Apple's iTunes, Google, Spotify, and others) have mostly failed to exercise any oversight in this area. But in some cases, show titles are quite distinctive, and podcasters are just becoming more attuned to the need to register and enforce trademarks. Unfortunately, the USPTO isn't always keen to help. In 2016, the very successful podcast "Serial" encountered a rejection of its attempt to register the title because it is, well, a "serial" program[25].

TRADE SECRETS AND SPOILERS IN PODCASTS

What happens when a podcast reveals secret information about a company, brand, product or program?

In 2016, the producers of the TV series the "Walking Dead" sought DMCA Takedowns and injunctive relief[26] against bloggers who revealed plot developments expected in the then-unaired season episodes. Similar cases have arisen with blogs prematurely revealing details about upcoming mobile phone launches.[27]

Surely, a similar fate could befall a podcaster who produces episodes containing similar information, but whether liability for this kind of thing would sound in copyright law or trade secret[28] remain open questions.

MONETIZING PODCASTS

Podcasts can be monetized in a number of ways, each carrying its own risks and rewards, and each having its own legal implications. As podcasters begin to employ these strategies, it is essential that they consider carefully, and negotiate their deals accordingly.

CPM ADS

CPM - Cost/Per/mil (thousand) advertising is the most traditional advertising model, with advertisers selecting programs in which to advertise on the basis of audience size. Yet for podcasters, measuring audience size is challenging. Podcasts may be consumed through a number of channels: downloaded, streamed on the web, and streamed via third-party services such as stitcher.com, iHeartRadio, and others. More troubling, podcasts may be downloaded automatically by subscribers, but never actually consumed. Consequently, accurate audience figures may be difficult to pin down.

Further, traditional advertisers are accustomed to very large audience numbers, such as those reported by general-circulation newspapers and terrestrial radio and television. But podcasts tend to be more narrowly focused on a particular niche, and thus attract much smaller, but perhaps more attentive, dedicated audiences.

As a consequence, with a few notable exceptions, major brands have been hesitant to invest their advertising budgets in podcasts.

SPONSORSHIPS

One of the more commonly adopted monetization strategies for podcasts is the "sponsored" model. In this scenario, a podcast may attract a business that serves its same niche audience. In exchange for some brand messaging in the episode content, and on the podcast's website, the sponsor pays a negotiated fee on a per-episode basis. Again, audience size is a factor in determining the rate paid, but the sponsor may also look to other strategies to measure its return on investment.

The brand messaging may include special promotions, website landing pages, or direct response offers, which when used by consumers, demonstrate that the customer learned of the offer from the podcast.

Contract terms for advertising and sponsorship arrangements vary dramatically, with the key points relating to the advertising period, fee, number of messages per episode, and placement of messages and

---

[25] See Trademark applications, Serial Nos. 86454420, 86454424 & 86464485

[26] See http://www.avclub.com/article/are-walking-dead-spoilers-protected-copyright-law-240390

and https://torrentfreak.com/amc-threatens-copyright-lawsuit-over-walking-dead-spoiler-160614/

[27] O'Grady v. Superior Court, 139 Cal.App. 4th 1423, 44 Cal. Rptr. 3d 72, modified by O'Grady v. Superior Court, 140 Cal.App. 4th 675b, 2006. (ruling in favor of online journalists requesting protective orders against enforcement of subpoenas for disclosure of "leaked" information about an upcoming smartphone product)

[28] RESTATEMENT OF TORTS SECTION 757.

ads within the content and website. Savvy podcasters disclaim any particular return on investment. When the sponsor provides advertising copy, recorded "commercials", and graphics, the podcaster should also require appropriate warranties, representations, and indemnities from the sponsor.

UNDERWRITING

An underwritten podcast is similar in character to an underwritten program in the public broadcasting arena. Typically, the entire show or season is underwritten by a single donor or contributor. This model is best used when the underwriter seeks no particular return on investment, but rather some kind of brand-related goodwill by being associated with the podcast in the minds of audience members. This model is relatively rare, but has been used effectively by podcasts related to charitable organizations.

Some podcasters have found considerable success with a variation on the underwriting model that involves the use of online donation-gathering platforms (e.g. patreon.com, et. al.) to allow listeners to directly support programs, often in exchange for some kind of "premium" content not available to non-paying audience members.

DIRECT SALES

Podcasts may also be a sales strategy all on their own. A business might, for example, produce and distribute a podcast as a means to developing authority, affinity and trust with a highly targeted audience, in the expectation that direct offers to that audience will result in sales, new clients, and increased revenues.

AFFILIATE ADVERTISING

Among the most common monetization strategies employed by podcasters is affiliate advertising.

Essentially, the affiliate relationship is akin to a commission-sales model. The podcaster enrolls to become a brand's affiliate and receives a unique identifier which can be tracked by both podcaster and the brand owner. The affiliate then incorporates advertising messages within the podcast, always using this identifier (often a unique landing page or promotional code) and, each time that identifier is connected to a sale transaction, the affiliate receives credit, and a commission on the sale. Commission rates vary widely, with larger, stronger brands, paying very small percentages,[29] and other, more niche-oriented product and services providers paying larger commissions. In some cases, brands will pay 100% commission to affiliates who sell a "tripwire" offer to customers, to whom the brand can then market other, higher value products or services without paying ongoing commissions.

Affiliate messages need not appear as traditional "commercials" in the podcast. An affiliate could, for example, include product reviews in the show, recommending the products to the audience, and thus generating sales. This can be extremely powerful for brand and podcaster alike. But it is vitally important that both the brand and affiliate be aware of strict rules and regulations affecting truth in advertising, and the specific disclosures required for compensated endorsements.

To comply, a podcaster must disclose, conspicuously and adjacent to the endorsement or advertising message, the nature of the relationship with the brand. If an affiliate commission will be paid, this should be made clear to the audience. Likewise, if a review copy of a product was provided to the podcaster for free, the podcaster must so indicate. See Exhibit B for more on endorsement deals and FTC compliance requirements. Watch the FTC's explainer video on YouTube: https://youtu.be/D6SQOy1ukD *See* 16 CFR Part 255 Federal Trade Commission Guides Concerning the Use of Endorsements and Testimonials in Advertising[30].

PAY-TO-PLAY PODCASTING

A recent trend in the podcasting space has podcasters charging guests a fee to appear on their programs. While this may be attractive to an author promoting a new book, for example, the practice could be viewed as an endorsement of the guest and product being promoted. Thus, such episodes would require compliance with the aforementioned FTC regulations. But this raises challenging questions about the proper placement, frequency and prominence of disclosures.

RECENT DEVELOPMENTS IN THE PODCASTING ARENA

ACCESSIBILITY OF PODCASTS

In July, 2020, Spotify-owned Gimlet Media became the target of a class-action lawsuit brought by Kahlimah Jones, for violations of the Americans with Disabilities Act (ADA) by failing to provide closed captioning on various podcasts. This raises important

[29] Amazon.com, for example, pays its affiliates (called "associates") only a fraction of a percentage of each sale, but tends to do multiple sales per customer.

[30] https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-publishes-final-guides-governing-endorsements-testimonials/091005revisedendorsementguides.pdf

questions about the applicability of ADA, and to whom, as well as which types of accommodations are reasonable. While larger platforms like Gimlet are certainly equipped to implement some technologies, smaller independent podcasters (many of whom are hobbyists) are not so equipped. The danger for such independents is that settlements and court judgements may set standards or industry "best practices" with which they cannot comply. This, then may cause a "chilling effect" on podcasting.

LABOR AND EMPLOYMENT ISSUES IN PODCASTING

September 2020 saw the announcement that podcast company Parcast has been targeted by the Writers' Guild of America, East for organizing efforts on behalf of writers, producers and editors. Parcast joins two other Spotify-owned podcast companies, Gimlet Media and The Ringer which had previously been unionized.

Meanwhile, in California, legislation known as AB-5, which went into effect on January 1, 2020 has complicated things for podcasters who use the services of freelance writers, editors, and even co-hosts. Under the law, (ostensibly targeted at ride-share companies Uber and Lyft) adopts an extraordinarily strict and narrow definition of who may be classified as an independent contractor. Under he so-called "ABC" test, nearly all contributors to a podcast are likely to be deemed employees, with the accompanying tax and insurance burdens. In fact, under AB-5 (and other wage/hour laws, the use of volunteers, interns, and other unpaid workers is also strictly curtailed. This represents another challenge that will disproportionally impact the small independent podcast community.

CONCLUSION

Although there have been few legal precedents dealing directly with podcasting, the fields of blogging, social media, journalism and traditional media provide useful guidance. Application of traditional media and entertainment law principles to this new media will inform best practices for podcasters who wish to avoid liability and develop sound, sustainable business models. Meanwhile, as larger players enter and grow in the space, smaller independents are facing new challenges.

ETHICAL ISSUES FOR LAWYERS WHO PODCAST

Like conducting seminars, publishing articles, writing blog posts, and publishing books, podcasting can be a tremendously valuable marketing tool for lawyers. And, like all other marketing strategies, lawyers who employ podcasting should be mindful of their ethical responsibilities. The pages that follow explore some of the ethical considerations for the lawyer-podcaster.

CLIENT CONFIDENTIALITY

It goes without saying that a lawyer should not disclose confidential client information in a podcast. But what of the lawyer who interviews his own client for a podcast episode? Could that attorney inadvertently cause the client to divulge information that could later prove harmful? Would that client be justified in blaming the lawyer?

Perhaps.

Obviously then, care should be taken to avoid this situation. But this should not be viewed as a significant impediment to law podcasting.

IS PODCASTING LEGAL ADVERTISING?

In many jurisdictions, lawyer and law firm websites are deemed to be advertisements. Because social media profiles (including blogs, Facebook pages, and LinkedIn profiles) are by their nature websites, they too may constitute advertisements. The same might, arguably, be said of many lawyers' podcasts.

In 2013, The Florida Supreme Court clarified the state's advertising rules to specify that lawyer and law firm websites (including social networking and video sharing sites) are subject to many of the restrictions applicable to other traditional forms of lawyer advertising. Similarly, California Ethics Opinion 2012-186 concluded that the lawyer advertising rules in that state applied to social media posts, depending on the nature of the posted statement or content.

Certainly, then, a podcast, like a blog, website, or social media post may be deemed legal advertising, and lawyers must comply with applicable rules and regulations.

IMPROPER SOLICITATIONS

Obviously, as with any other medium of communication, lawyers should refrain from soliciting clients, and should offer their services only to those who've specifically requested information from the attorney. When using social media, blogs, podcasts and other one-to-many forms of media, it is important to consider how the communication reaches its audience. Unlike Facebook, LinkedIn, and their ilk, podcasts are on-demand media and not delivered to recipients who do not seek them out. But, since audience members can subscribe to podcasts, and in some cases receive updates by email, it's important to ensure that the content sent does constitute solicitation. Thus, it is wise to restrict podcast content to information, and not specific offers of representation. While it might be

improper to invite audience members with a specific problem to call the office, it is probably permissible to declare one's field of practice and more generally to invite listeners to request more information.

False or Misleading Statements

Lawyers are prohibited from making false or misleading statements in their marketing and advertising communications. Like lawyer websites and social media profiles, lawyers who podcast should take steps to assure compliance with the rules. These rules generally include prohibitions on statements declaring the attorney an "expert" or, unless so-certified, as a "specialist". Similarly, it is wise to avoid statements which might mislead podcast listeners into believing a lawyer is licensed in a particular jurisdiction, practices before a specific court, or admitted to a particular bar, unless the attorney is, in fact, so licensed or admitted. Best practice is to explicitly identify those states and courts in which the lawyer is duly licensed.

Which, naturally, leads us to the question of …

UNAUTHORIZED PRACTICE OF LAW

Lawyers are not permitted to practice in jurisdictions where they have not been admitted and licensed, and are subject to discipline in any jurisdiction where they provide or offer to provide legal services.

But can podcasting be deemed to be "practicing law?"

Generally, I think not. Unless the attorney is directly interacting with clients, holding himself out as a licensed attorney in a jurisdiction where he or she is not licensed, or offering legal services or advice to clients there, the mere act of communicating with people outside the lawyer's home jurisdiction should not be construed as practice of law.

FORMATION OF AN ATTORNEY-CLIENT RELATIONSHIP

Could an attorney-podcaster inadvertently form an attorney-client relationship by podcasting?

Certainly. But it's rather an unlikely scenario.

Suppose, for example, the attorney runs a podcast in a "call-in" format, and fields questions from listeners. In such a scenario, where someone is seeking advice for a specific fact situation, a lawyer who responds with legal advice, rather than general information, might, in fact, create an attorney-client relationship. But this is easily avoided by providing disclaimers and avoiding the specific advice scenario in favor of providing general information applicable to a host of situations.

The question whether an attorney-client relationship is formed through any communication is determined by the "reasonable man" standard. So, we must ask whether a reasonable person would construe a lawyer's podcast content, replies to blog comments, or social media posting as providing legal advice and thereby creating the attorney-client relationship. In most cases, this seems unlikely.

Imagine, as an analogy, a lawyer appearing on a conference panel before an audience of potential clients. In such situations, it is customary to take and respond to audience questions. Why, then should a blog, podcast or social media context be any different?

In fact, my own YouTube series, "Asked & Answered" invites consideration. I invite question submissions from my audience, and after reading the questions on-camera, respond with the general legal information implicated by those questions. In providing these answers, I take care to "sanitize" the questions, referring to the submitter only by first name, and stripping out specifics as much as possible. Then, I restrict my answer to the general principles of law implicated, and typically wind up by encouraging viewers to contact an attorney to help them with their specific situation. Moreover, the description field on YouTube and the web-page where I repost the video include a disclaimer of any attorney-client relationship. I believe this to be a best-practice approach.

Attorneys who podcast should remain vigilant and, of course, avoid providing specific legal advice in response to fact-specific questions and comments. However, merely providing general legal information in the form of a podcast, even when replying to listener comments and feedback, should not result in establishment of an attorney-client relationship.

CONCLUSION

Like blogging, publishing articles, and other media strategies employed by lawyers, Podcasting can be tremendously effective as a marketing tool. Attorneys must remain mindful of their ethical obligations and applicable rules of professional conduct when adopting this or any other marketing strategy.

EXHIBIT A

PODCAST GUEST RELEASE

GUEST: _____ (hereinafter, "Guest")

ADDRESS: _____

PHONE: _____

APPEARANCE DATE: _____

For good and valuable consideration, the receipt and sufficiency of which I'd hereby acknowledged, the above named Guest does hereby agree to the recording and distribution of reproduction(s) of the Guest's voice and performance as part of the media program entitled _____ (herein referred to as the "Program").

Guest does hereby acknowledge that _____ ("Podcaster") is the sole owner of all rights in and to the Program, and the recording(s) thereof, for all purposes; and that Podcaster has the unfettered right, among other things, to use, exploit and distribute the Program, and Guest's performance as embodied therein, together with guest's name, sobriquet, biographical sketch, photograph or likeness (including, without limitation, any photographs or other material provided to Producer by Guest), in any and all media or formats, throughout the world, in perpetuity. Any materials prepared in the course of the production and distribution of the Program ("Materials") become property of Podcaster, and Podcaster shall have the sole and exclusive right to use, exploit and distribute such Materials, throughout the world, in perpetuity.

Nothing contained in this Podcast Guest Release shall be construed to obligate Podcaster to use or exploit any of the rights granted or acquired by Podcaster, or to make, sell, license, distribute or otherwise exploit the Program or Materials whatsoever.

Guest understands and agrees that he/she shall receive no additional compensation for appearances on and participation in the Program.

Guest's name, likeness and photograph may be used in connection with the Program, and in advertising and promotional material for the Program, but not as an endorsement of any product or service.

Guest hereby releases and discharges Podcaster from any and all liability arising out of or in connection with the making, producing, reproducing, processing, exhibiting, distributing, publishing, transmitting by any means or otherwise using the above-mentioned production.

_____

Guest's Signature

_____

Podcaster's Signature

EXHIBIT B

ENDORSEMENT DEALS AND FTC COMPLIANCE

https://www.tbennettlaw.com/createprotect/2014/7/11/endorsement-deals-and-ftc-compliance
Reprinted by permission

Actors, athletes, models, musicians are usually thrilled when an endorsement deal is finalized. They might receive free products, cash upfront or even cash for every tweet that mentions a product. It's rumored Kim Kardashian receives $10,000 a tweet for certain brands she endorses.

In drafting and implementing talent and/or brand endorsement deals, it's important both the brand and talent comply with Federal Trade Commission (FTC) Revised Endorsement Guidelines.

The revised Endorsement Guidelines reflect three basic truth-in-advertising principles:

- Endorsements must be truthful and not misleading;
- If the advertiser doesn't have proof that the endorser's experience represents what consumers will achieve by using the product, the ad must clearly and conspicuously disclose the generally expected results in the depicted circumstances; and
- If there's a connection between the endorser and the marketer of the product that would affect how people evaluate the endorsement, it should be disclosed.

Talent, to protect their integrity, should always use their best efforts to disclose their endorsers. That disclosure becomes tricky in 140 characters on Twitter. If followers understand the talent is being paid to endorse a product, then no disclosure is necessary. What if a significant number of followers don't know? In that case, a disclosure would be needed. Determining whether followers are aware of a relationship could be tricky in many cases, so a disclosure is recommended.

Also, talent should investigate any product claims before they endorse a product. In 2014 the FTC cracked down on Sensa, L'Occtaine and HCG Diet Direct for deceptive advertising claims. Talent would regret associating with a product or service that runs afoul of the FTC.

Remember, you don't have to be rock-star or pro-athlete to be subject to the Endorsement Guidelines - bloggers and affiliate marketers must also comply.

Texas media and entertainment lawyer Tamera Bennett can answer questions on endorsement deals and FTC compliance.