

Podcasts and the Law



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1. Introduction

The use of podcasts in education is likely to grow in the future as a useful “on-demand” learning tool. There are a number of legal issues which need to be considered, however, to ensure that institutions can have confidence in compliance and quality. The issues that will be considered in this paper include:

- The application of general broadcasting regulation to podcasts
- The ownership of copyright in the podcast
- The inclusion of third-party copyright material in the podcast
- Recognising moral rights in included material
- The inclusion of trade marks in the podcast
- Potential liability for defamatory, obscene, copyright infringing or otherwise illegal material

What is Podcasting?

The term podcasting is a combination of two words – broadcasting and iPod, the clear market-leader brand in personal digital media players. Early iPods could only play mp3 and other audio format material, however, newer models can also display picture and video files in several formats too. Podcasting involves making media files available via the internet for download at the instruction of the end user. The file formats that may be contained in a podcast include audio files, images, video, pdf and other document formats, and so on. Podcasts are most commonly sound recordings, typically in the standard mp3 format.

The original purpose of podcasting was to make available radio-show type programmes, and this remains the most common usage to date. Podcasts can be streamed from the server they are stored on or downloaded for storage and later playback on a portable device. In recent years a growing proportion of students arrive in further and higher

education with access to a wide range of devices such as laptops and iPods, thus making the delivery of educational material via podcast a viable teaching tool.

The purpose of this overview document is to outline the legal issues raised by the use of podcasting as an educational tool and to provide some practical advice on how institutions can ensure compliance with the law. Please note however that these guidelines should not be relied upon as a substitute for legal advice in specific cases.

Scope of this Paper

This guide is limited to the law of the United Kingdom. It is important to be aware that if you are making a podcast and a person living in another country can receive it, you may need to comply with the law of that country also. In particular, the country of origin principle in the E-Commerce Directive (2000/31) does not apply to intellectual property. The country of origin principle means that in the Internet environment, a person need comply only with the laws of the country in which they are based. They do not need to satisfy the law in all states where the material is available. As this does not apply to copyright, trade marks and other intellectual property, it may be necessary to get clearance to cover each country of receipt.

2. The Legal Regulation of Podcasting

Broadcasting Law

Although an element of the word broadcasting makes up part of the term podcasting, simply making content available over the Internet for download at a place and time convenient to the end user has not traditionally been regarded by law as a broadcasting activity. The law in this area is set to change during 2008 as a result of the Audiovisual Media Services Directive, the final draft of which is due by mid 2007. This Directive for the first time seeks to impose a set of Europe-wide minimum standards for content delivered online which consists of “moving images with or without sound, in order to inform, entertain or educate, to the general public by electronic communications networks.” (Draft Directive Article 1(2)). The proposed Directive will cover both “linear services” (where the content is made available at a time selected by the provider, as with traditional broadcasting) and “non-linear services” where the content is made available for download and use at a time chosen by the viewer. Online, non-linear services are to be subject to a basic level of regulation for the first time. This Draft Directive has been the cause of much controversy, as at least as initially drafted, it appeared that all podcasts, blogs, etc made available via the Internet were to be subject to its regulations. This has provoked much opposition from podcast producers, the Internet industry, and some government bodies (Ofcom has notably expressed disapproval). As of mid February 2007 it seems that the final draft will include some form of exemption for non-commercial services. However, as yet, the exact position of educational podcasts, whether freely accessible online or available only to a limited user-group, remains unclear. In any case, even if such are excluded from regulation under the Directive, the content will still be subject to a whole range of legal issues as discussed below.

3. Copyright in Podcasts

A wide range of creative and expressive works is protected in the UK by copyright under the Copyright, Designs and Patents Act 1988 (CDPA). It does not matter where the work was published or the nationality of the author, a work will be protected in the UK under the CDPA (and not the foreign law). The kinds of works protected by copyright include, for example, scripts, musical compositions, sound recordings, video and films, tables and photographs. The term of copyright protection begins as soon as the work is created: as soon as a document is typed into the author's laptop, or a lecture is recorded, it is automatically protected by copyright.

Any form of original, creative content in a podcast will be covered by copyright. Podcasts can include blogs (which may contain text or music, for example), sound recordings, live streams (which may be video or audio), voice casts, still images, video, and 'screencasting' (where the podcast may be the screen of a computer, interactive white board, or other similar teaching aid where the digital capture of a screen may occur). Therefore, the kind of material that may be subject to protection in podcasts can be very diverse, including video material, sound recordings, literary works (such as lectures), and artistic works.

As a general rule under the CDPA, the owner of the copyright in the podcast is the author. The author for copyright purposes is the creator of the work. For a literary, artistic, or dramatic work, the identification of the author (or artist) is quite straightforward. However, for other copyright works, the "author" might be more difficult to identify. In the case of sound recordings, this will be the person who makes the arrangements necessary for the making of the recording (the producer), who in relation to films will be the author along with the principal director. In addition, where a work is produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the others then it is a work of joint authorship.

Where there is a podcast of a scripted lecture there is likely to be two copyright works, which are not jointly authored. The first work is the script, which would be literary work owned by the academic who wrote it. The second work is the sound recording of the lecture, which is authored by the producer of the sound recording. The podcast will also include "performers' rights" as well as copyright. Performers' rights exist independently of copyright, and grant certain rights protecting the performance of persons who perform a copyright work as distinct from the copyright holder. Thus, for example, a lecturer who delivers a podcast reading a script which has been written by someone else has no copyright in the script, but will have a right in his or her performance. These rights include a right of control over the recording of a live performance and distribution of such recordings – for example, where a lecture is recorded by a student without permission, this will be in breach of the lecturer's performers right (unless any exception applies). Performers' rights also extend to the making of copies of a recorded work other than for private use, as well as distribution of such copies. Thus the making and redistribution of copies by students of a podcast made available via an institution's website could also infringe the performing rights. The term of protection for performers' rights runs for fifty years from the end of the calendar year during which the performance in question, such as the lecture which has been recorded, took place.

It is also possible, but unlikely, that there may be different kinds of copyright work within a straightforward lecture. For instance, in a lecture on a musical composition course, it is conceivable that the lecture could include a musical work, and so the podcast will contain a sound recording, as a musical work and a literary work (the script); and the lecturer will also have performers' rights in his or her musical performance.

Where podcasts are created in the course of employment, under the CDPA, the employer will own the copyright. So, for instance, when a lecturer employed by the University of Stepney writes the script of a lecture and records it on his or her personal digital recorder in order to distribute it to students via a course website, the University will automatically own the copyright as the lecturer has produced these works in the course of his or her employment.

However, this situation may be more complicated, and the employment contract of the lecturer may affect this. For instance, this situation would be different if a lecturer is employed on a contract for services (to deliver particular goods or services, such as teaching on a specific course), and not a contract of service (e.g., appointed to a lectureship). In this case, if the lecturer made the recording described above, then the lecturer would hold the copyright. But if a student recorded a lecture, then although the sound recording will still belong to the student, the lecturer in this case will have a copyright in the literary work which the student recorded.

A further development in this area, is that many universities now have intellectual property policies with respect to their academics. Some of these allow academics to hold copyright in lecture material (although this is not always the case).

If the institution decides that it wants to make regular use of podcasting and uses the services of an outside party who runs a recording studio in order to ensure the best quality recordings possible, the producer in the studio will technically become the owner of the copyright in the sound recording (although the institution will still own the copyright in the literary work (the script of the lecture), which was recorded at the studio). Copyright however is not fixed to one person – it can be transferred by assignment (assignment in Scotland) or by succession, and the exercise of certain rights may be affected by various licensing arrangements. Performers' rights may also be transferred. Moral rights cannot be transferred to another party whilst the author is alive, however, they may be waived. This is commonly required in contracts with authors in order to allow the publisher to republish extracts from the material without having to first seek the original author's permission.

In order to exercise copyright ownership and control over the sound recording, it will be a simple matter of the university ensuring that the contract with the outside recording party assigns the copyright to the institution. The term of copyright protection for sound recordings is not calculated according to the term provided after the death of the author (the producer in the case of sound recordings). Rather it is calculated as fifty years from the date when a sound recording is made. But if it is first published or made available to the public during that fifty year period, then copyright will run from then (e.g., if a sound recording was made in 1990 but not published until 2005, then copyright will run to 2055, not 2040). Copyright in film, however, endures for seventy years after the death of the last "author" (director, screenwriter, dialogue writer, or composer of musical score – but *not* the producer in this case). As the assignee, the institution will exercise control over the work and as owner of the copyright may reap the royalties itself. Where a work is protected by copyright, the owner of that work has a number of exclusive rights. These rights prohibit anyone else from doing certain things like copying a work, distributing the work, or communicating it to the public.

Use of Third Party Copyright Material

Often, an institution might wish to use material in which the copyright belongs to other people. To use a work which is protected by copyright, the copyright owner's permission is required or the use must fall within one of the copyright permitted acts.

Copyright: the General Rule

The general rule is that where you incorporate text written by anyone else (whether it comes from a book, a journal, a blog or a letter someone sent you), you will need to get the permission of the copyright owner (which may or may not be the author of the work). Similarly, where you include a film, sound recording or other type of work in your podcast you will need the copyright owner's permission. Technically, copyright infringement occurs only if you use a substantial part of another's protected work. This is assessed both qualitatively and quantitatively. However, it is difficult to know whether something amounts to a substantial taking: a line or two of a poem may be substantial, or a hundred or so words from a book. Because it is difficult to know whether something would amount to a substantial part, it is better to err on the side of caution. Therefore, when an exception does not apply it is advisable to obtain prior permission.

Copyright Limits

Copyright does not protect the ideas in a work, only the expression of those ideas. This means that it is possible to discuss a film's plot or the theme of a book or comments on a blog, for example, without infringing copyright. Of course, the ability to comment on another's work does not extend to libelling the author! (For an explanation of defamation and libel go to the Paradigm workbook at <http://www.paradigm.ac.uk/workbook/legal-issues/defamation.html>). Copyright is not perpetual; rather, the term of protection varies depending on the nature of the work. Books, for example, are protected for the life of the author plus seventy years; whereas performances are protected for fifty years from when they occur. Once copyright (or performers' rights) ends in a work it is described as being in the "public domain". This means that any person can do whatever they like with it, whether the former copyright owner likes it or not. So, for example, you could read out the entirety of *Oliver Twist* (which is in the public domain) on your podcast. Titles and catch phrases and other short comments will generally not be protected by copyright. Accordingly, using them in your podcast will not generally infringe copyright (but some catch phrases may be protected by trade mark law).

Copyright Exceptions

Copyright law provides a number of limitations and exceptions to the rights provided to the author (and to performers' rights), and these are set out in the CDPA. There is no general "fair use" defence under UK law (unlike the law of the United States); therefore, any conduct must be expressly allowed under the provisions of the CDPA. Similarly, there is no general exception for "non-commercial" use. Therefore, a podcast of copyright material for non-commercial or even charitable purposes might require permission from the copyright owner, unless one of the exceptions applies. There are about sixty exceptions to copyright under the CDPA, but most of these are unlikely to have any application to a podcast. The exceptions which might apply include:

- (a) fair dealing for the purposes of criticism or review of a published work;

- (b) fair dealing for the purposes of reporting current events (but this does not apply to photographs); and
- (c) incidental inclusion of a work in another work (for example where someone is filmed walking down the street)

In addition, there are exclusions from liability for cachers, mere conduits and hosters set out in the Electronic Commerce (EC Directive) Regulations 2002. These exclusions also protect such persons from copyright infringement where certain conditions are met

Copyright Permissions

Many copyright works are managed by collecting societies, such as the CLA (Copyright Licensing Agency: magazines, journal articles and books), NLA (Newspaper Licensing Agency: newspapers), PPL (Phonographic Performance Limited: performers and record producers), PRS (Performing Rights Society: music and lyrics). These societies generally provide one-stop shops for a wide range of works and have differing rates depending on the use being made of the work. Where the works are not managed by a collecting society it is necessary to contact the copyright owner directly. It is often possible to discover who this is by looking at the copyright notice. This normally looks something like this “© University of Erewhon 2007”. Government works are protected by a special type of copyright called “Crown copyright”. In most cases it is possible to get a licence to use Crown copyright online from www.opsi.gov.uk. Otherwise it is necessary to contact the Office of Public Sector Information to get the relevant permissions.

4. Moral Rights

In addition to the economic exclusive rights, authors, directors, and performers also have moral rights attached to their work – in particular, the right to be identified as the author of the work, and the right not to have the work subjected to derogatory treatment. The first of these rights is satisfied provided that the author is identified as such in the podcast. The second of the rights prohibits you, as the podcaster, from playing a modified version of the work in a podcast, if that modification might be prejudicial to the author.

5. Trade Mark Issues

It may be that in putting together a podcast you use images or brand labels and product names, for example the Apple Corps logo, or the term iPod. The use of these marks may raise issues of trade mark law. Some signs are protected as registered trade marks under the Trade Mark Act 1994 or the Community Trade Mark Regulation No. 40 of 1994. The main purpose of trade mark law is to provide consumers with a guarantee of origin for goods or services. A trade mark is normally registered in relation to certain goods or services (e.g. entertainment services). Once registered, the trade mark owner has the right to prohibit other people from using the mark (or a similar mark) on the same (or similar) goods and services. This protection is limited to using the mark in the course of trade. In addition, a sign used by a trader (whether it is registered or not) may also be protected by the law of passing off. This provides a similar type of protection to trade marks, based on the idea that one party should not be able to take advantage of the reputation and goodwill of another. So, the law of passing off will guard against the

misrepresentation of the identity or origin of one's goods, and against the misappropriation of reputation and goodwill, in ways similar to the law of trade marks.

Trade Mark Law – General

If the owner of a trade mark thinks that you are making an association between your podcast and its trade mark, and that association is sufficient to cause viewers or listeners to think that there is a link, it might mean that you are infringing the trade mark. For example, if you brand a podcast as “the NME Music Hour”, it might suggest that it is linked to the publication NME. This may be sufficient to infringe the trade mark. On the other hand, if you called it “NME Chess Hour” it is unlikely to cause such confusion because of the unrelated trade or industry. However, certain marks which have reputation are given slightly more protection. The use of such marks without due cause, that takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trade mark, will also be an infringement. For example, associating “Coca Cola” with a pornographic podcast might damage the repute of that mark and so it might be possible to prevent it being used.

Trade Mark Law Exceptions

The most important thing to remember is that a trade mark is not infringed if the use is not commercial. Even where it is a commercial podcast, a trade mark will not be infringed where the use is descriptive; for example, “Coca-Cola is a fizzy drink, and I like drinking it”. It is also possible to use another's trade mark where it is your own name. Therefore, Tom McDonald could call his podcast “McDonald's Happy Hour” provided he does so honestly. In other words, provided he is not simply doing so to take advantage of McDonald's restaurants, this use will not infringe the trade mark.

6. Use of the Podcast and Licensing

When you make your podcast available for others to download, the law will presume that you are granting an implied licence to others to use the podcast – that is, you are licensing others to use the podcast. Such an implication can be rebutted by expressly indicating that no such licence exists. However, most podcasters want other people to use the podcast without having to go back to them for permission. The best way of doing this is to include a suitable licence with the podcast. The licence can include various types of permission: for example, allowing others to distribute the podcast, provided they do so with no intention to gain. There are certain organisations which provide standardised licences which are free to use. One of the most well known is the creative commons licence (<http://www.creativecommons.org>).

A licensing arrangement may also be used where the institution wishes to exploit the podcast by selling the right to use it in teaching to other institutions. Again the licence here will form a contract setting out the limitations of acceptable use of the podcast.

7. Liability for Third Party Material

This overview document is primarily concerned with the use of podcasting by further and higher education institutions to deliver educational content produced in-house. Obviously the institution is likely to bear any legal liability which arises in relation to the content of those podcasts, but only if the institution is vicariously liable for the conduct or

authorised that conduct. Therefore, if a lecturer acts in such a way that those actions are outside the activity authorised by the university and for which the lecturer is employed, then the university will not be liable.

However, other circumstances may affect liability. Liability in respect of third party provided material may arise: for example, if you decide to outsource production of podcasts to be used in place of lectures in a distance learning programme delivered online. Another example would be allowing students to upload their own podcasts. In both these cases, the output being uploaded to and made available online is via the institution's servers, and care must be taken in relation to the material made available thus in order to avoid running afoul of certain legal liabilities regarding content. For more information on the legal issues surrounding content liability go to the JISC Legal website at <http://www.jisclegal.ac.uk/publications/thirdpartycontent.htm>.

The Electronic Commerce (EC Directive) Regulations 2002 provide that liability will arise in certain circumstances in respect of any third party provided unlawful content made available online by the institution. The most likely problem to arise here would be in relation to infringement of copyright – for instance, a student presentation which uses a piece of music by the Ramones as a 'theme song', or a podcast prepared by an outside academic who has failed to acquire permission to reproduce a substantial extract from a journal article or textbook. It might also be possible in some circumstances that a defamatory statement may be included in a podcast – say in the course of a presentation on the Holocaust, a particular historian's views are discussed and dismissed as being those of a 'Nazi sympathiser and Holocaust denier.'

The key element in determining whether liability arises under any of the laws mentioned here is awareness. If a court finds that an institution knew, or ought to have known, that the unlawful material was made available on its servers, then the institution may be liable in respect of that third party content. Obviously, if you read, view or listen to the material before it is uploaded – as is likely in the case of podcasts outsourced to third parties for production - or even if the material is read, viewed or listened to after it is uploaded – for instance, student presentations uploaded to the website in order to be assessed – it is much more likely for sufficient awareness to give rise to liability to be found to have been present. In relation to libel, if the institution is considered to have an editorial role over the material (such as when podcasts are perused before uploading, or where a website to which students routinely upload material is monitored and the content viewed) the institution may be viewed as a publisher of the material and strict liability can arise as a result. In other words, as the editor of the material, the institution will be liable for any libel published in it even if the institution is not aware that the content was libellous (but note the defences mentioned above under the Electronic Commerce (EC Directive) Regulations 2002 mentioned above). Such potential liability should not be seen as an insurmountable obstacle to the exploitation of new delivery methods for dissemination educational content, but it is important that care is exercised in relation to the material that is permitted to be made available via podcasts on institutional servers.

8. Conclusion & Checklist

Before making any podcast it is important to consider the following issues:

- **Users / Audience**
 - Who will be able to access the podcast? (e.g. will it be on the institutions intranet or will it be available to the public on the Internet);
- **Author**
 - Who made the sound recording or the film which forms the basis of the podcast? (Is it necessary to get a copyright licence to use it?);
- **Copyright Works in the Podcast**
 - Are any copyright works or performances being included in the podcast? (if so has permission to use it been given? Is there any licensing mechanism, e.g. creative commons, already in place?);
- **Trade Marks**
 - Are any trade names or trade marks mentioned in the broadcast? (If so, consider whether there is a trade mark infringement);
- **Defamation**
 - Does the work disparage any person? (if so, is it defamatory?);
- **Moral Rights**
 - Will users have the right to edit or amend the podcast? (If so have moral rights been waived?);
- **Further Distribution and Copying**
 - What rights to further distribute or copy should someone downloading the podcast have? (consider licensing agreement).

As a rule of thumb, if you have any doubts about whether you should make the podcast available, get legal advice before proceeding. Copyright infringement, trade mark infringement and defamation may attract strict liability, and it does not normally matter that a person thought they were acting lawfully if in fact they were not.

9. More JISC Legal Guides

For further information on the areas of law referred to in this paper go to the JISC Legal website at <http://www.jisclegal.ac.uk> and in particular:

For publications relating to intellectual property rights (including copyright):
<http://www.jisclegal.ac.uk/ipr/IntellectualPropertyPub.htm>

For information on accessibility law:
<http://www.jisclegal.ac.uk/disability/accessibilityPub.htm>

For information on liability issues:
<http://www.jisclegal.ac.uk/ispliability/ispliabilityPub.htm>

For the full JISC Legal publications list:
<http://www.jisclegal.ac.uk/publicationspage.htm>

10. Useful Links

Wikipedia definition of 'podcasting'

<http://en.wikipedia.org/wiki/Podcasting>

Creative Commons Information on Podcasting Tools

<http://creativecommons.org/podcasting>

Creative Commons Podcasting Legal Guide (based on US law)

http://wiki.creativecommons.org/Podcasting_Legal_Guide

BBC News, "Wordsmiths Hail Podcast Success", 7 December 2005

<http://news.bbc.co.uk/1/hi/technology/4504256.stm>

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