



# Reed Smith's guide to **live streaming U.S. edition**

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# Introduction

**A**lthough, 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.

Fast forward to today and live streaming is now well and truly mainstream, aided somewhat recently by the global COVID-19 pandemic. At Reed Smith, we have lost count of the number of times we've seen live streaming give rise to legal issues that require our services. In some instances, these issues are easily fixed by a simple license 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, plus 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 and a fertile feeding ground for lawyers. Nobody wants that.

See below, then, for what we hope is a useful guide to legal issues related to live streaming. It's not intended to be definitive or to cover every legal issue in every jurisdiction, and it is certainly not intended as legal advice. However, contributors to the guide are among the world's leading legal practitioners in this area and represent some of the world's largest creators, producers, platforms and content owners in relation to their live streaming activities. Happy streaming, people.

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# Chapter 1

## Why do I need to worry about legal issues?

Live streaming allows content creators and personalities to broadcast to their global audiences in real time, which has proved to be both lucrative for the streamer and entertaining for their fans. However, before “going live”, streamers should be aware that the live streaming industry is highly regulated; if live streamers do not comply with applicable laws, digital content can have real-world consequences. For example:

- YouTube has deployed an automated process to detect the unauthorized use of copyrighted music in live streams. If YouTube detects any such unauthorized use, the platform may automatically pause a streamer’s broadcast until it no longer detects copyrighted materials in the stream.<sup>1</sup> Repeat offenders have been banned by YouTube and lawsuits against such offenders have been pursued by copyright holders.
- In June 2019, Twitch sued 100 of its users that were broadcasting content that violated their terms of service, alleging that those users committed federal trademark infringement, breach of contract, trespass to chattels and fraud. This lawsuit is ongoing in federal court.<sup>2</sup>

- Streamer Jammal Harraz was arrested in June 2018 for making a bomb threat on a classroom at the University of Washington, despite the fact that he did not do so intentionally. Harraz’s production allowed fans to play him audio messages in return for a donation of just a few dollars. One donator played a warning siren along with the words “C-4 has been successfully activated. Bomb detonation countdown successfully started”. Prosecutors cited his reaction upon being arrested, which was re-uploaded to Youtube by fans after the video platform took down automated recordings of the live stream.<sup>3</sup>

The ever-evolving world of privacy laws and regulations are also, by nature, intertwined with live streaming. While a streamer may be comfortable broadcasting every detail of their life, the same may not be true of others, and although privacy laws tend to favor streamers carrying on their activities in public, recording when someone caught on video has a reasonable expectation of privacy can result in harsh penalties for streamers.<sup>4</sup>

While setting up a live stream may be as simple as creating an account and turning on a webcam, streamers should inform themselves of applicable laws before jumping into the fun and lucrative medium.

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<sup>1</sup> Google, *Copyright issues with live streams and Hangouts On Air*, Google.com, <https://support.google.com/youtube/answer/3367684?hl=en> (last visited Apr. 15, 2020)

<sup>2</sup> See *Twitch Interactive, Inc. v. Doe*, 2019 U.S. Dist. LEXIS 132842

<sup>3</sup> Will Sommer, *Youtube Stars Get Rich Making Bomb Threats and Streaming It*, THE DAILY BEAST.COM (Jun. 13, 2018), <https://www.thedailybeast.com/youtube-stars-get-rich-making-bomb-threats-and-streaming-it>

<sup>4</sup> See Brandon W. Clark, *IP Legal Considerations for Live Streaming*, LEXOLOGY.COM (Aug. 28, 2019), <https://www.lexology.com/library/detail.aspx?g=69529b96-65b3-4769-841b-59aeb097293>



# Chapter 2

## What should I watch out for in any license 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 multinational company. 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 your account may be terminated by the 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, most frequently 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 the live stream becomes very popular and draws in larger numbers than initially anticipated. 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? Will your reach be too limited that it could stifle your success? On the other hand, are you able – both financially and legally – to stream to an open, wider audience like those on Twitch or YouTube? For instance, are you including third-party content in your live stream for which you only have rights to broadcast to a limited audience or geographic area? What about your rights to stream the performance of other individuals included in your event?

### Can I do anything I want in my live stream?

You probably already know the answer to this one. No. In addition to familiarizing yourself with copyright and other intellectual property considerations, you should carefully review the applicable platform’s terms of use policies. Platform policies include requirements 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, or that promotes fraudulent, misleading, or deceptive practices, or that violates or encourages others to violate the law or the platform’s policies and community guidelines. 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 will suspend or remove your content (with or without notice). Nobody likes to read all the small print, but at least become familiar with the platform's copyright and privacy policies and its acceptable use rules and community standards.

### **Can I monetize my live streams?**

There are a number of ways in which you may wish to monetize your content, some of which are discussed later in chapter 8 of this guide. You should always familiarize yourself with your provider's rules on paid promotions or similarly sponsored content, including product placements and endorsements, and any monetization features that your provider may make available (for example, donations, affiliate links, 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 clearly and conspicuously disclose paid promotions and sponsorships in your content, including when and how these should be disclosed. Remember that the Federal Trade Commission's guidelines on disclosing material connections still apply to live stream content. We discuss these issues in more depth in chapter 8, below.

### **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 – and, in most cases, you will not have any choice as to what ads are being served to those viewing your content. 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 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. If you are in a position where you can negotiate the terms of the agreement, consider requiring a level of technical support as well as prorated refunds or reduction in fees paid to the platform (if any) in the event you experience technical issues that impact your live stream.

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.

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# Chapter 3

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

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

## Why do I have to clear copyright?

If you're a copyright owner in the United States, you have certain exclusive rights to do things with respect to your work that no one else is allowed to do without your permission. A person who creates an "original work of authorship", which is copyright protected under U.S. copyright law, is the only one who can copy or record the work; create other "derivative" works based on the work; distribute copies or recordings of the work by selling, renting, leasing, or lending it; perform or display the work publicly (depending on the type of work); and, if the work is a sound recording, perform it publicly by digital audio transmission. So, you need the relevant copyright owner's permission to do any of these things if you want to use that person's intellectual property in your live stream.

## What "original works of authorship" are covered?

The main works in which copyright subsists are:

- Literary works, e.g., books, periodicals, computer software
- Musical works, including any accompanying words, e.g., musical compositions and arrangements
- Dramatic works, including any accompanying music, e.g., scripts, plays, musicals
- Pantomimes and choreographic works, e.g., a recording of a pantomime, dance performance, or written choreography notes

- Pictorial, graphic, and sculptural works, e.g., photographs, paintings, maps, technical drawings, murals, or any other two- or three-dimensional art work
- Motion pictures and other audiovisual works, e.g., films, television shows, and any other work that combines audio and visual elements
- Sound recordings, e.g., of musical or spoken performances
- Architectural works, e.g., plans, drawings, buildings

## 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 protection. A work will be original if it is independently created by a human author with some minimal level of creativity; the threshold for originality is low. The work does not have to be novel or unique nor have any particular artistic merit. You also do not need to have labored over the work for decades; spending effort on the work is not relevant.<sup>5</sup> Your work will not be original, however, if it is directly copied from another's work.

## Are ideas protected by copyright?

No. Only the expression of ideas is protected if it is fixed in a tangible, long-lasting medium – meaning that it has to have been written down or recorded somehow. You cannot claim copyright protection for an idea that lives only in your mind's eye! So if you have a good idea for a live stream, write it down quickly and with as much detail as possible before you forget it.

<sup>5</sup> *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 345–46 (1991).

## What about names and logos?

Names, titles, short phrases, slogans, and internet domain names do not attract copyright protection. 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. Put simply, these areas of the law prevent a person from misrepresenting that their goods or services are the goods and services of another, and also prevent that person from holding out their goods or services as being connected with another that it does not actually have in reality. In other words, the idea is to stop a person from profiting from the established brand, goodwill, or reputation of another. Logos may be protected under U.S. copyright law as artistic works but are less likely to be protected if they are commonplace or familiar symbols or designs.

## Can I just use a photograph, video, or artwork I got from the Internet without getting permission?

Almost certainly not, unless the website specifically says that you can, and even then, you may need the consent of the copyright owner of the work (which may not be the website concerned). This applies to all copyrighted 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 live stream production.** If you have written the script on your own, you will own the copyright in the script as the author of the script. Otherwise, there are two advisable options, depending on whether the script is not yet written or has already been written by someone else.
  - **Engaging a writer to write the script.** First, if you have not written the script and are planning to engage someone to write the script for you, then

you should engage that writer to write the script for you as a “work made for hire” specially ordered or commissioned for use as part of a motion picture or other audiovisual work. You will need to make sure that this is done in writing and meets the following criteria: (1) it should be signed by both parties; (2) it should expressly state that the script is a work made for hire; (3) all rights should be assigned to you in any and all media throughout the universe in perpetuity; and (4) it should state that if, for any reason, the work made for hire arrangement proves to be invalid, the copyright in the script is assigned to you anyway. You are then considered the author and copyright owner of the script and are free to use it however you wish. If the script is changed or improvised upon by other people then again you need those people to also be engaged on a “work made for hire” basis so that all of the rights in their contribution to the script are also assigned to you.

- **Acquiring rights in a pre-written script.** Secondly, if someone has already written the script or if a participant in the live stream, such as an interviewee, has written and provided a script to you, you will need to obtain a written assignment of the rights to use the script in the live stream (and any other rights that you can obtain from the scriptwriter), again, in any and all media throughout the universe in perpetuity.
- **Any underlying work(s).** If the script itself is based on an underlying work, such as the life story of someone, a book, an article, a novel, or other story, then you also need to secure the rights to adapt the underlying work into a script for a live stream from the copyright owner of that underlying work. If this is the case, we suggest consulting with an attorney, as navigating these waters can be complicated.
- **The filmed production itself that you are streaming.** Once you have secured the rights to the underlying materials (the script, books, etc.), and if your production is sophisticated enough to have a director directing it, actors appearing in it, editors

editing it, and any other contributors contributing to its creation, you will also need to engage those people on a work made for hire basis. If your live streamed content is documentary or non-fiction in nature, you should obtain a contributor release from any participants ensuring that you have the rights to use the footage you film of them in your filmed production. This ensures that you own all the rights in their services and/or participations as it relates to the filmed production. It should also stop any of those contributors from claiming that they have a competing copyright interest in the production and a say in how it is live streamed online or otherwise exploited.

- **Any works that appear in whole or in part in your production.** These might include a literary work you quote from (such as a book, play, article, poem), any artwork that appears (such as a photograph (including stills from a film), painting, poster, mural, tattoo), or even a television program 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 such copyright-protected works in the background clearly enough to identify them.

### So, what constitutes copyright infringement?

For an infringement to occur, the copyright owner has to prove the following three things:

- First, the copyright owner must prove its copyright ownership in the work allegedly being infringed.
- Secondly, the copyright owner has to prove that you had access to their copyrighted work (easy to prove if that work is available online and you had a reasonable opportunity to access it).
- Thirdly, the copyright owner needs to show that there is substantial similarity between their work and yours. If the two works are nearly identical, that is also likely to

be enough to prove you had access to the work. The courts look at whether an ordinary reasonable audience could recognize the two works as being substantially similar, with the same aesthetic appeal. Note, however, that if what has been copied is a “scènes à faire” (scenes that are stock images or common to a genre and crucial to the premise), there will not be copyright infringement as they are not copyright protected.

### Are there any relevant defenses to copyright infringement?

The following defense may be able to protect you from a successful infringement of copyright claim. You may not need to clear the material (by seeking permission from the underlying copyright owner) if you can rely on this defense. Fair use and the concept of “fair dealing” in the UK are among the most often incorrectly cited defenses when talking about copyright infringement. Proceed with extreme caution for the reasons set out below, and, if in doubt, seek legal advice.

- You may be permitted to use a copyright-protected work without getting permission from the copyright owner if your use of the work constitutes “fair use”. To be able to rely on the fair use defense, a court will look at a minimum of four factors:
  - **The purpose and character of the use.** This includes whether your use of the work is of a commercial nature (less likely to be fair) or for non-profit, educational purposes (more likely to be fair). If your use of the work is “transformative”, that is, you have added something new, with a further purpose or different character, altering the first with new expression, meaning, or message,<sup>6</sup> then it is more likely to be a fair use, such as a parody of another’s work, for example.
  - **The nature of the copyrighted work.** If the underlying copyrighted work is factual or non-fiction (for example, a newspaper article), then the use is more likely to be fair than using someone’s fictional, creative work (such as, a novel or a play).

6 *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).



- **The amount and substantiality of the portion used in relation to the copyrighted work as a whole.**

If you have used a great deal of the underlying work, then the use is not likely to be fair. Note, however, that if you've only used a small portion but it was the "heart" of the work<sup>7</sup> (or the essence or the thing for which it was best known), then it is unlikely to be fair use. If you incidentally include a copyrighted work in your live stream, it is more likely to be fair use (if, for example, you film works that are permanently situated in public places such as buildings or a sculpture in a public park in the background of your shot). Further, if you've used someone else's work that is not yet published that is unlikely to be fair because U.S. copyright law protects a creator's right to choose when to first publish their own work.

- **The effect of your use upon the potential market for or value of the copyrighted work.**

This factor refers to whether or not your use of the copyrighted work negatively impacts the existing or future market for the original work. The question is whether you are taking sales from the owner of the copyrighted work or whether the widespread distribution of your work would cause the copyrighted owner substantial harm. In brief, is your new work depriving the owner of the existing copyrighted work of any revenue(s)?

Courts will weigh the four factors above against each other on a case-by-case basis. Courts may also consider other factors including any bad faith by either party<sup>8</sup> or whether your new work is in the public interest.<sup>9</sup> A use is likely to be fair if it is for criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, but otherwise, it largely depends on the judges of the day as to the outcome. Unfortunately and frustratingly, there are no strict rules to follow for producers who want to live stream content. The safest rule of thumb is: if in doubt, get permission from the relevant copyright owner(s).

- There are also certain equitable defenses to copyright infringement that may be used on the basis of fairness including where the copyright owner has misused their copyright protection, behaved badly, abandoned their copyright protection, or the infringer has relied on the copyright owner's conduct to his detriment. In general, most turn to fair use as the first line of defense.

<sup>7</sup> *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985).

<sup>8</sup> *MCA, Inc. v. Wilson*, 677 F.2d 180, 183 (2d Cir. 1981).

<sup>9</sup> *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1166, 1168 (9th Cir. 2007).

## 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 freely. In the United States, any work published before 1923 is now in the public domain (see below). So you don't need to 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 protection has expired. Copyright protection lasts for the following periods in the United States:

### Works created on or after January 1, 1978:

- Literary, dramatic, musical, or artistic works: The duration of copyright is the life of the author plus 70 years after the author's death. If it is a joint work with more than one author, copyright protection expires 70 years after the last surviving author's death.
- Films: If it is a work made for hire, as discussed above, the duration of copyright is 95 years from the year the work is first published or 120 years from the year of its creation, whichever is the shorter period.

**Works created before January 1, 1978:** The duration of copyright depends on whether or not the work was published and if so, when. If the work was:

- published between 1964 and 1977: it is protected from when it was published with a copyright notice. The first term is 28 years and can be extended automatically for an additional 67 years; or
- published between 1923 and 1963: it is also protected from when it was published with a copyright notice. The first term is 28 years and could be extended for an additional 67 years if renewal was obtained (if not, the work is now in the public domain, unless it is a foreign work, in which case copyright is likely to have been restored); or
- published before 1923: the work is now in the public domain; or
- unpublished before 1978: as per works created on or after January 1, 1978, copyright protection lasts for the life of the author plus 70 years, or for a work for hire 95 years from publication or 120 years from creation, whichever is shorter. No such copyright protection could expire before December 31, 2002

however (if the work remained unpublished before that date or, if the work was published on or before December 31, 2002, then it could not expire before December 31, 2047).

### Are there any other intellectual property rights to consider?

Yes, plenty. These are the areas to think about: moral rights, right to privacy, rights of minors, right of publicity, defamation, performers' rights, trademark rights, and property law.

- **Moral rights.** Unlike in Europe where the scope of moral rights protection is much broader, in the United States, moral rights are limited to certain works of visual art only. These moral rights last for the life of the author or the term of copyright of the visual work, depending on when the work was created. These are called the rights of attribution and integrity, and exist separately from copyright as follows:

- **Right of attribution.** This is the right to be identified as the author of a work, but, conversely, it is also the right to stop someone from using your name as the creator of a work of visual art that you did not create.
- **Right of integrity.** This is the right to stop someone from using your name as the author of a work of visual art that has been distorted, mutilated, or otherwise modified to the extent that it would be prejudicial to your honor or reputation, that is, where you have created a work but someone subsequently adapts it in a damaging way so that you no longer wish to have your name attached to it. Under this right, you can also stop someone from intentionally distorting, mutilating, or modifying your work if it would be damaging to your honor or reputation and you can stop someone from destroying a work of "recognized stature" (though this is a term open to varied interpretation). There will be a violation of your right of integrity, if someone destroys your work in an intentional or grossly negligent manner.

In other words, people with moral rights have the ability to stop you from materially changing their works or claiming them as your own. Professional producers of audiovisual content typically require their counterparties (writers, directors, etc.) to waive these rights so that they cannot make a claim against the producers for infringing their moral rights if the producers independently adapt their contributions to the content before distributing it to the public.

- **Right of privacy.** The four main rights of privacy may apply to your live streamed content if you're: (1) disclosing something in your content about a person's private life that would be highly offensive to a reasonable person and is not of legitimate public concern; (2) intentionally intruding on a person's private affairs (if the intrusion would be highly offensive to a reasonable person); (3) painting a person in a false light with your words (if it would be highly offensive to a reasonable person and where you're acting negligently or with actual malice); and (4) taking someone's name or likeness for your own use or benefit. Only living individuals have this personal right of privacy. Businesses do not because the law is meant to address the mental distress suffered by humans through an invasion of their right of privacy. If your live streamed content contains sensitive information about other individuals that they may not want featured in your production and you do not have their permission to include it, be mindful of this area of the law. The right of privacy varies from state to state, and so it's prudent to seek legal advice as to the relevant state law(s).
- **Rights of minors.** You should be extra prudent in terms of how you present any minors to the public in your live streamed production. If any children do feature in your live streamed content, it would be a good idea to obtain



an appearance release from the children in question together with an acknowledgement of the contents of the release signed by each child's parent or legal guardian. You need the parent's or guardian's signature because children cannot give consent legally. You need to make sure that you're comfortable that both the parent and the child fully understand what is being asked of the child and what the release itself means.

- **Right of publicity.** This is where a person has the right to control the commercial exploitation of their name, likeness, voice, and other aspects of their identity. Under this right, a person can stop others from using their identity for commercial use without her permission. Be careful, therefore, if your live stream suggests that a celebrity or other famous person endorses any product or content in your live stream without obtaining permission from that celebrity. There is no federal right of publicity in the United States, so, as with the right of privacy, you will need to get specific state law advice for your live stream if this applies.



- **Defamation.** If you are live streaming commentary or editorial about another person, the law of defamation may apply. "Defamation" is where you make a false statement (slander if spoken and libel if written) that results in injury to another person's reputation. The law broadly says that harming someone's reputation means lowering that person in the estimation of the community or deterring other persons from associating or dealing with that person.<sup>10</sup> Some rules in this area: (1) you cannot defame a dead person; (2) it is not defamation if what you say is true and you can prove it is true; (3) you have to publish the allegedly defamatory statement to an audience for defamation to apply (for example, you say it in your live streamed production); (4) you have to have been at least negligent in publishing the false statement (there needs to have been some kind of fault at play); (5) as the subject of the defamation, you have to show economic or financial losses caused by the damage to your reputation (except for certain types of defamation that are enough on their own to not have to prove any loss; loss is assumed); and (6) it is possible to defame a business. Defamation law also differs from state to state.
- **Performers' rights.** 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.
- **Trademarks.** 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, causing consumer confusion, or you pretend the brand is yours, 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.

10 Restatement (Second) of Torts, section 559.



- **Property Rights.** 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). You also want to make sure when obtaining permission that you have all rights to the footage filmed of that location and that you are free to do whatever you want with that footage in any and all media throughout the universe in perpetuity.

#### **How difficult is all of this to document?**

It's generally not difficult, particularly if your contributors have bought into the idea of your live stream content. 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 template agreements to use. It's always worth it, though, because rights holders can be litigious sometimes, and the potential cost, worry, and delay involved in any potential litigation is always something to be avoided where possible. You want to be completely free to produce and release your content to the widest possible audience, for as long as possible, according to your own schedule and without interference from anyone else.

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# Chapter 4

## What about music rights?

### 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 are “mixed” by a DJ. This means that for most live artist performances and music contained in a live stream, it will not be necessary 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 publicly perform the recording 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 noncommercial 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 that 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. Also, in many countries outside the United States, there are separate performers' rights attached to performances embodied in recordings, which are controlled by the performer (see below). Unless your server is located in the United States and you are “geo-blocking” your stream by restricting viewers who do not have U.S.-based IP addresses, you may need to

comply with laws outside the United States pertaining to those performers' rights.

If you are live streaming the performances of an artist and intend to make a copy of that stream for use in the future, it is reasonably likely that you will already be speaking with the artist's record label (if the artist is signed to one). 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 (that is, 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 if the artist wishes to incorporate a recording owned by another label in their live stream, then you may first wish to find out if 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 would 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 through the U.S. statutory license regime, or from collection societies, such as [PPL](#) in the UK, which represents the interests of both performers and record labels. These are the most common ways that live streams of recordings are licensed for online radio usage.

Sections 112 and 114 of the U.S. Copyright Act have a statutory “compulsory license” regime that permits the noninteractive performance of sound recordings by digital audio transmission within certain usage parameters, as well as the creation of “ephemeral copies” of such sound recordings during the digital transmission process – in each case without having to obtain the permission of the copyright owner, so long as statutory formalities are followed and royalties are paid. SoundExchange is



designated by the U.S. Copyright Office to administer these compulsory licenses and to collect the royalties therefrom and pay them to copyright owners and performers. To obtain a statutory license, you must first notify sound recording copyright owners by filing a Notice of Use of Sound Recordings under Statutory License with the U.S. Copyright Office and paying the \$50 filing fee, prior to making the first ephemeral copy or first digital transmission.

For territories other than the United States, record labels and performers typically mandate PPL (or its sister collection societies around the world) to license certain limited types of online services. In particular, PPL is capable

of granting a live streaming license under its standard webcaster licensing scheme. Similar schemes are available in other countries outside of Europe and the United States. 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 organizations. Many people do not realize this.

Licensing through the U.S. statutory licensing regime and through the licensing schemes of PPL and other collection societies has the advantage of obtaining the recording clearances required for labels and payments to performers





from just one entity or a few source entities per territory. However, in light of the U.S. statutory licenses' limited scope and PPL's limited mandate, the licenses available are subject to various restrictions and limitations that 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 both PPL's licenses and the U.S. compulsory licenses under section 114 are 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. Also, the U.S. compulsory license regime places certain restrictions on the number of selections from the same album or featured artist that may be played within any three-hour period, and does not allow more than three selections from the same featured artist to be played consecutively.

Despite these limitations, for budding live stream DJs, available collective licensing solutions 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 license 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, the label may consider providing the license 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 license, PPL charges a minimum payment of £754 (plus VAT) per year, recoupable against a rate per performance of £0.000854. An additional administrative

fee of £110 (plus VAT) is also payable where the license 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.

The U.S. statutory license regime applies different minimum fees and rates to commercial webcasters, noncommercial webcasters, and other service providers under the Copyright Royalty Board's determination for 2016–2020 webcasting rates. Check [here](#) for more information on those current fees and rates.

## **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 United States, performers on sound recordings are entitled to be paid royalties when a sound recording is publicly performed digitally and on a non-interactive basis (played on a digital streaming service's radio-like playlist, for example). These are often referred to as "featured artist royalties."

### **Who pays performers, and how?**

In most cases, payments to performers for audiovisual recordings are negotiated case-by-case, or are handled directly by the owner of the copyright in the sound recording (typically the record label). The featured artist royalties are paid by non-interactive digital streaming services to SoundExchange in the United States for distribution to performers. Notably, SoundExchange's collection and distribution of these royalties are currently

limited only to sound recordings and not to audiovisual recordings (for instance, live streams).

Ultimately, your use of a sound recording that is performed by anyone other than yourself in your live stream will likely require you to enter into a license agreement with the owner of the copyright in the sound recording. If you enter into an agreement directly with the record label, the label will typically cover the payments due to performers. It's important to check your contract to make sure you're not liable.

### **Is this position the same in other countries?**

The way it works in other countries may be different. For instance, a webcast falls under the definition of a "broadcast" in the UK and you can obtain a license from PPL, the UK's national recording collective management organization. In other countries, you may be able to obtain a simple webcasting agreement via local collecting societies in the same way that you can in the UK, or you may need to approach record labels directly for a webcast license agreement to operate your live stream.

## **Musical compositions**

If you are planning to host a live stream that features music, either with live performances or the playback of recorded music, it is important to ensure that you have the necessary rights and consents to exploit the musical compositions embodied in the performances and recordings. If used without permission, your use of the musical compositions will constitute an act of copyright infringement, which can result in financial liability, take-down requests, muting of your videos and channels, and, in some territories, potentially criminal charges.

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

### **What is a "musical composition"?**

"Musical composition" refers to the underlying music, melodies, and lyrics that make up a song. For example, if your live stream includes Whitney Houston's recording of "I Will Always Love You" playing in the background,

you are exploiting not only Whitney Houston's recorded performance (i.e., the master recording), but also the underlying musical composition originally written by Dolly Parton. Likewise, if you are live streaming a band's performance of "I Will Always Love You," the underlying musical composition written by Parton is being exploited, even though you are not using a previously recorded version of the song.

### **What rights in musical compositions contained in my live stream do I need to clear?**

When live streaming music, two types of rights are implicated: 1) the right of "public performance" and 2) the right to synchronize the underlying musical composition with visual images.

### **What does the right to publicly perform a musical composition mean and how can I clear that right?**

The right of public performance is the right to perform a song in a public location or via a public transmission (e.g. on the radio, at a gym, restaurant or live performance venue, over the Internet, etc.). Under the U.S. Copyright Act, a copyright owner (in this case, the owner of the musical composition) has the right to decide if a song should be made available for a public performance and to be compensated for that performance.

The public performance right is almost always delegated by songwriters and music publishers to Performing Rights Organizations (PROs) (e.g. ASCAP, BMI, SESAC, GMR, etc.) that act as licensing clearing houses by entering into blanket public performance license agreements with rights users, granting them the right to publicly perform the songs in the relevant PRO's repertoire. This blanket licensing system is an industry-wide mechanism that eliminates the impossible task of issuing individual licenses for every piece of music played in every gym, venue, and restaurants or on digital service providers (DSPs) like YouTube, Facebook, Instagram, and Spotify, etc.

If you are live streaming through a DSP that has a blanket license in place, the general terms of service of each specific platform likely govern whether you can "piggy back" on the licenses they have with the various PROs.

If not, to be fully licensed for the public performance right, you will need to enter into license agreements with each PRO in every territory that you intend to make your stream available, to cover your live streaming activities. 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 licenses for their users, including services such as YouTube, SoundCloud, Mixcloud and others, but it's important to carefully determine which ones have sufficient licenses in place for your particular needs.

### **What about the synchronization right – when does this come into play?**

A live stream may also implicate synchronization rights (also known as “sync” rights). The sync right refers to the right to synchronize or couple a musical composition with visual images – like a live stream with visuals (i.e., not audio-only) or recorded video. In other words, any time you see a movie, TV show, or commercial with a song playing in the background, there must be a sync license in place. Similarly, when exhibiting visual content online that has a song playing in the background, you must get permission from the owner of the musical composition to do so.

A sync license is necessary even when you are streaming Dolly Parton's version of “I Will Always Love You” or a cover of the same song recorded in your bedroom – they are just different recordings of the **same musical composition**. As long as the song is playing with visual images, you'll need a sync license.

### **Are both public performance licenses and sync licenses *always* necessary?**

A live stream will **always** implicate a public performance right when you are streaming because the live stream will necessarily **publicly perform** the musical composition of the song you are playing.

A sync license may not always be necessary. If the live stream is truly “live” (i.e., in real time and not recorded), many rights users take the position that the musical composition does not need to be cleared, as it is not “fixed” with the visual images and therefore does not implicate a copyright owner's exclusive rights.

On the other hand, if you are live streaming a song that will be posted later or replayed on-demand (e.g., posting it to your YouTube channel for any amount of time after the live stream) this will certainly require a sync license.







**What if I downloaded a song on iTunes or bought a CD? Do I still need these licenses?**

Yes. When you purchase a song via download or through a physical configuration like a CD, you are buying the song only for **personal** use – in your car, bedroom, etc. When live streaming, however, you still need the right to publicly perform and (maybe) sync the musical composition.

**Does a live stream or replay of a live stream implicate any other rights?**

As discussed in the master recording section, the live stream will also implicate rights of the owners of the master recordings that embody the musical compositions.

Further, if you are live streaming the performance of someone other than yourself, you should consider getting an appearance “release” agreement in place to give you the right to use the performer’s name and likeness in the stream.

Moreover, if you are live streaming a performer signed to an exclusive recording agreement with a record label or distributor, you may need a “label waiver” from their label or distributor waiving their exclusive right to exploit recordings of that performer’s performances.





**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 the U.S., but 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.

**How much do musical composition rights cost?**

The cost of the license varies depending on the use, amount and selection of music you will be including in

your live stream, the potential reach of the live stream, the length of term to exploit any recordings of the live stream, and other factors. PROs offer a range of licensing structures, including a flat fee with a usage limit or a royalty based on a percentage of revenue associated with the live stream.

The rates will vary significantly across the world. In the U.S., ASCAP and BMI have published forms where you can apply for licenses:

[https://www.bmi.com/digital\\_licensing/contact#ms](https://www.bmi.com/digital_licensing/contact#ms) and <https://www.ascap.com/music-users/licensefinder>.

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# 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 licenses from the Federal Communications Commission (FCC) to operate, 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 Federal Trade Commission Act and applicable state unfair deceptive acts and practices (UDAP) laws.
- All advertising must be truthful, not deceptive, fair, and supported by sufficient substantiation. An advertisement is deceptive if it is likely to mislead a reasonable consumer or omits information that is material to a reasonable consumer's decision-making about the product. An advertisement is unfair if it is likely to cause injury that could not be reasonably avoided. For example, native advertising or disguising content paid for by a third party as editorial content would be deceptive. Finally, all express and implied claims that the ad conveys to the reasonable consumer must be substantiated.
- If the advertising includes endorsements or testimonials, the connection between the endorser and seller of the advertised product must be clearly and conspicuously disclosed if that connection could affect the weight or credibility of that endorsement or testimonial.
- In June 2018, the FCC repealed net neutrality rules which required internet service providers to treat all websites and applications equally. In April 2019, the U.S. House of Representatives approved the bipartisan Save the Internet Act<sup>11</sup> which would reinstate many of

the overturned net neutrality rules. The U.S. Senate has yet to schedule a vote on the Act.

- Unauthorized 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.

### Streaming platform guidelines

In addition to the regulatory framework, streaming platforms may have their own guidelines which companies that stream content need to comply with. For example, all streams on YouTube must comply with YouTube's restrictions on live streaming, which state, in part, that live streaming functionality will be turned off for reasons including a violation of YouTube's community guidelines, a copyright takedown notice, or if the stream violates the copyright of a live broadcast. If the streamed content is directed to children, also consider whether the streaming platform's guidance places parameters on that content. For more information on content that is directed to children, please refer to chapter 6 of these Guides.

### Defamation

In the United States, defamation is defined in federal and state specific statutes therefore each courts' interpretation of what constitutes defamation may vary. However there are overarching principles that apply irrespective of the statute. The tort of defamation includes written statements (also known as libel) and spoken statements (also known as slander). There are four elements to establish a prima facie case of defamation: "1) a false statement purporting to be fact; 2) publication or communication of that statement to a third person; 3) fault amounting to at least negligence; and 4) damages, or some harm caused to the person or entity who is the subject of the statement."<sup>12</sup>

Be mindful that the burden of proof varies across state and federal courts. Generally, state courts require that

11 H.R. 1644.

12 <https://www.law.cornell.edu/wex/defamation>.

the plaintiff prove that the defendant was negligent. Alternatively, the requisite burden of proof to establish defamation in federal court differs when the subject is a private citizen or a public figure. If the subject is a public figure, that public figure must prove that the statement was made with actual malice.

To minimize risk, you should not make disparaging, unprovable comments about people (including public figures) or entities, and you should ensure that others on your live stream do not do so. Defenses include truth and absolute privilege – but it is easier and cheaper to avoid claims in the first place.

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# Chapter 6

## What about data privacy, safety and content ratings?

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

Yes, but provided you're live streaming via someone else's platform (for example, via Instagram or YouTube live), these issues are primarily the responsibility of the platform because the platform will be in direct contract with users. There are a number of legal considerations a platform must take into account regarding consumer laws, such as the terms of use it puts in place with its users and how "consumer-friendly" these are, privacy notices, payment provisions, cooling off periods (a period during which the consumer can change their mind, cancel, and get a refund), and so on. Platform providers will also have to consider whether children are likely to engage with the content, and, if so, the terms must be vetted from that standpoint. Most of these issues will be managed by the platform, so you won't need to think too carefully about them. Nonetheless, always check the terms in place between **you** and the platform as some legal obligations may be passed down to you by the platform (for example, notice obligations to provide certain information to subscribers). If in doubt about what obligations fall to you, always check with the platform.

If you **are** contracting directly with users, you should think carefully about the permissions and engagement on your site to ensure they comply with applicable laws. Pay special attention to how your terms and conditions are drafted and promote clarity by avoiding legal jargon. Well-drafted terms and conditions that contain all the information required by consumer laws must be presented clearly and conspicuously to consumers before they are able to stream content. Note, however, that 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 General Data Protection Regulation (GDPR to you and me) is the EU's overarching

data protection legislation that controls how companies process an individual's data legally. The GDPR applies to businesses in the United States to the extent such businesses have operations in the EU, direct their services to consumers located in the EU, or collect personal data from consumers located in the EU. Similar to the consumer law point in the UK, the main data protection issues will apply to the platform provider rather than to you as a live streamer. It is unlikely that **you** will be collecting any personal data from your subscribers, except for things such as anonymized statistics 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 terms and conditions!

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.

### **What is the CCPA and what does it mean for me?**

The California Consumer Privacy Act, or CCPA for short, is California's consumer privacy legislation and the first of its kind in the United States. The CCPA applies broadly to businesses that handle the personal information of California residents, regardless of whether the business is located in California.

What does this mean for you? Well, if you're streaming content via a platform and collecting and using data from residents of California as part of your business model, you should be aware of the CCPA. The CCPA grants California consumers a number of new privacy rights and requires businesses to implement certain privacy controls. Specifically, the CCPA gives a California consumer the right to ask a business what data or information it holds about



that consumer. It also gives California consumers the right to ask a business to delete their personal information or not sell it to third parties.

Any business that collects information from consumers in California should be aware of the CCPA, but the extent of the obligations will depend on the platform and the contract that you enter into with that platform. In some scenarios, the platform will be the party that controls how the personal information is used and therefore is in the best position to comply with the CCPA. In that case, the platform may require you to be a “service provider.” This essentially means that the contract will require you to collect and use the data only in accordance with the platform’s instructions and for the purpose of providing your services to the platform.

In other models, you may be the party responsible for the data and therefore in the best position to ensure compliance with the CCPA, which means you are responsible for providing consumers with notice and enabling them to exercise their rights. There is no one-size-fits-all solution under the CCPA, and much depends on the platform, the flow of data, and which party controls how the personal information collected is used.

If you are collecting data from residents of California, it is worth a quick check to see if the CCPA applies to you, and, if so, you should implement systems for compliance. The CCPA is in effect as of today, and enforcement will start on July 1, 2020.

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# 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, designating 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 monetize 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 license to use them – for example, copyrighted materials (including music and photographs) and trademarks (including words and logos) on anything which appears in the live stream (clothing, beverage containers, etc.). You also should ensure that you have permission to use the name, image, and likeness of any person 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 unauthorized 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.

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# Chapter 8

## Could I make money from my live stream?

Yes, absolutely. It is important to remember that the revenue streams will vary based on the particular service. 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 along with some related considerations.

### Ads

Advertisements can be placed before, after or embedded within your content. There are also options for banner displays, bot commands, chat boxes, or other types of ads on a live streamer's page. It can be a delicate balancing act when using ads to monetize content – too many ads and you may lose views; too few and you may not make much money.

It is worth bearing in mind that advertisers typically pay for ads on a cost-per-click or cost-per-view basis (such as on the YouTube Advertising AdWords service). Under this payment structure, the live streamer will only be paid if a user clicks on the advertisement 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 or subscribers before allowing the live streamer to monetize 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 monetization 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.”<sup>13</sup>

### 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 the ability 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 third-party services such as Patreon, which 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. Which third-party service a live streamer uses will depend upon how the streamer needs to finance upcoming projects. For instance, Patreon charges patrons a monthly fee that can be used to directly fund a streamer, while GoFundMe will generate a bulk lump sum amount that the streamer may need to budget over time.

### Branded content

Live streamers may be paid or sponsored by brands to produce content using, discussing, or 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 – in some cases, where streamers have become very popular, the streamer may be represented by an agency or management company, or brands might reach out to the streamer directly where there is good brand or campaign alignment. However, as with sponsored or paid streams, live streamers need to be careful which brands they work with so as not to alienate their viewers.

Live streamers producing paid or sponsored content need to make sure that they comply with the applicable rules set

13 [https://help.twitch.tv/s/article/joining-the-affiliate-program?language=en\\_US](https://help.twitch.tv/s/article/joining-the-affiliate-program?language=en_US).



forth in the Federal Trade Commission's (FTC) Guides on Endorsements and Testimonials (the FTC Guides). In late 2019, the FTC updated the FTC Guides on disclosures, including making it clear that for endorsements made during a live stream, the disclosure should be **repeated periodically** so that viewers who only see part of the stream will get the disclosure. If a platform offers a "paid partnership", "sponsored" or similar tagging tool to disclose a material connection between a brand and an endorser, those should be used in addition to periodic disclosures during the stream. Note, also, that even if you are working with a brand to promote a product or service during your live stream and the brand fails to require disclosures, this does not mean you can ignore the FTC Guides. The FTC remains active in taking action against both brands and individual endorsers where endorsements lack adequate disclosures. Reed Smith provides regular updates on the FTC's actions in connection with the FTC Guides on its Advertising and Marketing Law blog, "AdLaw by Request®" ([www.adlawbyrequest.com](http://www.adlawbyrequest.com)).

Finally, depending on the content, a live stream may trigger union obligations. Where the live streamer is a member of SAG-AFTRA, he or she is required to perform video services when doing so under a SAG-AFTRA collective bargaining agreement. For example, the SAG-AFTRA New Media Agreement covers original and derivative entertainment productions made for initial release on new media platforms, which includes certain live streaming services. In some instances, where a streamer is producing content that would constitute a commercial under the SAG-AFTRA Commercials Contract and the streamer is producing the stream in partnership with an agency or brand signatory to the Commercials Contract, certain obligations may apply for the brand or agency (including, for example, payment of pension and health contributions). For questions about possible union considerations, reach out to Stacy Marcus ([smarcus@reedsmith.com](mailto:smarcus@reedsmith.com)) or Michael Isselin ([misselin@reedsmith.com](mailto:misselin@reedsmith.com)).

## 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 may 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. It is important to note that the FTC's guidelines on disclosing material connections also apply to streamers obtaining a commission in exchange for posting product reviews.

## 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 incentivize donations by offering exclusive content for donors (similar to Patreon, described above), and many streaming services make it easy for users to donate to their favorite live streamers. For example, YouTube offers "super chat," which allows users to donate and in return highlights those users' comments, helping the users 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.

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