



Reed Smith's guide to **live streaming**

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ReedSmith

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through partnership



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Introduction

Although, as with any internet-based media, there is heavy conjecture and punditry concerning the date and time of the first live stream (see here, for example: <https://player.vimeo.com/video/56349011>), most commentators agree that at least by 1995, technology which enabled live streaming was alive and well. Early pioneers of live streaming included the Rolling Stones, Bill Clinton and YouTube. Ten years or so later, Justin Kan, founder of Justin.tv (which we now know as Twitch), put a webcam in his hat and streamed what was happening in his life, 24/7. That was 13 years ago. Live streaming is by no means a new phenomenon.

Fast forward to today, however, and live streaming is now breaking into the mainstream, aided somewhat recently by the global COVID-19 pandemic. At Reed Smith, we have lost count of the number of times that we have seen live streaming give rise to legal issues that require our services. In some instances, these issues are easily fixed by a simple licence agreement or a tweak in the way that a live stream is delivered. In other instances, millions of dollars in damages can become payable and, in the very worst cases, lives are at risk.

The transient and immediate nature of live streaming combined with the ease with which people with almost zero orientation towards technology or indeed media or legal training can become instant global celebrities, is a heady combination. It also creates a fertile feeding ground for lawyers. Nobody wants that.

See below, then, what we hope is a useful guide to legal issues related to live streaming. It is written from the perspective of English law, although the majority of the principles apply in many jurisdictions. It is not intended to be definitive or to cover every possible issue in every jurisdiction; that would require us to write a long book that nobody would ever read. Neither is this guide intended as legal advice. However, Reed Smith contributors to this short document are among the world's leading legal practitioners in this area and represent some of the most famous creators, largest producers, eminent platforms and global content owners in relation to their live streaming activities. We hope that what they say can be useful to you.

In these times where many of us are temporarily staying in our homes, live streaming offers an instant transmission and feedback loop to the whole world. Happy streaming, people.



Gregor Pryor
Partner, London
+44 (0)20 3116 3536
gpryor@reedsmith.com

Chapter 1

Why do I need to worry about legal issues?

Live streaming can be a fun and sometimes lucrative way to express creativity and find fame. However, live streamers need to take care to ensure that their content complies with applicable laws. One wrong move could result not only in a backlash from audiences and streaming platforms, but in a worst case could lead to legal liability, prison sentences, heavy fines and legal fees.

In 2019, YouTuber Kanghua Ren, aka ReSet, was sentenced to 15 months in prison and given a €20,000 fine for violating moral integrity laws in Spain after he filmed himself handing a homeless man an Oreo filled with toothpaste instead of Oreo-crème. The Barcelona court also banned Ren from operating on YouTube for five years.

Similarly, it is essential that live streamers strive to comply with all the laws, rules and regulations related to working with minors. In 2017, the parents behind the 'DaddyOFive' YouTube channel, which posted prank videos involving the couple's five children, were found guilty of child neglect and sentenced to five years' probation each. Similarly, the husband of a UK YouTuber family, who trade under their family brand of the Inghams, found himself in hot water when allegations emerged of him direct messaging an under-age fan while on a family trip to Disney World.

Live streaming protected content such as premier league football matches, professional boxing matches, or films without first obtaining broadcasting or communication rights can be illegal. This may result in injunctions against service providers, and individuals may face unlimited fines, in addition to a custodial sentence.

Filming others for advertising or other promotional content without first procuring a release from that individual is illegal in the UK. The rules around promotional content for influencers and live streamers can differ from country to country. Advice will almost certainly be needed when a live stream endorses or advertises a brand.

Live streaming in locations where filming is forbidden can also land live streamers in legal difficulties. For example, the former leader of the English Defence League was infamously found guilty for contempt of court when he livestreamed defendants in a sexual exploitation trial as they arrived at court.

Broadcasting yourself on the internet is supposed to be fun. Cease and desist letters written by lawyers are typically not intended to elicit a similar range of emotions. We advocate taking a sensible approach to legal risk when live streaming.

Author:
Gregor Pryor



Chapter 2

What should I watch out for in any licence or service agreement with my live streaming service or provider?

Playing by the rules

Before pressing the 'upload' button, it is worth considering some of the key contractual terms and licensing issues that may apply to you. By using video hosting and streaming services, you must first agree to be bound by their terms. Even where you are in a position to negotiate a bespoke arrangement, you will most likely be contracting on the service provider's standard terms. These key considerations apply whether you are new to live streaming, an established social media influencer or a large multi-national. If you do not play by the rules, the provider may hit the 'pause' button and your account could be suspended. Worse, if streaming is your livelihood, your streams may be interrupted or you may be thrown off a platform, putting your brand at risk.

How much do I need to pay?

While some platforms allow you to share your content free, others are likely to charge you on a recurring basis. Choose your distribution partner based on your target audience, the nature of your production (including complexity, duration and frequency), your budget and the availability of technological support included.

Many platforms offer wide arrays of streaming plans with, for example, different hourly rates for streaming content and maximum number of listeners or bandwidth allotment. Some service providers may also offer advanced business-oriented features that will cost you extra. Naturally, the needs and pricing for a one-off live stream of an event will differ from those of an online radio.

Also consider what could happen if you realise your ambitions and the live stream becomes very popular. If you have chosen to use a private live streaming service rather than to live stream via a platform such as Twitch or YouTube, are you aware of the cost of going viral?

Can I do anything I want in my live stream?

You probably already know the answer to this one. No. Where you are using one of the popular platforms to deliver your streams, you should familiarise yourself with the applicable copyright and acceptable use policies. These will include reminders that you must ensure that you have the right to upload or share the content in the first place. This includes using music in the background, as automated content filters are likely to pick this up and may inadvertently block your video (we delve into clearance issues in Chapter 3).

You should also take care not to share content that might be, for example, defamatory, hateful, sexual, explicit or offensive, promotes fraudulent or dubious practices, or that violates or encourages others to violate the law. Your service provider's standard terms are likely to contain a lengthy list of things that you are not allowed to do. Failing to comply with these may mean that the provider suspends or removes your content (with or without notice). Nobody likes to read all the small print, but at least get familiar with the platform's copyright and privacy policies, and its acceptable use rules and community standards.

Can I monetise my live streams?

There are a number of ways in which you may wish to monetise your content, some of which are discussed later, in Chapter 8 of this guide. You should always familiarise yourself with your provider's rules on paid promotions, including product placements and endorsements, and any monetisation features that your provider may make available (for example, donations or channel subscriptions). Commission and revenue sharing arrangements may apply depending on your preferred business model and platform provider.

In addition, remember that you, as the creator, are responsible for understanding and complying with your obligations to disclose paid promotions in your content, including when and how these should be disclosed.

Do I retain full control over my content?

Not necessarily. Make sure you understand what rights you are granting to the other party. Depending on the type of content and the service or platform provider, the applicable terms of service might allow the provider to run ads against your videos. The provider's terms could also require a period of exclusivity during which you will be unable to exploit your content or allow others to do so outside of the relevant platform. This might impact on the type of brand perception you are trying to build and your preferred business model.

What if I experience technical difficulties?

It is frustrating when things go wrong and you may wish to spend a bit more time and money to make sure that the service provider has your back. The terms of many providers will include broad disclaimers of warranties and limitations of liability without guaranteed technical support. Where you are making a substantial investment into your production, you will want to protect it and are likely to be more concerned about uptime and things running smoothly. You should therefore review your service provider's service level agreement to ensure that it satisfies your technical requirements.

Pick your live streaming service carefully, with your intended audience in mind, and be aware that by live streaming on these platforms you are entering into a binding contract with the platform operator or provider.

Author:
Roch Glowacki



Chapter 3

What rights clearances do I need in respect of the video feed?

This section covers intellectual property rights you might need to clear for your live stream, other than rights relating to music, which is covered separately. The issues covered by this section are complex and detailed. This is a summary of the most relevant provisions, but is by no means exhaustive and is not a substitute for taking legal advice where you're unsure.

Why do I have to clear copyright?

Because the owners of copyright in what copyright legislation calls 'works' are the only people who have the right to copy, issue copies, rent or lend, perform, show, play, communicate or adapt works that they own or control. So you need their permission to do any of these things with their property.

What 'works' are covered?

The main works in which copyright subsists are:

- Original literary, dramatic, musical or artistic works, including photographs, computer programs and some databases
- Sound recordings, films or broadcasts
- Typographical arrangements of published editions or, as some people say, books and scripts

What counts as 'original' for these purposes?

The work that you wish to include in your live stream does not have to be a brilliant bit of artistic creation to attract copyright. Originality is judged by the law simply on whether the work is a result of independent creative effort. However, works are not original if they themselves have been copied from other works. Note that sound recordings, films and broadcasts do not need to be original to attract copyright protection. However, they are not protected if they are themselves copies.

Are ideas protected by copyright?

No. Only the expression of ideas is protected. So if you have a good idea for a live stream, write it down quickly before you forget it.

What about names and logos?

Names, titles and internet domain names also do not attract copyright. These can, however, be protected in other ways. For example, protection can be afforded by a registered trademark or a common law action to prevent passing-off (which, put simply, is a law which prevents a person from misrepresenting goods or services as being the goods and services of another, and also prevents that person from holding out their goods or services as having some association or connection with another when this is not true). Logos may be protected under copyright as artistic works.

Can I just use a photograph or work I got off the internet without getting permission?

Almost certainly not, unless the website specifically says you can and even then, you may need the consent of the copyright owner of the photograph (which may not be the website concerned). This applies to all copyright material on the internet. All material sent over the internet or stored on web servers is generally protected in the same way as material in other media. It is a commonly held mistake to think that once material is posted on the internet it enters the public domain and ceases to be protected by copyright law: it doesn't.

So what works am I really looking at (apart from music)?

They might include the following:

- The script of your production or live stream. If you did not write the script, you need to get the author of it to assign or license the copyright in it to you. If the script is improvised by other people (or, for example, provided by people who are interviewed), then again you need those people to assign or license the copyright in it to you. If the script is itself based on an underlying work (such as a dramatisation of a novel or story), then you also need a licence to adapt the underlying work into the script.
- The filmed production itself that you are streaming. The owner of the production itself is the person who makes the arrangements for it to be filmed. That will usually be you. But if your production is sophisticated enough to have a director directing the action and shots, then that director is a joint owner of the copyright in it, and you will need the director to assign the copyright in the production to you.
- Any works that appear in whole or in part in your production. These might include a literary work you quote from, any original artwork that appears or even a television programme or film that the viewer can see someone watching in the background. Remember that even if you are filming on a smartphone, viewers will not necessarily watch it on a small screen and may be able to see more easily such copyright works in the background.
- However, particularly in relation to the third bullet point above, there are three additional points to note:
- For an infringement to occur a 'substantial' part of the applicable work must be copied. The courts have distilled this into a question of whether the part in question is the author's own intellectual creation. So a famous line from a film might, for example, be considered a substantial part of the screenplay: "Toto, I've a feeling we're not in Kansas anymore" is a good example.
- There is no copyright infringement if you include a copyright work incidentally in your live stream (so-called 'passing shot' use). This does not apply to music (or films or TV programmes) deliberately included in the production (for example, a song heard on the radio, or a film being watched on a screen in the background).
- You can film works permanently situated in public places without infringing copyright (for example, buildings or a sculpture in a public park).

Are there any other relevant exceptions to copyright infringement other than the three mentioned above?

The following do not constitute an infringement of copyright (so you don't need to clear material that falls into any of these categories):

- Where the use is fair and is for one of a list of specified purposes (for example, where it is for the purposes of review, criticism, or where the use is by way of caricature, parody or pastiche). This is usually called the 'fair dealing' exception. 'Fair dealing' and the somewhat different U.S. concept of 'fair use' are among the most often incorrectly cited defences that we hear about copyright infringement. Treat with extreme caution.
- If the copier can show that the publication or use of the copyright material is in the public interest. You should assume this exception does not apply to you unless you have sought legal advice about it, as it is a fairly restricted defence.

How far back do I have to go?

Copyright does not last forever. Once a work falls into the public domain, it can be copied. So you don't pay Shakespeare's heirs anything if you want to live stream your own special performance of 'Hamlet'. Works go into the public domain when their copyright has expired. The expiry dates for published works in the UK are as follows:

- Literary, dramatic, musical or artistic works: 70 years after the end of the calendar year in which the author dies (or 50 years after the end of the calendar year in which the author dies if the work was computer generated) although for artistic works exploited by an industrial process the period is reduced to 25 years from the end of the year in which the articles are first marketed.
- Films: 70 years after the end of the calendar year in which the death occurs of the last to survive of the principal director, the author of the screenplay, the author of the dialogue, and the composer of any music specially created for the film – or if no such person can be identified by reasonable endeavour, 70 years from the end of the calendar year in which the film was made or made available to the public.

Are there any other intellectual property rights to consider?

Yes, plenty. We think that there are three main areas to think about. Moral rights, performers' rights and trademark rights.

Copyright holders generally also have what are called 'moral rights', which give them the right:

- To be identified as author or director (so long as they have asserted this right)
- To object to derogatory treatment
- Not to have a work falsely attributed to them.

In other words, people with moral rights have the ability to stop you materially changing their works, or claiming them as your own. Professional producers of audio-visual content typically require their counterparties (writers, directors, etc.) to waive these rights.

There is also a moral right of privacy in relation to photographs or films made for private or domestic purposes. So you need consent to show bits of someone's photograph album or home video clips.

Performers also have rights in relation to the reproduction, distribution, rental and lending of recordings of their performances, similar to the rights a copyright holder has (although they have no moral rights). So if your live stream production is a drama using actors, for example, you will need to get their consent.

Possible infringement of trademarks also needs to be considered, although generally, showing a brand name or logo does not constitute trademark infringement unless you imply some relationship with the brand or show the product or brand in a bad light. To be safe, however, you should avoid giving any prominence to them at all, and should generally avoid filming them where possible – unless, of course, your live stream is intended to promote a brand (in which case, there are other regulatory issues). In particular, look out for brands and logos on clothing, food packaging and other consumer products.

Also, if you are filming other than at home or in a public place, you should get permission from the owner of the location to film there (as otherwise you may be trespassing).

How difficult is all this to document?

It's generally not difficult, particularly if your contributors have bought into your live stream. In many cases, a one-or-two-page release will be sufficient, although sometimes a slightly longer agreement may be needed. Reed Smith is here to help you with this and can give you pro formas. It's worth it, though, because rightsholders can be litigious sometimes, and the potential cost, worry and delay involved in any potential litigation is always something to be avoided where possible.

Authors:

Michael Maxtone-Smith
Henry Birkbeck

Chapter 4

What about music rights?

Music rights is one of the areas in respect of which we get the most questions. It is also one of the most complex areas to deal with. This section is divided up to deal with the two copyrights associated with music content: copyright in musical compositions and copyright in sound recordings. We also explain how registered performers get paid in a live stream environment.

Musical compositions

If you are looking to live stream with commercial music (for instance, all mainstream music and likely all of your guilty pleasures!), it is important to ensure that you have permission to use the musical compositions. Musical compositions are the underlying songs and lyrics that are recorded by performing artists and record labels. Many people forget to license musical compositions. If used without permission, your use of the musical compositions will constitute an act of copyright infringement, which in some countries is a criminal offence.

We set out below our answers to common questions regarding the use of musical compositions in live streams.

What is a 'musical composition' exactly?

'Musical composition' basically means songs and lyrics. Where there is music there will be a musical composition. For example, if your stream features any of the following you will be using a musical composition: the radio playing music in the background, you strumming or singing along to your favourite tunes or your favourite songs playing out of your speakers, turntable, gramophone, headphones (that don't have any sound isolation), essentially, any device audible on your stream.

Do I need to clear rights in music compositions that are contained in my live stream?

Yes. Musical compositions are present from the moment music is played, regardless of whether you chose to use a cover version (whether or not produced yourself) or a sound recording you acquired from a download service or CDs you purchased.

What rights would I need to clear?

You need to clear the online rights in the musical composition. The primary act restricted by copyright when undertaking live streaming is the right of 'communication to the public'. Where a copy is made, you may also be using the right of 'reproduction' (depending on the type of acts undertaken). Permission to undertake these acts is usually granted in the form of a licence by the people responsible for managing the copyrights in the musical compositions.

If you already have a licence to play music in your premises (gym, shop, restaurant, etc.), please note that the licence for your premises will not cover your use of music in a live stream (even if you are streaming from those premises). Online rights are separate from the rights granted to businesses playing music in their premises and you will need a separate licence for online rights.

Do I need to clear the musical composition rights?

In theory, yes, all music usage requires a licence and it is the responsibility of the streamer to ensure that the licence is in place.

However, if you are live streaming via a service or platform, that service may already have a music licence in place and offer limited music licensing cover to its users as an additional service. We recommend that you carefully review the terms, policies and documentation made available by the service or platform that you use. There are several live streaming platforms that have invested many millions of dollars in an effort to obtain licences for their users, including services such as YouTube, SoundCloud, Mixcloud and others.

If I need to clear the musical compositions rights, who do I need to speak to?

Due to the complexity of music licensing practices, most composers 'outsource' the commercial exploitation of their compositions by giving their rights to organisations designed specifically to manage such rights. In Europe, these organisations are the collective management organisations (CMOs) who will generally obtain the right of communication to the public and reproduction right in the musical compositions produced by the composer. For example, in the UK, the CMO managing musical compositions is called PRS For Music. The CMOs will then seek to collect royalties on behalf of the composer when the composer's musical composition is used by third parties (for example, on a live streaming service).

There is usually one CMO in each country (or in some instances, multiple) that control the relevant rights and the CMOs typically manage those rights on a territorial basis. The CMOs can grant a music user a national 'blanket' licence, which means all approved music usage on your service in the applicable territory will be cleared with payment to the CMO only. The advantage of obtaining a blanket licence is that you will not need to seek permission for every additional piece of music you include on your service in that territory. To the extent that your stream is geo-blocked and only available in the territory of that CMO, you will not need to obtain additional licences for the musical compositions.

However, if your service will be accessible in more than one European country, you may need to obtain more than one licence, depending on where you propose to make your live stream available. It is fair to say that the effort required to clear music licences for musical compositions in multiple territories can be a significant burden on a small live streaming business, and we recommend that live streamers who wish to use music extensively look towards operating on those platforms who are well publicised as being in possession of music licence arrangements around the world. If you are determined to strike out on your own platform, due to the complexities and diverse practices, we recommend seeking legal advice to determine which approach would be more economical and better suited to you.

I want to make my live stream available globally using my own platform. What can I do?

It's complicated and it may not be for everyone. We live in a complex world and the music industry takes that to a whole other level. Our responses above broadly apply across Europe and to some extent the USA however, practices across the globe vary from country to country. Due to intricacies and the potential repercussions associated with global music licensing, we recommend you seek legal advice.

What are my other options?

If music licensing sounds like too much effort or disproportionate for your use case, there are alternative options you could consider.

- Live streaming platforms may have already cleared the rights in a library of music for its users to use on the platform free of charge. The choice will likely be limited, but at least you will not need to incur any additional risks, cost or time in music licensing.
- Consider using fully cleared production music that is not associated with CMOs instead of commercial music. There are production music service providers out there that operate outside of the CMO framework and provide greater flexibility in offering licences for online service. They will be able to provide you with music that they have pre-cleared with their composers and you can use without any additional licences.

How much do musical composition rights cost?

The cost of the licence varies depending on your use case and the amount of music you will be including in your live streams. CMOs offer a range of licensing structures, including a flat fee with a usage limit or royalty rate based on a percentage of revenue associated with the live stream.

The rates will vary significantly across the world. However, in the UK, PRS has published tariffs of its applicable rates for online uses available here <https://www.prsformusic.com/licences/using-music-online/all-online-licensing-documents>. For instance, if you're offering a small live streaming service with general entertainment content to a UK audience with an annual gross revenue of less than £12,500, you could be looking at a licence for webcasting of between £142 and £1,414 which would cover you for between 180,000 and 1,800,000 streams per year. We think that for a small live streaming operation, the innovative licence offered by PRS is a great solution.

Authors:
Sophie Goossens
Hannah Kong

Sound recordings

Do I need to clear rights in sound recordings that are contained in my live stream?

Live performances by musicians do not generally involve the performance of sound recordings, except where the recordings are incorporated into live music or 'mixed' by a DJ. This means that for most live artist performances and music contained in a live stream, it won't be necessary at all to clear any sound recording rights. You will only need the consent of the performing artist, normally obtained directly or through their management.

However, if the live stream does include sound recordings, then it will be necessary to clear certain rights.

What rights would I need to clear?

Provided that you are operating a simple live stream, with no ability for users to pause, record or watch-back later on-demand, it is likely that you will only need to obtain the right to perform the recording (that is, the communication to the public right) and will not require the right to reproduce the recording.

However, care needs to be taken with how you are obtaining the recordings themselves. Often, when you obtain recordings as a consumer, they are made available to you strictly for non-commercial and private purposes. For instance, on a strict contractual footing, you won't be able to use your Spotify account for a live stream, as this is restricted by the Spotify terms of use. That's not to say many people don't do it, of course.

If I need to clear the sound recording rights, who do I need to speak to?

The copyrights in recordings are typically owned by record labels or self-releasing artists. However, there are separate performers' rights attached to performances embodied in recordings, which are controlled by the performer (see below).

If you are live streaming the performances of an artist or a small number of artists and intend to make a copy of that stream for us in the future, then it is reasonably likely that you will already be speaking with the artist's record label. If this is the case, then it may be easiest to deal directly with the label, because many record labels engage artists under an exclusive recording agreement (ie. the artist only makes sound recordings and videos for that label) and therefore the label owns all recordings made. It will be important to ensure in your agreement with the label that the label is responsible for clearing and paying all payments that may be due to applicable performers arising from the live stream.

If you are not dealing with the artist's record label or the artist wishes to incorporate a recording owned by another label in their live stream, then you may first wish to check whether the artist would be open to proceeding without the recordings. Of course, if the recordings are key to the set, then this is unlikely but if not, it would be a much simpler solution and reduce your clearance burden.

If you intend to stream music more extensively by, say, running a live radio station, it may also be possible to obtain the necessary recording rights from collection societies, such as PPL in the UK, which represents the interests of both performers and record labels. This is the most common way that live streams of recordings are licensed for online radio usage. Record labels and performers typically mandate PPL (or its sister societies around the world) to license certain limited types of online services. In particular, PPL is capable of granting a live streaming licence under its standard webcaster licensing scheme. Similar schemes are available in other countries outside of Europe (such as through Sound Exchange in the U.S.). It should also be noted that in certain countries, such as Spain, there are separate collection societies for labels and performers meaning that, for such territories, clearances will be required from both organisations. Many people don't realise this.

Licensing through PPL has the advantage of obtaining the recording clearances required for labels and payments to performers from one source entity. However, in light of PPL's limited mandate, the licences available are subject to various restrictions and limitations which would need to be carefully considered. For instance, PPL is only capable of licensing live streams accessible in the UK and in certain other European territories and only for 'vanilla' usage (usually with no skipping or on-demand playback). Additionally, PPL cannot license subscription services or those that are behind a paywall, or funded or branded by a sole commercial sponsor. Check here for PPL's available tariffs. However, for budding live stream DJs, collective licensing solutions available represent an incredibly easy way to make what would otherwise be a pirate radio station a legitimate operation that pays artists and musicians.

The record labels, as ultimate owners, are not restricted in the rights they can provide to you, but may not be so easily able to deal with the rights of performers, leaving you with a potential gap in the rights coverage.

How much do sound recording clearances cost?

If you are dealing directly with the record labels, then they are free to negotiate the licence fee at their discretion. It is not uncommon for labels to request a minimum guarantee payment, together with a per stream royalty. If the live stream can be seen as being promotional for their performing artist, then the label may consider providing the licence on a gratis or flat-fee basis. Ultimately, this will depend on the artist, the size of the service and other relevant circumstances.

PPL, on the other hand, has published tariffs of its applicable rates. For instance, for the commercial webcaster licence, PPL charges a minimum payment of £754 (plus VAT) per year, recoupable against a rate per performance of £0.000854. An additional admin fee of £110 (plus VAT) is also payable where the licence is required for the other European territories under PPL's remit. We believe that this is a reasonably priced solution to enable you to broadcast your live streaming around the world, particularly when compared to the cost of dealing with litigation and an inevitable settlement.

Author:
Nick Breen

Performer remuneration

Must performers be paid if they feature in sound recordings that are contained in my live stream?

As mentioned above, many performers whose performances are embodied in sound recordings enjoy their own rights, separate from the copyright in sound recordings. Most of these rights (such as performers' property rights) are assigned to the owner of the copyright in the sound recording under the performer's recording contract. However, some rights can't be assigned.

In the EU, each performer has the right to be paid a single 'equitable remuneration' (in plain English: a 'fair payment') when a commercially-published sound recording embodying their performance (let's call this a 'track') is broadcasted by wireless means (played on TV or on the radio, for example) or communicated to the public (for instance, live streamed).

Who pays performers, and how?

European law doesn't specify who should pay equitable remuneration to performers. In most cases, equitable remuneration for live streaming is collected by a local collection society established for the purpose, or is handled directly by the owner of the copyright in the sound recording (typically the record label).

Ultimately, in the UK you will not be responsible for directly paying performers. So how do performers get paid for the use of the tracks they feature in? As mentioned in the section on sound recordings above, you will either enter into a licence agreement with the record label, or with PPL.

If you enter into an agreement directly with the record label, the label will cover the payments due to performers. It's important to check your contract to make sure you're not liable. If you enter into an agreement with PPL, PPL will distribute the performers' payments to the applicable performers directly.

Is this position the same in other countries?

The way it works in other countries may be different. Not every country agrees that a webcast falls under the definition of a 'broadcast'. In these countries, webcasting can't be licensed in the same way as you would license a broadcast (that is, by obtaining a licence from the national sound recording collective management organisation – such as PPL in the UK). In these countries, you may need to approach record labels directly for a webcast licence agreement to operate your live stream, although in most countries a simple webcasting agreement is available via local collecting societies in the same way that it is in the UK.

Author:
Hunter Thomson





Chapter 5

Are there any regulatory obstacles or issues that I need to watch out for?

Regulatory and other restraints

Although there are no legal obligations on providers of live streaming to obtain licences to operate from Ofcom, the regulator of audiovisual and audio media services in the UK, this does not mean that live streaming is free from any regulatory and other restraints. For example:

- Advertising and promotions carried on a live streaming service, whether separately from the primary content or embedded in it, must comply with the requirements of the UK Code of Non-broadcast Advertising and Direct and Promotional Marketing (the CAP Code) and the Consumer Protection from Unfair Trading Regulations 2008. The CAP Code, which is an advertising industry self-regulation code rather than a statutory one, includes rules about how advertising should be recognisable as such and other rules that advertisers must follow to avoid misleading people. The Regulations, which by contrast are enforced by the Competition and Markets Authority, provide consumers with protection against unfair commercial practices. Unfair practices include, for example, using editorial content to promote a brand, product or service in return for payment, without making clear to the viewer that this is the case.
- Unauthorised live streaming from performance venues or sports stadiums, where admission is by ticket or membership, will usually be prohibited by terms of entry. Breach of such a prohibition will usually be a breach of contract, allowing ejection from the venue or termination of membership.
- Particularly if live streaming is provided on a 'paid for' basis, the various requirements of the Consumer Contracts Regulations 2013 (which govern sales of goods or services to consumers without face-to-face contact), E-Commerce Regulations 2002 and the Consumer Rights Act 2015 are also likely to apply. These cover areas such as information which is required to be provided to consumers, cancellation rights, content of commercial communications, required standards for the provision of digital content, and remedies for consumers if these are breached.

Unless live streaming takes place on the basis of a programme schedule, it does not qualify as an audiovisual media service regulated by the EU Audiovisual Media Services Directive. The freedom that such a service enjoys from the regulatory requirements of the Directive also has the potential downside that individual EU member states are free to regulate such services as they see fit. Consequently, unlike a broadcasting or on-demand programme service, a live streaming service that passes muster in one EU member state may not do so in another.

Defamation

Defamation laws differ between jurisdictions. Under English law a defamatory statement is one that "lowers the claimant in the estimation of right-thinking members of society" or makes people "shun or avoid" the claimant. Such statements are libel where the communication method is permanent and slander where transitory. Both should be avoided.

To minimise risk, you should not make disparaging, unprovable comments about people (including public figures) or entities and should ensure that others on your live stream do not do so. Defences include truth and honest opinion – but it is easier and cheaper to avoid claims in the first place. Remember that under EU law you can be sued wherever your live stream recording is received. Remember also that it is no excuse to say that you were just repeating what someone else said or wrote. And often it's no excuse at law to say that you were only joking.

Authors:

Stephen Edwards
Ingrid Silver
Michael Skrein
Tomos Jones
Jonathan Andrews

Chapter 6

What about data privacy, safety and content ratings?

Are there any consumer law issues I should be thinking about?

Yes, loads! However, fear not – provided you're live streaming via someone else's platform (that is, via Instagram or YouTube live), the rules are primarily the responsibility of the platform since it will be they who contract directly with users. There are a number of legal considerations a platform needs to take into account regarding consumer law, such as the terms of use it puts in place with its users and how 'consumer-friendly' these are, any payment provisions, cooling off periods (a period during which a consumer can change their mind, cancel and get a refund) and so on. Most of these will be managed by your platform so you won't need to think too carefully about them. However, it is always worth checking the terms in place between you and your platform, as some of these consumer law obligations may be passed down to you (such as certain information you need to provide to subscribers). If in doubt, always check with your platform.

If you are contracting directly with users yourself, you should be thinking carefully about how your terms and conditions are drafted to ensure absolute clarity using simple non-legal jargon language and that you are providing consumers with all the prescribed information required before they enter your terms of service in the terms, during any registration period and by way of confirmation information. Consumers will also have certain rights, regardless of what you say in your terms, including a right to receive goods or services as described and which are fit for purpose.

What about the GDPR? What is the GDPR? Surely this will ruin my plans!

Where do we start? The GDPR (General Data Protection Regulation to you and I) is the EU's overarching data protection legislation that controls how companies process an individual's data legally. For the time being, the framework also applies to the UK (and after Brexit still applies through domestic legislation). Similar to our consumer law point, the main data protection issues will apply to the platform provider rather than you as a live streamer. It's unlikely you will be collecting any personal data from your subscribers, except for things such as anonymised stats and viewer demographics that are provided to you by the platform. You will though, as before, be required to follow any rules set out in the terms in place between you and the platform – they may restrict you from collecting personal data from your subscribers, for example. Always check the T&Cs!

If you run your own platform or otherwise collect personal data directly from individuals (whether it be registration data, cookie data from your website or additional information such as comments and 'likes'), the obligations fall directly upon you and there is a lot to think about – it might be best to get in touch with us if that's the case! A good starting point, however, is the ICO's small business assessment tool.

Authors:
Elle Todd
Tom Gates

Chapter 7

How do I protect my live stream?

Securing a live stream is vital so that you can be certain that only those people you want to have access can use it – ensuring that, for example, people are not accessing a pay-per-view stream without paying. This could involve:

- Password-protecting a live stream so that only those with access to the password can view it
- Real-Time Messaging Protocol (which offers protection from online ‘spying’ on streams)
- If YouTube or a similar service is used, marking a stream as private
- If using Twitter or a similar service, marking out particular groups who will be the only people who (i) will be notified when the stream goes live, and (ii) can watch the stream.

Another way to protect your stream is to monetise it. Services such as Twitch allow the community to show their appreciation for your creative efforts directly, which has turned out to be a powerful way of enabling live streamers to fund their activities.

In terms of protecting your live stream from legal challenges, you should avoid materials that may include the intellectual property rights of others (see chapters above) unless you have a licence to use them – for example, copyright materials (including music and photographs) and trademarks. You should ensure that you have the permission to feature those who might appear in the live stream.

It is also important to protect the intellectual property in your own live stream – if others copy or allow access to your live stream without your consent, you may be able to sue them for infringement and obtain an injunction to prevent unauthorised use as well as damages. You can do this easily by adding a logo or watermark to your own live stream.

Content which is restricted in terms of distribution or access is, in general, easier to protect but there are protections in place even where content is accessible to the public generally. Consideration should be given to registering any related trademarks and, if your live stream includes material that may be unsuitable for children, to restrict access to children and put in place and monitor a system for enforcement.

Authors:

Carolyn Pepper
Jonathan Andrews

Chapter 8

Could I make money from my live stream?

Yes, absolutely. It is important to remember that the revenue streams supported by a particular service vary. While the majority of live streamers do not earn very much, the most successful live streamers take home millions of dollars. We have set out below five key sources of revenue for money from a live stream.

Ads

Ads can be placed before, after or embedded within your content. There are also options for banner displays or other types of ads on a live streamer's homepage. It can be a delicate balancing act when using ads to monetise content – too many ads and you will lose views, too few and you will not make much money.

It is worth bearing in mind that advertisers typically pay for ads on a costs per click or cost per view basis (such as on the YouTube Advertising AdWords service), so a live streamer will only be paid if a user clicks on the advert, or watches it for a certain period of time.

Similarly, not all streaming services are ad-supported, and some will require that a live streamer attain a certain number of followers before allowing the live streamer to monetise their viewership through ads. Live streamers are typically required to broadcast a certain amount of content and have a base level of followers. For example, users of Twitch can become Twitch 'Affiliates' and take advantage of monetisation benefits such as ads, subscriptions, and donations ('bits') only when they have:

- "At least 500 total minutes broadcast in the last 30 days
- At least seven unique broadcast days in the last 30 days
- An average of three concurrent viewers or more over the last 30 days
- At least 50 followers".

Subscriptions and crowdfunding

Users can access the majority of live content on streaming services such as Twitch and YouTube for free, but subscribers can get access to extra perks, such as exclusive content or to use the chat room during the stream. Services may also impose content and follower minimums for streamers to attain before they are able to offer subscriptions. In addition, most services will take a cut on subscription fees. Specific requirements, and the percentage of revenue retained by the service, will vary by service provider. Live streamers can also set up memberships with services such as Patreon that allows patrons to directly fund a live streamer without the involvement of the actual service where the content is streamed. Alternatively, a live streamer may set up a campaign through a service such as GoFundMe to finance a particular project in advance.

Branded content

Live streamers may be sponsored by brands to produce content reviewing the brand's products or services. The more successful your channel, the more likely that brands will reach out. Live streamers can actively promote themselves by reaching out to the brands that they want to work with. However, as with paid ads, live streamers need to be careful which brands they work with so as not to alienate their viewers. In addition, live streamers producing paid content need to make sure that they comply with the applicable advertising rules under the Consumer Protection from Unfair Trading Regulations and the UK Code of Non-broadcast Advertising and Direct & Promotional Marketing (we talk about the rules in more detail here).

Merchandise

Streamers who review products as part of brand partnerships may be able to earn additional revenue by directing their viewers to purchase such products. This can be done by posting links in the stream, or giving viewers a code to use on a particular site – the streamer will earn a commission on sales attributed to their viewers. Successful and popular streamers can also offer their own branded merchandise. If you are selling your own merchandise, you may want to do it through online store services that already have terms and conditions that comply with consumer law requirements. Sites such as Merch by Amazon allow live-streamers to create and sell designs with no upfront investment or costs.

Donations

Users may give donations to a streamer, in a similar way to giving a tip to a street performer or a server at a restaurant. Streamers may incentivise donations by offering exclusive content for donors and many streaming services make it easy for users to donate to their favourite live streamers. For example, YouTube offers 'super chat', which allows users to donate and in return highlights that user's comments, helping the user to engage with the live streamer. However, most streaming services will take a cut from donations.

When picking which service to live stream from, it is important to pick one that offers the revenue streams you want. Make sure you are also aware of the service's terms and conditions, and any FAQ pages they make available. These will be different for each streaming service and will govern how you can make revenue from the service, so it is important to check these carefully to make sure you know what your obligations are, and what the service's obligations are to you.

Author:
Jessica Parry

Our team of stream experts



Stephen Edwards
Partner, London
+44 (0)20 3116 2910
sedwards@reedsmith.com



Sophie Goossens
Partner
Paris +33 (0)1 76 70 40 75
London +44 (0)20 3116 3593
sgoossens@reedsmith.com



Michael Maxtone-Smith
Partner, London
+44 (0)20 3116 3462
mmaxtone-smith@reedsmith.com



Carolyn Pepper
Partner, London
+44 (0)20 3116 3521
cpepper@reedsmith.com



Gregor Pryor
Partner, London
+44 (0)20 3116 3536
gpryor@reedsmith.com



Ingrid Silver
Partner, London
+44 (0)20 3116 3738
isilver@reedsmith.com



Michael Skrein
Partner, London
+44 20 3116 3584
mskrein@reedsmith.com



Elle Todd
Partner, London
+44 (0)20 3116 3532
etodd@reedsmith.com



Nick Swimer
Consultant, London
+44 (0)20 3116 3537
nswimer@reedsmith.com



Jonathan Andrews
Associate, London
+44 (0)20 3116 2918
jandrews@reedsmith.com



Kimberley Beilin
Associate, London
+44 (0)20 3116 3734
kbeilin@reedsmith.com



Henry Birkbeck
Associate, London
+44 (0)20 3116 3755
hbirkbeck@reedsmith.com



Nick Breen
Senior Associate, London
+44 (0)20 3116 3748
nbreen@reedsmith.com



Tom Gates
Associate, London
+44 (0)20 3116 3752
tgates@reedsmith.com



Roch Glowacki
Associate, London
+44 (0)20 3116 3691
rglowacki@reedsmith.com



Tomos Jones
Senior Associate, London
+44 (0)20 3116 3751
tomos.jones@reedsmith.com



Hannah Kong
Associate, London
+44 (0)20 3116 3634
hkong@reedsmith.com



Jessica Parry
Associate, London
+44 (0)20 3116 3753
jparry@reedsmith.com



Hunter Thomson
Associate, London
+44 (0)20 3116 3853
hthomson@reedsmith.com

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Phone: +44 (0)20 3116 3000

Fax: +44 (0)20 3116 3999

DX 1066 City/DX18 London

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