Copyright, podcasts and crowdfunding: An 'abundance model' for an emerging medium?†

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† © Cody Rei-Anderson, 2021. The definitive, peer reviewed and edited version of this article is published in *Queen Mary Journal of Intellectual Property,* Vol. 12 No. 2, pp. 185-205 (2022) and online at https://www.elgaronline.com/view/journals/qmjip/12/2/article-p185.xml.

Keywords

copyright, podcasts, crowdfunding, content analysis, digital media

Abstract

Podcasts have emerged as an increasingly popular form of creative expression over the past decade, and are largely released for free. Their distribution and funding model are reliant on digital technologies, but what role does copyright play?

Prior to the digital age, the reproduction of works implied physical reproduction, which imposes a natural scarcity. The technological default for digital works on the other hand is abundance. In this context, some creators and publishers have embraced new business models which do not rely on excluding non-paying users, so-called 'abundance models'. Many podcast creators are independent from anything like traditional publishers and so have to find their own funding. For independent creators, like podcasters, releasing free work through intermediary platforms, the role of copyright in realising their business models is far from clear and worth investigating.

This paper discusses how podcast creators monetize their work through crowdfunding. The specifics of this business model are laid out with support from data gathered through a content analysis study of podcasts which fundraise through the crowdfunding platform Patreon. The concept of an 'abundance model' is only an imperfect fit for crowdfunded podcasts, but nevertheless provides a useful frame for discussion of existing business models.

Introduction

Podcasts have emerged as an increasingly popular form of creative expression, growing immensely in profile and popularity since the term 'podcast' was coined in 2004.[1] This success may stem in part from the fact that podcasts, like some other forms of digital media, are largely released for free. This leads to a question that copyright scholars have investigated in other contexts: what does copyright do for creative work when those works are released for free?

The grant of exclusive rights in creative works through copyright is often framed as an incentive for creators to create works and for publishers to distribute them.[2] One way it has accomplished this is by imposing scarcity: copyright holders or their licensees can sell copies of works protected by copyright without concern for competition from unauthorised copiers and with the ability to enforce their copyright against unauthorised copiers.[3] The introduction and dissemination of digital technologies for the reproduction and

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[1] See Ben Hammersley, 'Audible Revolution', *The Guardian* (12 February 2004), online: <www.theguardian.com/media/2004/feb/12/broadcasting.digitalmedia>. The runaway success of *Serial*, an audio podcast first released in 2014, is credited by some for the medium's recent surge in popularity: Miranda Katz, 'Podcast Listeners Really Are the Holy Grail Advertisers Hoped They'd Be' *Wired* (29 January 2018, online: <https://www.wired.com/story/apple-podcast-analytics-first-month/>; Richard Berry, 'A Golden Age of Podcasting? Evaluating *Serial* in the Context of Podcast Histories' (2015) 22:2 J Radio & Audio Media 170, 171 (describing reactions to *Serial*'s success that saw it as 'perhaps a sign that we had reached the tipping point for a medium in maturity').

[2] See Steven Shavell, *Foundations of Economic Analysis of Law* (Belknap Press, Cambridge, Mass 2004), 137–74.

[3] *Ibid*.

consumption of works, however, effectively eliminated the natural scarcity that physical goods afforded.

Prior to the digital age, the reproduction of works implied physical reproduction, in forms like books, film, audio records, and video and audio tapes. The physical forms of copyright works were scarce, in the sense of existing in finite numbers that could be sold on the market at any one time. In the digital context, this limitation is effectively removed: a digital work can be reproduced perfectly at virtually zero marginal cost, and each individual reproduction can itself be the basis of an unbounded number of additional copies. The technological default, for digital works, is abundance rather than scarcity.

In this context, creators and publishers have had to innovate, whether by reimposing some of the limitations of physical works through technological protection measures or by embracing, to one extent or another, the possibilities of 'abundance' over scarcity. These responses vary: from open source software and open licenses such as Creative Commons, to all-you-can-eat subscription services for streaming media or software supported through subscriptions or ads. In some areas, including podcasting, this proliferation of business models has included creators who are independent from anything like traditional publishers implementing business models themselves.

The role copyright plays in these new business models is clearly different from the role it plays in the 'sale of copies' model applied to physical works. For users, copyright law is now frequently mediated by contract law through terms of service and license

agreements. Creators who work through publishers are still in the position of licensing or assigning rights in their works.[4] But with respect to independent creators releasing their work through intermediary platforms, the role of copyright in realising their business models is far from clear.

Commons-based peer production of creative works including software is one point of comparison, where works are often released under open licenses and production is governed through community mechanisms.[5] However, independent podcasts generally involve few contributors, unlike, for example, free and open source software projects or Wikipedia. As an 'online creation community', podcasting is hardly governed at all, except perhaps by the terms of service of the big podcasting apps.[6] So, the question arises whether podcasting is another 'negative space' for copyright, where creative work happens in the relative absence of copyright law—and whether copyright does anything for podcasting or podcasters.[7]

This article takes the concepts of abundance and scarcity, drawing on Nicolas Suzor's work, to look at how podcast creators realize a financial return from their work

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[4] See Giuseppina D'Agostino, *Copyright, Contracts, Creators New Media, New Rules* (Edward Elgar 2010).
[5] See Primavera De Filippi and Miguel Said Vieira "The Commodification of Information Commons: The Case of Cloud Computing" (2014–2015) 16 Colum Sci & Tech L Rev 102; Daniela Simone "Copyright or Copyleft? Wikipedia as a Turning Point for Authorship" (2014) 25 King's Law Journal 102.
[6] See Mayo Fuster Morell "Governance of Online Creation Communities for the Building of Digital Commons: Viewed through the Framework of Institutional Analysis and Development" in Brett M Frischmann, Michael J Madison and Katherine J Strandburg (eds) *Governing Knowledge Commons* (Oxford University Press, 2014).
[7] See Christopher Jon Sprigman "Copyright and Creative Incentives: What We Know (and Don't)" (2017–2018) 55 Hous L Rev 451.

through crowdfunding.[8] Podcasts are a uniquely digital medium that are largely released for free, and a closer look at the business models which enable creators in this field to monetize their work can help inform how copyright ought to develop in the digital age. This article will investigate how podcast creators monetize their work, and consider what role if any copyright plays in realizing financial returns.[9]

1. Copyright, crowdfunding and podcasts

1.1. Scarcity and copyright in the digital age

One major theoretical account of copyright holds that copyright is necessary to incentivize creative production. In the law and economics account of copyright, an important function of copyright is to allow creators to sell their works without competition from unauthorized copiers.[10] Copyright does so by providing authors with a bundle of exclusive rights in works that can be transferred or licensed.[11] One of the most important of these rights is the exclusive right to reproduction. The exclusive right to copy works allows copyright owners to sell individual copies without competition from unauthorized copiers. The sale of

[8] See Nicolas Suzor, 'Access, Progress, and Fairness: Rethinking Exclusivity in Copyright' (2013) 15 Vand J Ent & Tech L 297.
[9] This article consciously focuses on financial returns without considering whether they cover podcasters' costs of production and distribution, as this would require access to data which is generally not publicly available.
[10] Shavell, *supra* note 2, 137–74.
[11] Creators in various media license their works through contract to publishers or other intermediaries, making the relationship between contract and copyright law an important one: see D'Agostino, *supra* note 4. While many podcasters operate independently of publishers, recent acquisitions of major podcast networks and exclusivity deals with podcasting personalities may signal ongoing structural change within the industry: see Miranda Sawyer "Listen up: why indie podcasts are in peril" *The Guardian* 1 August 2021, online: <https://www.theguardian.com/media/2021/aug/01/listen-up-why-indie-podcasts-are-in-peril>.

individual copies of works as a model for funding creative work therefore relies directly on the exclusive right to copy.

The continued relevance of this model in the digital age has been questioned, however, and with it the continuing importance of copyright.[12] This article will suggest that Nicolas Suzor's concept of 'abundance models' can be helpful in explaining how digital creative business models operate, but that specific attention to the details of these models is required to paint an accurate picture.[13] The effortless and nearly-free copying enabled by the internet and digital technologies can achieve wide distribution without relying on copyright to exclude non-paying audiences: that is the promise of abundance models. Suzor's framework contrasts this with 'scarcity models', which do rely on excluding non-paying users from enjoying works.[14] 'Abundance' models of creative production find funds for projects by means other than selling copies of or licensing access to works—such as advertising support or donations. These models are made possible—or at least much easier—by the effortless copying and cheap distribution which computers and the Internet enable.[15]

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[12] See Guy Pessach "Beyond IP - The Cost of Free: Informational Capitalism in a Post-IP Era" (2016–2017) 54 Osgoode Hall L J 225 at 234; Sprigman, above n 7; Daniel Gervais "Uber Copyright Reform" in Susy Frankel and Daniel J Gervais *Intellectual property and the regulation of the internet* (Victoria University Press, Wellington, 2017) 66 at 66-68. Pessach suggests that in the "schemes of free access and free distribution" that characterise online content "intellectual property rights do not function as a mechanism to govern the production, exchange and distribution of such creative materials." Gervais more directly addresses copyright business models to consider whether and how their destruction through applications of new technologies should be regulated.
[13] See Suzor, *supra* note 8, 314–15.
[14] *Ibid.*
[15] *Ibid*, 299–300. Open licensing projects like Creative Commons with their ethos of sharing are a natural fit for abundance models, although the concept admits of other approaches as well. More discussion of some of the practical barriers to abundance models follows in section 3.1, below.

Copyright directly supports and enables scarcity models, but its relationship with abundance models is less clear. The exclusive right to copy works granted by copyright is the legal means through which scarcity models are enforced. The copying right and the scarcity model are conceptually linked: scarcity models require copyright owners to be able to stop unauthorized copiers and thereby create scarcity in the market, and the exclusive right to copy exists so that copyright owners can use scarcity models. This is essentially part of the law and economics account of copyright: that copyright provides an incentive by allowing copyright owners to exclude non-paying users from works. However, the exclusive right to copy is not of central importance in abundance models in the same way it is under scarcity models. A rightholder freely giving away copies of a work is not using copyright to create scarcity; indeed they are likely more interested in getting the work out to as many people as possible if that aligns with their monetisation strategy (e.g., advertising).

Nevertheless, the control that copyright grants creators over their creations may still be important to creators even if they are giving their works away for free. Copyright may help to support abundance models insofar as control remains important: for example, if an ad-supported podcast could be freely re-cut and re-released without ads, that would certainly have the potential to undermine that podcast's business model. However, the methods creators might use to make financial returns from their work under an abundance model—such as crowdfunding or advertising—do not have analogous legal rights in the

same way selling copies under a scarcity model does.[16] Copyright's relationship with scarcity models is therefore much stronger than its relationship to abundance models. One such model which does not necessarily rely on scarcity is crowdfunding, in which creators appeal to audiences directly for funding.

1.2. Crowdfunding as a business model for digital creativity

Patreon is a prominent crowdfunding platform used by many podcasters. The platform offers a model of continuous crowdfunding where users commit to a recurring charge, similar to a subscription fee. In a 2018 book chapter, Bishnu Kumar Adhikary, Kenji Kutsuna and Takaaki Hoda characterise different types of crowdfunding based on what the 'entrepreneur' provides to the 'investors' in exchange for their support.[17] Under what Adhikary et al. call community-based models, crowdfunding can be based on purely voluntary donations or for non-financial rewards. Other crowdfunding models are based on financial returns for the funder including peer-to-peer lending, equity and royalties. In these terms, Patreon largely operates on a reward model: Patreon backers usually receive something for their contribution (often bonus episodes, in the case of podcasts), so it is not purely philanthropic, but do not receive a financial return.

However, there is an appreciable difference between the continuous crowdfunding model used by Patreon (and other platforms) and the one-time payment model used by

[16] This is not to suggest that property rights are necessarily the most effective way law could support abundance models.
[17] Bishnu Kumar Adhikary, Kenji Kutsuna & Takaaki Hoda, 'Crowdfunding—Types and Models' in *Crowdfunding* (Singapore: Springer Singapore, 2018) 9.

other crowdfunding platforms, including those considered by Adhikary et al. Peter Younkin and Keyvan Kashkooli evoke this difference when in a 2016 article they describe Patreon as designed to provide an 'alternative revenue stream' for artists.[18] More broadly, they differentiate 'patronage' model crowdfunding from other forms of crowdfunding which 'encourage "one-time" contributions for specific projects.'[19] Crowdfunding on the patronage model instead 'decouple[s] donations from products and encourage[s] continual contributions or contributions for projects that may change direction.'[20]

However, this characterization may not accurately describe all Patreon crowdfunding: for podcasts that offer regular bonus content as a perk for backers, donations seem to be in fact closely tied to the product these creators are releasing. Some creators use Patreon and similar platforms to implement a subscription model, similar to those operated by streaming services such as Netflix. In 2021, Spotify and Apple, two of the most important podcast platforms, announced features that would similarly allow independent podcasters to offer subscriptions to listeners who would receive exclusive content.[21] However, podcasters often couple subscriber-exclusive content with the release of substantial amounts of free content, while some choose to operate wholly on an open model supported by voluntary donations. Whether and how this fits with the abundance model concept is considered below through the results of an empirical content analysis study.

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[18] Peter Younkin & Keyvan Kashkooli, 'What Problems Does Crowdfunding Solve?' (2016) 58:2 California Management Review 20 at 20.
[19] *Ibid*, 24.
[20] *Ibid*.
[21] See K Bell, 'Apple Will Launch Podcast Subscriptions next Month' (*Engadget*, 20 April 2021) <https://www.engadget.com/apple-podcast-subscriptions-172016084.html> accessed 25 May 2021; Ben Thompson, 'Spotify's Surprise' (*Stratechery by Ben Thompson*, 28 April 2021) <https://stratechery.com/2021/spotifys-surprise/> accessed 25 May 2021.

1.3. Podcasting as a case study in digital creativity

Before answering the question of whether podcast crowdfunding is an 'abundance model', it is important to establish what podcasting is. However, defining a medium can be a difficult task in itself, and constructing a definition for 'podcast' is no exception.[22] Podcasts can consist of audio or audio-video,[23] can be delivered live or downloaded or streamed on-demand,[24] and can take many different formats including lectures, conversations and improvisational comedy.[25] Podcast series are generally distributed using a unique RSS feed (see below) which is updated with new episodes as they are released.[26] Users may access a podcast series directly through its RSS feed, through a series' website, or through a podcast listening app. The term 'series' denotes a set of episodes released under one show title and (usually) one RSS feed. The 'episode' is the basic unit of the podcast series, consisting of a single (audio or video) file distributed using an RSS feed. Podcast series have no effective upper or lower limits to the number of episodes they can include, with some having reached over 1,000 episodes. Many are open-ended, while others have defined end-points and may be organized into seasons. Some podcast series release a number of episodes as a 'season'

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[22] See Kimberley A. Neuendorf, *The Content Analysis Guidebook*, 2nd ed (Sage Publications, Thousand Oaks, CA 2017), 111–13; Andrew J. Bottomley, 'Podcasting: A Decade in the Life of a "New" Audio Medium' (2015) 22:2 J Radio & Audio Media 164, 166 [Bottomley, 'Podcasting: A Decade in the Life'].
[23] Research conducted for this study found examples of podcasts released in audio and audio-video formats. See section 2, below. However, audio-only seems to be the dominant format.
[24] Some podcasts are recorded live at physical venues and some podcasts are recorded and streamed live over the internet. In the sample set for this study, the series *All About Android* and *Bizarre States* appear to regularly stream live episode recordings, while several podcast episodes from various series consisted of recorded live events.
[25] See Bottomley, 'Podcasting: A Decade in the Life', *supra* note 22, 166–67; Kris M. Markman, 'Everything Old is New Again: Podcasting as Radio's Revival' (2015) 22:2 J Radio & Audio Media 240, 241–42.
[26] The research conducted for this project found RSS feeds for every podcast series in the sample. iTunes/Apple Podcasts, a major podcast platform, requires creators provide an RSS feed in order to list a podcast: Apple, 'About Submitting a Podcast', online: <help.apple.com/itc/podcasts_connect/#/itc4f0f5ac7d>.

distinguished by a common theme or narrative.[27] Podcasters may refer to these as 'seasons' or 'series'.[28] A podcaster may choose to do this because starting a new series under a new title usually entails starting a new RSS 'feed', which existing subscribers will have to newly subscribe to (potentially resulting in a loss of subscribers).[29]

Podcasts are likely to be protected by copyright law: as sound adaptations of literary works (e.g., a script), or through so-called "neighbouring rights" as sound recordings or as performances.[30] However, for the most part, podcasts are released for free. Relatively few podcast creators sell individual episodes, and many instead rely on crowdfunding or advertising to support their work.[31] In contrast, though the sale of individual podcast episodes appears to be fairly rare, podcasting is booming.[32] There is a comparison here to terrestrial radio or over-the-air television: these are also provided for free, and talk radio in

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[27] See e.g., Mike Duncan, *Revolutions*, online: <www.revolutionspodcast.com> (seasons of 20-100 episodes on different political revolutions); Karina Longworth, *You Must Remember This*, online: <www.youmustrememberthispodcast.com> (seasons of 10-30 episodes on different themes and stories in 20th century Hollywood history).

[28] For the sake of clarity, this project will exclusively refer to these as 'seasons'.

[29] However, some podcasters do start new series for various reasons, usually where there is a significant departure from the first show's theme, format, or narrative—as an example, before starting the *Revolutions* podcast, Duncan produced a series on the history of Rome: Mike Duncan, *The History of Rome*, online: <www.thehistoryofrome.typepad.com/>. 'Subscribers' use a podcast listening app or RSS feed reader to be notified of new episodes in a podcast series, and (with many podcast apps) have them downloaded automatically to a device.

[30] For sound adaptations of literary works, see Berne Convention, art 9. For examples of sound recording and performer's rights protections, see the Canadian *Copyright Act*, RSC 1985, c C-42, ss 15, 18. An interesting wrinkle here is who owns the right: the literary work right would belong to the author, while the sound recording right may belong to the producer (though in the context of podcasts these are often the same person), and performer's rights may also cover podcast guests.

[31] The study results support this, but note that there are podcast series outside the sample which do sell individual episodes. Further, some podcasts in the sample offer access to archives and bonus podcast episodes only to paying users. See section 3, below.

[32] 'Sale' should be read here as charging for access to individual episodes of a podcast, likely accomplished through a copyright license.

particular is a predecessor format to podcasts, which are also largely talk-based.[33] However, podcasts have never been bound by the limitations of the radio spectrum. Further, there is little practical reason why podcasts could not be offered for sale: unlike, for example, broadcasting over radio airwaves before the advent of encryption, podcasters could prevent non-paying users from downloading their shows (and some do). Given this article's focus on how podcasts fundraise, it is sufficient to distinguish podcasts from radio or television on the basis of mode of delivery.

In podcasting's early history, the medium's name itself was contentious, with Apple attempting to assert its iPod trademark against podcasting app creators.[34] At that time, prior to the rise of smartphones, the iPod and similar portable media players were one of the main ways for listeners to listen to podcasts, which gave the medium its name.[35] But podcasting did not remain tethered to the iPod, and may yet outlast the device: the years after the iPhone's release saw the decline of portable media players in favour of smartphones, leading to the eventual discontinuation of most of Apple's iPod line.[36] Smartphones, with data connections and 'podcatching' apps, greatly reduced the friction for users to subscribe and listen to podcasts.[37] It was in this context that podcasting saw its

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[33] Radio and over-the-air television have also benefitted in many jurisdictions from state funding and have historically had high capital costs—two further contrasts with podcasting.
[34] See Jonathan Sterne, Jeremy Morris, Michael Brendan Baker & Ariana Moscote Freire, 'The Politics of Podcasting' (2008) 13 Fibreculture J, online: <http://thirteen.fibreculturejournal.org/fcj-087-the-politics-of-podcasting/>.
[35] *Ibid*.
[36] David Pierce, 'Goodbye iPod, and Thanks for All the Tunes', *Wired* (27 July 2017), online: <https://www.wired.com/story/goodbye-ipod-and-thanks-for-all-the-tunes/>.
[37] Richard Berry, 'A Golden Age of Podcasting? Evaluating *Serial* in the Context of Podcast Histories' (2015) 22:2 J Radio & Audio Media 170, 173.

recent boom in popularity, often connected to the 2015 release and runaway success of *Serial*.[38]

This historical context is valuable to lay the groundwork for a review of podcasting literature. It emphasizes that podcasting took some time to become what it is today as a medium, even if the predominant format (digital audio released serially) has stayed more or less constant.[39] Some early legal scholarship on podcasting focused on legal considerations around the inclusion of copyrighted music in podcasts and the applicability of U.S. statutory licensing schemes for recorded music to podcasting.[40] Similarly, existing legal guides for podcast creators devote significant attention to issues around the inclusion of copyrighted material in podcasts.[41] In fact, podcasting has remained a primarily talk-based medium, which may be in part attributable to the legal and financial difficulties associated with using copyrighted music.[42] In this focus on talk, podcasting diverged from radio, a medium to which many scholars trace podcasting's roots.[43]

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[38] See *ibid*; Bottomley, 'Podcasting: A Decade in the Life', *supra* note 22, 165.
[39] See Markman, *supra* note 25.
[40] See Edward L. Carter & Scott Lunt, 'Podcasting and Copyright: The Impact of Regulation on New Communication Technologies' (2006) Santa Clara Computer & High Tech LJ 187; Jared Barrett, 'Podcasting Pop Songs?: Licensing Concerns with Podcasts that Contain Mainstream Music' (2006) 3 Shidler JL Com & Tech 3; Michael N. Lang, 'The Regulation of Shrink-Wrapped Radio: Implications of Copyright on Podcasting' (2006) 14 CommLaw Conspectus 463.
[41] See e.g., Colette Vogele, Esq & Mia Garlick, 'Podcasting Legal Guide: Rules for the Revolution', online: <wiki.creativecommons.org/wiki/Podcasting_Legal_Guide>; Kathleen Simmons & Andy Kaplan-Myrth, 'Podcasting Legal Guide for Canada: Northern Rules for the Revolution', online: <cippic.ca/sites/default/files/Podcasting-LegalGuide-Canada.pdf>.
[42] See Christopher Cwynar, 'More than a "VCR for Radio": The CBC, the Radio 3 Podcast, and the Uses of an Emerging Medium' (2015) 22:2 J Radio & Audio Media 190 (describing CBC's Radio 3 podcast as a rare, music-based exception).
[43] See Berry, *supra* note 37, 171; Sterne et al., *supra* note 34.

More recent scholarship on podcasting has focused on podcasts' content and impact in law-related areas. Brandon Golob, in a 2017 law review article, considers how true crime 'new media' such as *Serial* might impact legal consciousness around wrongful convictions.[44] Golob expresses concern that these series might lead audiences to mistaken conclusions about the criminal justice system, including making out the cases as merely 'isolated instances of injustice'.[45] Taking a broader scope, a 2018 media studies article from Kelli S. Boling and Kevin Hull explores the motivations and demographics of the audiences of 'true crime' podcasts generally.[46] Their findings indicated a preponderance of female listeners in the true crime audience (73%) despite other cited research finding that a majority of podcast listeners are male (56%), as well as a majority of male users on the site on which they circulated their survey (Reddit, 67%).[47] Outside of this popular genre, other podcasts deal with law as well. An episode of the podcast *More Perfect* provided the basis for an article by Nancy S. Marder on peremptory challenges in the U.S. justice system.[48] For this article, the podcast episode in question contributed to an understanding of peremptory challenges by engaging persons involved in the *Batson v Kentucky* case and including input from practitioners and academics on whether peremptory challenges should be abolished.[49]

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[44] 'Un-Making a Murderer: New Media's Impact on (Potential) Wrongful Conviction Cases' (2017) 54 Cal W L Rev 137.
[45] *Ibid*, 149.
[46] '*Undisclosed* Information—*Serial* is *My Favorite Murder*: Examining Motivations in the True Crime Podcast Audience' (2018) 25:1 J Radio & Audio Media 92.
[47] *Ibid*, 99, 103.
[48] '*Batson v. Kentucky*: Reflections Inspired by a Podcast' (2016) 105 Ky LJ 621.
[49] *Ibid*, 624.

One theme that comes out of some podcasting scholarship is the intimacy and immersion of podcasts.[50] Podcasts are often experienced by a listener alone, through headphones.[51] Podcasting is also characterized as a space in which marginalized or less well-established voices can be heard, literally.[52] These themes come through in Andrew J. Salvini's discussion of history podcasts as folk or 'DIY' histories, Vincent M. Meserko's discussion of fan identification with the *Mental Illness Happy Hour* series, and Sarah Florini's article on series by Black podcasters which 'reproduce a sense of being in Black social spaces' outside of the white gaze.[53] The latter piece makes a particularly interesting point that the fact that spoken audio is not as easily searched as text effectively makes podcasts more 'resistant to easy intrusion' by outsiders (that is, those outside of a podcast's listening community) than some social media.[54] The intimacy of podcasting and its potential to elevate marginalized voices may in turn be factors in the development of strong communities or fandoms around some podcasts.[55] This article looks at crowdfunding as a means for podcast creators to fund their work. Since crowdfunding is based around voluntary donations (though often with incentives), the feelings of intimacy and community around podcasts may underpin the success of these models. Although the methodology

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[50] See Vincent M. Meserko, 'Going Mental: Podcasting, Authenticity, and Artist-Fan Identification on Paul Gilmartin's *Mental Illness Happy Hour*' (2014) 58:3 J Broadcast & Electronic Media 456; Andrew J. Bottomley, 'Podcasting, *Welcome to Night Vale*, and the Revival of Radio Drama' (2015) 22:2 J Radio & Audio Media 179, 186 [Bottomley, 'Revival of Radio Drama']; Sarah Florini, 'The Podcast "Chitlin' Circuit": Black Podcasters, Alternative Media, and Audio Enclaves' (2015) 22:2 J Radio & Audio Media 209, 210.
[51] See Florini, *supra* note 50, 215.
[52] See Markman, *supra* note 25, 243; Florini, *supra* note 50.
[53] Florini, *supra* note 50, 210.
[54] *Ibid*, 214.
[55] See Markman, *supra* note 25, 243.

chosen for this study does not include the perspectives of listeners, future research might follow up on this aspect of podcasting.

2. A study of crowdfunding in podcasts

For this article, a study was conducted using content analysis methods to generate data on how podcast creators fund their work, to help uncover the role of copyright in podcasting. [56] Podcasting is a medium in which creators have largely chosen not to restrict access to their works in order to sell them.[57] Nevertheless, the results of this study suggest that podcasting business models are not quite the 'abundance models' that forgo exclusion of non-paying users.[58]

2.1. The studied population: top podcasts crowdfunded through Patreon

This study focused on one well-defined set of podcast series: series crowdfunded through Patreon. This corresponds to one major way for podcasters to financially support their work: crowdfunding (which platforms such as Patreon facilitate). This article therefore takes a more narrow focus than a study of all podcast series would, instead limiting the population to one subset of podcasts as a whole. A fulsome survey of all podcasts would have to grapple with an immense number of series across multiple platforms—as an

[56] However, material limitations on this project prevent the use of multiple coders; as such, the study will be more limited in scope than conventional content analysis and may not qualify as a true content analysis study. See Neuendorf, *supra* note 22, 166.
[57] See Katz, *supra* note 1; NYC Media & Entertainment, 'New York City, the Podcasting Capital' (2017), online: <https://www1.nyc.gov/assets/mome/pdf/MOME_PODCAST_REPORT_Web_Final.pdf>.
[58] See Suzor, *supra* note 8, 298–99.

example, the podcast directory Blubrry claims to list over 600,000.[59] Further, the focus on crowdfunding is justified as one of the methods of fundraising put forward in Suzor's account of abundance models, discussed above.

The study included episodes published over a three-week period, 15 July 2018 to 5 August 2018. This coincides with an issue with payment which affected Patreon users and creators across the platform. In brief, a change in how payments were processed by Patreon led to many banking institutions flagging payments as suspicious conduct. This resulted in a large number of declined payments. Many Patreon creators saw a drop in income as a result of this event, evidenced in data drawn from Graphtreon for July and August 2018. By some accounts, however, the initial scale of this problem was worse than is reflected in the data. Affected users could manually resubscribe to Patreon accounts, and many did. Patreon communicated with users about the issue, but many podcasters on the platform felt the need to address the issue as well. Their shows were usually the most convenient venue in which to do so: they took the opportunity to explain the issue to their listeners, to ask them to resubscribe, and to thank those who had already done so.

Basing the selection of episodes around this series of events had the potential to provide a richer source of data than a random sampling of episodes. The payment issue brought the 'business' side of podcasts into salience for creators and listeners of crowdfunded podcasts. This project is concerned with how financial support of podcasts works, and to what extent the copyright regime facilitates podcast creators earning a living

[59] See Blubrry, 'Blubrry Podcasting', online: <www.blubrry.com>.

off of their creative work. The example of these payment issues may begin to show that the work copyright purports to do in supporting creators does not help creators in these contexts.

The podcast series for this study were drawn from a list of the top 50 podcast Patreon pages. This is an exposure-based population because it is based on what is essentially a popularity statistic: the number of patrons for Patreon-supported podcasts.[60] The podcasts' presence in this top 50 indicates a degree of success in implementing the crowdfunding business model. Listener or subscriber numbers are not usually made public, which makes directly determining podcasts' popularity and revenue difficult; however, the number of patrons a Patreon-supported podcast attracts may provide a rough proxy.

2.2. Methodology: Content analysis

Content analysis is an empirical methodology used to analyze texts or other materials ('messages') and form generalizable conclusions about a large set of these messages.[61] Applying content analysis allows the researcher to summarize messages in a reasonably objective and reliable way. This is done through coding: formulating a list of message characteristics and counting how many messages in a set display those characteristics.[62] Content analysis methodology has been used in numerous studies published in law and

[60] See *ibid*, 79.
[61] See Neuendorf, *supra* note 22, 1–35.
[62] *Ibid*.

other academic journals.[63] Podcast audio and metadata offer a large, easily accessible set of messages, and content analysis provides a systematic way to make use of this large amount of content.[64]

This study used content analysis coding methods on freely-available podcast audio and metadata (the 'coded material') to generate data. The study focused on series which were available on-demand in audio-only format. Limiting the sample to audio-only podcasts was done to minimize methodological complexity that would be introduced with coding video content.[65] Further, on-demand podcasts available as audio appear to constitute the bulk of available podcast content online.

2.2.1. Coding

This research draws on Kimberley Neuendorf's operationalization of content analysis methods.[66] It used three sources for messages: podcast series metadata, podcast episode metadata and podcast episode audio. Skalski et al. recommend looking to metadata as

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[63] See e.g., Marcella Favale, Martin Kretschmer & Paul C. Torremans, 'Is There an EU Copyright Jurisprudence? An Empirical Analysis of the Workings of the European Court of Justice' (2016) 79:1 Modern L Rev 31; Barton Beebe, 'An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005' (2008) 156 U Pa L Rev 549; Antoni Terra, 'Copyright Law and Digital Piracy: An Econometric Global Cross-National Study' (2016) 18 NC JL & Tech 69; Francina Cantatore & Jane Johnston, 'Moral Rights: Exploring the Myths, Meanings and Misunderstandings in Australian Copyright Law' (2016) 21 Deakin L Rev 71; Eschenfelder, Howard & Desai, *supra* note 64; Yasmin Morais & Sara Sampson, 'A Content Analysis of Chat Transcripts in the Georgetown Law Library' (2010) 29 Leg Ref Services Q 165.

[64] *Ibid*, 23–31. For law-related content analysis studies, see Martin Z.P. Olszynski, 'Failed Experiments: An Empirical Assessment of Adaptive Management in Alberta's Energy Resources Sector' (2017) 50:3 UBC L Rev 697, 724; Mark A. Hall & Ronald F. Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96 Cal L Rev 63, 70. For use of the *Guidebook* in other content analysis studies, see also Kristin R. Eschenfelder, Robert Glenn Howard & Anuj C. Desai, 'Who Posts DeCSS and Why? A Content Analysis of Web Sites Posting DVD Circumvention Software' (2005) 56:13 J Am Soc Info Sci & Tech 1405, 1409; Geoffrey Supran & Naomi Oreskes, 'Assessing ExxonMobil's Climate Change Communications (1974–2014)' [2017]:12 Environmental Research Letters 1, 2, fn 25.

[65] See Neuendorf, *supra* note 22, 111–13.

[66] *Supra* note 61, 118–25.

useful in content analysis.[67] Metadata contains content that can be analyzed using content analysis methods, as well as data that can be important for establishing context. With respect to podcasting, metadata includes episode descriptions, publication dates, and episode length and file size. The choice of audio segments was targeted at 'show business' segments (anything to do with running the podcast, particularly anything about financial support for the podcast).

The final codes for each of the two sets were generated before coding began. As Neuendorf notes, generating codes before the content is coded is preferable to generating codes simultaneously with the coding process. Entirely *a priori* coding (i.e., coding at the very outset of a project) would be the most desirable from the perspective of scientific standards. However, developing the codes in the course of the project (but before coding begins) is appropriate in cases where 'existing theory [and] research literature cannot give a complete picture of the message pool'.[68] As discussed in an earlier section, research literature on podcasts is very limited, so it was necessary to first become familiar with the content under study.[69] The process of code generation involved listening to podcasts in the population to help provide further immersion into the 'reality of the messages'.[70] This helped to ensure that the chosen coding categories were appropriate.

The coding process included the audio content of the first and last five minutes of each podcast episode. Where content which satisfied one of the codes ('coded content')

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[67] *Ibid*, 212
[68] Neuendorf, *supra* note 22.
[69] *Ibid*, 102.
[70] Neuendorf, *supra* note 22, 108.

continued beyond the five minute mark at the beginning of an episode, the episode was allowed to continue to play until just after the coded content ended to ensure that it was not followed up by further coded content. Similarly, if coded content was already underway at five minutes from the episode's end, the coder listened to audio prior to the end mark to find the starting point of the coded content and listened to the content immediately preceding that. For example, a surveyed episode of *The Dollop* had 13 minutes of coded content (primarily advertisements) preceding the show content. The coder listened to the full length of the segment consisting of advertising and other 'show business' and enough of the following segment to be satisfied that it was not coded content. This ensured that the coding process did not miss additional coded content at the beginning or end of a podcast episode but outside the five minute windows at the beginning or end of the audio. (In most cases the non-coded show content began well before five minutes from the beginning of the episode and well after five minutes from the ending.)

The audio codes differed from the metadata codes but both were identical across each category. The audio codes coded for whether the content referenced in a given category (such as reference to a series' Patreon page) was present at the beginning of an episode (1), end of the episode (2), both the beginning and end (3), or was absent (0). The metadata codes only coded for whether the content referenced in the category (such as advertisement for a non-podcast related product or service) were present in the description metadata (1) or absent (0). Both the audio and metadata codes are mutually exclusive, but the variables are not: the same podcast audio segment (or metadata) could, for example, reference both the series' donation page as well as bonus content available to donors.

2.3. Results

This section will review the results of the study, the purpose of which was to generate data on the use of crowdfunding, advertising and copyright in a selection of podcast series. Two types of content were analyzed: podcast episode audio and metadata. The metadata and audio content were taken from 55 podcast episodes selected from a sampling of the top 50 podcasting Patreons in the month of July 2018. Each episode was assigned a unique identifier to aid with organization of results.

A set of 20 podcast series were sampled from the top 50 podcast series as listed on Graphtreon for the month of July 2018 using a randomly generated sequence of numbers from 1–50.[71] Graphtreon is a 3rd party service which collects and presents subscriber and financial data made publicly available by Patreon.[72] Of the set of 20 series, 3 were removed from the sample for failing to meet the study's specifications: two podcast series were non-English language (French and Portuguese), while a third was a video podcast. Two further series had to be removed from the set because their archives were unavailable for study. The remaining 15 podcast series were coded in two rounds using the process described in section 2.2, above. Where there were discrepancies between the two rounds, the data presented in this section assumes that there were no false positives. That is, where only one round of coding found coded content of a specific type (codes 1–3), that result was reported

[71] The random sequence of numbers was generated through an online tool: https://www.random.org/sequences/. The first 20 numbers of the sequence were used to generate the sample by selecting those podcasts as ranked in the Graphtreon top 50. See Graphtreon, 'Patreon Podcasts', online: <graphtreon.com/patreon-creators/podcasts>. These were the first 20 numbers of the generated sequence used for the sampling process: 37, 38, 3, 32, 42, 28, 35, 16, 41, 36, 18, 1, 46, 34, 26, 19, 2, 47, 10, 8.
[72] These data are made available for research purposes if the source is attributed. See Graphtreon, 'Terms of Service', online: <graphtreon.com/terms>.

rather than a null result (code 0). As discussed in section 2.2.1, the number of discrepancies was low, so how these are resolved does not greatly affect the results. Further, only one coder was used in the coding process, suggesting that the discrepancies is more likely attributable to the researcher missing content in the first pass.

A total of 55 episodes were coded. All podcast series surveyed had at least 1 episode in the relevant timeframe (15 July–5 August 2018), averaging 3.667 episodes and with a median of 3 episodes. Two of the surveyed episodes did not contain regular podcast content. One of these consisted of a short (1 minute and 1 second) promotion for an upcoming live podcast event. The other irregular episode was a ten minute advertisement consisting of a preview for a different podcast series. These two episodes were coded and included in the data set.

The categories which were coded for included references to donation pages, references to additional content available for crowdfunding donors, references to non-podcasting secondary activity, and advertising. Data was also collected on any copyright licensing terms included in the metadata.

Table 1. Coding results by category

Coding category	**No. of episodes with reference in audio (n=55)**	**No. of episodes with reference in metadata (n=55)**
References to donation pages	29 (52.7%)	16 (30.2%)
References to additional content for supporters	16 (29.1%)	8 (14.5%)
References to secondary activity	29 (52.7%)	15 (27.3%)
Advertisements	8 (14.5%)	6 (10.9%)

References to Patreon or other donation pages associated with the podcast series were common. This result was to be expected given that the podcasts were selected based on their crowdfunding performance. A slim majority (52.7%) of surveyed episodes included at least one reference to the series' Patreon page. If the outlier *Watch What Crappens* (which had a relatively high number of episodes) is excluded, the total for references in audio to a donation page drops to 12 (31.6% of 38 episodes). Nine series of fifteen (60%) had at least one reference to donation pages in their coded audio segments, and twelve of fifteen (80%) included a reference in either audio or metadata.

Many of the coded episodes also referenced additional content, such as bonus podcast episodes, available to listeners who donate to the series. This category was understood broadly, to encompass references in passing to bonus content that did not explicitly present the bonus content as an incentive to donate, or explicitly direct the listener to the donation page. (Where the metadata or audio also directed the listener to the series' donation page, the episode would also been coded for the 'References to Patreon or Other Donation Page' category.) Nine series (60% of the sample) included some reference to additional content available for listeners who supported the podcast through Patreon in either episode audio or metadata.

In addition to podcasting, many episodes referenced different forms of non-podcasting activity associated with the podcast series, such as merchandise, live events, or books. These may provide additional sources of revenue for podcasters, a possibility which is discussed further below. Examples of secondary activities in the sampled group included the sale of branded clothing (*Watch What Crappens*), books (*Lore*, *Chapo Trap House*) and

music featured on the podcast (*Friends at the Table*), as well as live shows or meet-ups (several series).[73] Twelve series (80% of the sample) included at least one example of promotion of non-podcasting activity in episode audio or metadata.

Some series also featured advertisements for products and services not affiliated with the podcast series—another likely source of revenue for podcasters. The coding for this category excluded advertisements for other podcasts as well as podcasting-affiliated products and services. [74] Five series (33.3%) included some advertisements for products or services unrelated to the podcast itself. As every podcast included in the study by definition engaged in crowdfunding as well, this demonstrates that crowdfunding and advertising are not incompatible as funding models. One limitation of the methodology was that the coded audio portions of each episode were generally limited to the first and final five minutes. As some podcasts also feature ads mid-episode, this limitation may have resulted in the incidence of advertising being underestimated. (The issue discussed below in section 2.4 relating to dynamic ads also makes a definitive measure of the incidence of advertisements difficult to achieve.)

Coding for references to intellectual property focused primarily on two kinds of podcast metadata where these references could appear: the descriptions of the surveyed

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[73] The series *Chapo Trap House*, *Generation Why*, *Hello Internet*, *The Liturgists*, *Ralph Report*, *Talking Simpsons*, *The Dollop*, and *Watch What Crappens* all advertised upcoming live events or meetups.
[74] This category excluded products and services affiliated with the podcast series in order to differentiate from the secondary activity category. In addition, since promotion of other podcast series may come from affiliation with a podcast network or with podcast guests promoting their own series, differentiating between paid and non-paid advertisements is difficult in this context.

episodes and the license information displayed on some iTunes pages.[75] None of the surveyed podcast episodes in this group included license terms in the podcast description. However, some of the series did include license terms on their respective iTunes pages. In the desktop version of iTunes, these licenses and notices appeared below the podcast art on the left side of the screen. In total, 9 of 15 series (60%) included some copyright information on their iTunes store page. Four (26.7%) asserted 'All Rights Reserved' and five series (33.3%) were generic notices including only a name and/or year.

2.4. Methodological issues

Two significant methodological issues arose in the data collection for this study. The first issue was that none of the series included discussion of the Patreon payment issues which were described above and which informed the choice of timeframe for this study. This finding does not necessarily imply that podcast creators did not inform their audience about these issues, as they may have used other channels of communication to do so. These channels may have included messages sent through the Patreon platform or discussion on bonus episodes unavailable to non-paying listeners, neither of which were available for study. These channels would have the benefit to creators of only going out to paying listeners and not to non-paying listeners who would not have been affected.

The second issue is revealing of one of the challenges in researching digital media: the sometime instability of digital content. This issue involved discrepancies in the presence of advertisements in some of the coded audio. During the initial coding process,

[75] None of the podcast audio surveyed included any discussion of intellectual property issues.

segments from one of the coded series were observed to contain references to advertisement breaks that did not occur in the excerpted audio.[76] These references indicated that dynamic ads were apparently meant to be included in these segments, but were omitted from the audio. A possible reason for these omissions is the way the podcast episodes were accessed: episodes were downloaded to a personal computer, and where possible directly from the URL for the episode audio file included in the RSS feed.[77] This was done for reasons of workflow and to preserve an archive of downloaded episodes.

To test this assumption, the second round of coding used, wherever possible, podcast episodes downloaded through iTunes.[78] The second round of coding confirmed that some episodes had dynamic ads which were not included in the files obtained for the initial round of coding; however, one series displayed the same phenomenon in reverse: the round of coding using iTunes did not detect any ads, while the first round of coding did detect ads.[79] It is unclear whether this issue was caused by the method by which the podcast episodes were downloaded or by some other factor (such as the approximately 6-week difference in time between downloads). Further, the unique presence of dynamic ads in both the episodes downloaded directly and those downloaded through iTunes means it may not be possible to identify a 'definitive' version of a podcast episode. In the presentation of results, ads detected in either the initial code or recode were counted.

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[76] The episode in which this was observed was part of the podcast network set and not included in the data for this article, but the issue was also observed in episodes included in the Patreon set.
[77] 'URL' is an abbreviation of 'Uniform Resource Locator'. A URL specifies the location of a resource (such as an audio file) on the web. See Web Hypertext Application Technology Working Group, 'URL Standard', online: <https://url.spec.whatwg.org/>.
[78] For this process the coder used iTunes software version 12.9.3.3 running on a Windows 10 PC.
[79] This series was part of the podcast network set not discussed in this article.

3. Discussion

This section will consider how the results of this study might fit podcasts within the framework of abundance and scarcity models put forward by Suzor. The promise of abundance models is that technology can be leveraged to produce more social good by lowering barriers to access, and podcasts released for free and supported by other means may be a realization of this. However, some of this study's findings complicate the assumption that creators are not relying on excluding users to make a financial return from their work. While all of the surveyed series had free episodes available (affirming that many creators in this area are using free distribution), many series had further bonus episodes that users had to pay to access. This section will conclude by considering this practice: it can be distinguished from the sale of copies model, because it is based on subscriptions and still has creators offering a large amount of content for free, but it nevertheless retains some of the exclusionary aspect of scarcity models.

3.1. Abundance and scarcity models

The results of this study confirm that some podcasts are distributed for free. One way to interpret this result is through Nicolas Suzor's concept of 'abundance models'.[80] In these models, effortless, low-cost distribution enabled by the internet and digital technologies enable the wide distribution of some kinds of works without relying on copyright to exclude non-paying audiences. The absence of exclusion, however, does not mean that the works do not require any source of funding, and Suzor cites advertising and crowdfunding

[80] See Suzor, *supra* note 8, 314–15.

as two possible ways to fund the production of creative works under abundance models.[81] Whether these fundraising methods can adequately compensate creators is an important question for the viability of abundance models.

Abundance models 'suggest methods of funding cultural production' that do not rely on copyright owners imposing scarcity through copyright by excluding non-paying users. These models take advantage of the near-zero marginal cost of copying digital works to envision broad access to works not constrained by users' ability to pay.[82] Instead of access meaning 'access to a smoothly functioning commodity market' for works, abundance models see the potential of digital distribution that 'all connected individuals could have immediate access to almost perfect reproductions of the entire wealth of recorded cultural expression'.[83] The challenge faced by abundance models is to find ways to fund creative production that are fair to audiences and creators, and which resolve coordination problems inherent in the production of capital- and labour-intensive creative works.[84]

For users, the potential benefits of abundance models over scarcity models are apparent. As Suzor notes, 'the great social cost of excluding users who cannot afford to pay the monopoly price of copyright expression, which is costless to distribute, is deeply troubling.'[85] This concern mirrors some criticisms of copyright grounded in distributive

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[81] *Ibid*, 298–99.
[82] *Ibid*, 299–300.
[83] *Ibid*, 313–14.
[84] See *ibid*, 321; Julie E. Cohen, 'Copyright as Property in the Post-Industrial Economy: A Research Agenda' [2011] Wis L Rev 141.
[85] See Suzor, *supra* note 8, 316.

justice that '[t]he advantages of copyright are reaped primarily by those already privileged: affluent consumers, the most successful creators, and major publishing houses and other copyright holders located in industrialized countries', while the 'burdens of copyright protection, in the form of higher prices, fall hardest on the already disadvantaged.'[86] The abundance model framework has the potential to address some distributive issues because under abundance models users are not excluded from works based on their ability to pay. However, whether abundance models can truly break out of the incentives-access dichotomy depends on whether creators can be sufficiently incentivized to do creative work.[87] Without an adequate economic incentive for creative work, works would be underproduced (in the language of the law and economics model). This problem can also be understood in distributive terms: if creators are unable to realize an adequate economic return on their creative work, those without the resources to create for free or at a loss would be excluded from opportunities for expression.

The success of abundance models therefore depends on whether creators can generate enough of a return on their work without excluding potential consumers from their works. The appropriate return for creators could be based on factors such as consumption of the work, the time and labour invested in the work, or the value derived by users from the work.[88] Suzor contends that reducing the cut of creative profits enjoyed by

[86] Lea Shaver, 'Copyright and Inequality' (2014) 92 Wash UL Rev 117, 141.
[87] See Oren Bracha & Talha Syed, 'Beyond Efficiency: Consequence-Sensitive Theories of Copyright' (2014) 29 Berkeley Tech LJ 229, 237–40.
[88] See Suzor, *supra* note 8, 324.

intermediaries could make abundance models more attractive for creators.[89] However, intermediaries also provide benefits for creators, such as marketing and promotion, which intermediaries may be able to perform more effectively than individual creators. In the absence of intermediaries providing services such as advertising, these costs are borne by the creators themselves. Further, in currently existing examples of crowdfunding (one of the abundance models Suzor identifies), there is at least one major intermediary, the technological platform which facilitates the crowdfunding (e.g., Patreon). Along with introducing costs that come with being an intermediary, these platform holders can create other issues that might negatively affect creators, such as disrupting the inflow of financial support.

However, these criticisms do not fully offset the benefits abundance models have with respect to access. If podcasts are successful operating on abundance models, that suggests that there may be types of works for which abundance models are a more attractive choice than scarcity models from the perspective of creators. The advantage of abundance models is access, and free podcasts are accessible to anyone with a computer or mobile device and an internet connection. The Suzor abundance framework provides a good fit for podcasts because it specifically contemplates the conditions under which podcasts are created (digital creation and distribution) and raises relevant questions about how free media can make money.

[89] *Ibid*, 331–32.

3.2. Bonus content: scarcity models in another guise?

This section will discuss the results of the study with reference to the theoretical framing discussed above. Suzor contrasts the concept of 'abundance models', in which creators make their work available without relying on excluding non-paying users, with that of the scarcity model, which does rely on exclusion. A majority (80%) of the series included at least one reference to the series' Patreon donation page in the coded metadata or audio. This indicates the importance of Patreon fundraising for podcast creators in this group. A majority (60% of the sampled series) referenced some bonus content available exclusively to paying subscribers. This bonus content largely consisted of additional podcast episodes. This may indicate that creators in this group find it useful to reward subscribers for their support in order to attract new subscribers. Since such content is available exclusively to paying subscribers, this section will consider whether this practice constitutes a scarcity model in another guise.

A defining characteristic of the 'scarcity model' is excluding users who do not pay from accessing works. The practice of providing bonus content to subscribers (the 'premium content model') certainly appears to be an example of this. However, there are significant differences between this model and the traditional sale of copies model. First, under the former model, subscribers pay for access to works, rather than for copies. As such, a subscriber to a podcast's Patreon may have access to a lengthy back catalogue of

premium episodes.[90] The similarity to streaming platforms such as Netflix or Spotify, which also offer access to a library of works rather than copies, is notable here.[91]

Second, while some of the surveyed series restricted access to older podcast episodes, all had at least some episodes available for free.[92] Over the chosen three-week time period, series which were included in the Patreon set had released an average of 3.667 episodes and a median of 3 episodes, with an average episode duration of 1h 23min 15s. This represents a substantial amount of content that podcast listeners have access to without paying. While these podcasts may not entirely adhere to the promise of abundance models, neither do they entirely exclude unpaying audiences.

The above two points support a third: it is not clear that the premium content model depends on copyright in the same way traditional scarcity-based sale of copies models do. As described above, copyright's exclusive reproduction right makes it possible for creators and other copyright owners to sell copies of works at a cost higher than the marginal cost of production without being undercut by competition. Asserting the reproduction right might

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[90] See e.g., Patreon, 'Chapo Trap House', online: <www.patreon.com/chapotraphouse/posts> (showing a $5 donation tier including 'access to weekly premium episodes and entire premium back catalogue'); Patreon, 'Sword and Scale', online: <www.patreon.com/swordandscale/posts?tag=Plus> (showing 'Sword and Scale Plus' episodes available for donors at $5 monthly donation tier).

[91] Paying for access to works is not in itself a new phenomenon, however: paying to attend a music performance, film or theatre production could also be understood to fall under this model. These older forms of paying for access are inherently limited to a particular time and place, restrictions which are significantly loosened in the digital context. (Although, live online performances emulating these restrictions may attest to the positive value of physical and temporal limits, particularly given the popularity of these performances during the isolation measures necessitated by the COVID-19 pandemic.)

[92] However, as noted above in section 2.3, two series from the Patreon set did not have freely-available archives of episodes released during the relevant timeframe.

be useful to a podcast creator whose premium episodes are shared with non-subscribers.[93] However, the first line of defense is technological: through Patreon, creators can provide paying subscribers with a unique RSS feed to download premium episodes.[94] Copyright may be valuable to podcast creators in the event of some future dispute, but—as suggested by this study—may do little to support the everyday business of making a financial return on creative work.

With these differences from traditional scarcity models in mind, however, it is still clear that some exclusion is taking place. The finding that many podcasts offer exclusive bonus content to subscribers makes it difficult to say that these podcasts are operating purely on abundance models, for which the defining feature is not excluding non-paying users. Further research could investigate whether 'bonus' content in this context is seen as qualitatively different by creators or users from the free content offered by podcasters. Another question may be to what extent paid bonus content might be shared with non-paying users, and what measures if any creators take to prevent this practice. More information on these topics would help to better understand the practical application of abundance models, and better characterize the qualified form of these models that the forms of crowdfunding observed in this study seem to use.

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[93] This study's focus was on free episodes and as such found no evidence of this, but future research could investigate the assertion of copyright with respect to subscriber-only podcast episodes.

[94] It should be noted that the circumvention of technological protection measures is itself addressed by various legislation. For example, in sections 41–41.21 of the Canadian *Copyright Act* such circumvention is an infringement of copyright except under certain circumstances: see *Copyright Act*, RSC 1985, c C-42. Whether a private RSS feed is a technological protection measure for the purposes of the *Act* and whether certain actions (such as sharing the feed with unauthorized persons) would constitute circumvention is a question beyond the scope of this article. Future research could explore the use (or non-use) of these and other 'digital locks' in podcasting, and contrast their use to protect traditional media distributed online with their possible irrelevance to 'born-digital' media based on abundance models.

In this study, the category of "secondary activities" included other activity by the podcasters promoted through the podcast, such as books, merchandise, and live podcast recordings. Where these activities were paid or ticketed they may be another source of financial support to podcast creators. Recorded versions of live events are also in some cases released on the unpaid podcast feed.[95] A large majority of the series surveyed (80%) included at least one example of promotion of secondary activity in episode audio or metadata. Examples of secondary activity included published books, merchandise, live events and fan meetups. The types of merchandise offered included branded clothing and other items available through online storefronts.

With respect to the abundance and scarcity model framework, some secondary activities include traditional media that may operate on scarcity models. Traditionally published books are a clear example in this data set of secondary activity which operates on a scarcity model.[96] Other podcast series have been adapted for television.[97] Podcasting may in these circumstances serve as a springboard into traditional media, although further research might examine whether podcasters who undertake these activities leave podcasting behind. A further question that remains unanswered by the data from this study is to what extent secondary activities provide financial support to the podcast creators who undertake

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[95] See note 24, above (listing episodes in the sample set which consisted of recorded live events).
[96] See e.g. Chapo Trap House, *The Chapo Guide to Revolution: A Manifesto against Logic, Facts, and Reason* (Touchstone, New York 2018).
[97] See e.g., IFC, 'Maron', online: <www.ifc.com/shows/maron>; IFC, 'Comedy Bang Bang', online: <www.ifc.com/shows/comedy-bang-bang>; John Koblin, '"Pod Save America" is Coming to HBO', *The New York Times* (February 8, 2018), online: <www.nytimes.com/2018/02/08/business/media/pod-save-america-hbo.html>. Whether television in fact operates on 'scarcity models' as Suzor describes them is beyond the scope of this project, but it is worth noting that broadcast, cable and satellite television are also not tied to a 'sale of copies' model (though the latter two do rely on exclusion of non-paying consumers).

them. Future research could explore the motivations behind these activities, such as through interviews with podcast creators.

Despite existing copyright law likely protecting podcasts, the study showed little evidence of the use of copyright by podcast creators. There was no indication that any of the series in the sample sold copies of episodes, no direct mentions of copyright in the episode audio or metadata and no licenses mentioned in episode metadata. Copyright notices or licenses did however appear for a majority of the podcast series. These notices were visible on the series iTunes page in an out-of-the-way location under the podcast art and details. These findings should not be taken to mean that copyright is playing no role in podcasting, but at least indicate that copyright is not something that is made very prominent for listeners of this medium. This may not be unique to podcasting—it is unclear how much users in general think about copyright, or how much creators or distributors want them to. However, in the context of free distribution it may be telling that creators do not feel the need to loudly proclaim their ownership of and control over their works. These findings indicate a need for further research into the role or roles copyright might be playing that are not apparent from the publicly available materials used for this study.

As discussed above, crowdfunding and advertising do not have the same relationship with copyright that the sale of copies model does. While creative work funded through advertising or crowdfunding and released for free may be protected by copyright (as in the case of podcasts), creators of these works do not have to rely on copyright to exclude non-paying users in order to fund their work. This study does not indicate why creators are choosing to make their work available for free. The study does suggest,

however, that crowdfunding and advertising are in use by podcast creators, and that these creators offer much of their work for free. But if abundance models work for podcasts, this complicates the law and economics proposition that 'copyright incentivizes creativity' and suggests that copyright is insufficient as the only or primary creative policy lever. Questions which remain unanswered by this study include: are crowdfunding and advertising models sufficient to meet creators' needs to make a return on their work? Do creators feel that they are receiving just compensation for their work through these models? Are there other issues with crowdfunding and advertising models that this study was not able to uncover? Further research could employ interviews with podcast creators to help answer these questions and provide a more detailed picture of how creators relate to copyright in this area.

Interpreting this study's results in the abundance framework elaborated by Suzor gives a richer description of the differences between distribution choices than focusing solely on law and economics concepts of incentives. However, this study has not fully answered the question: what is copyright doing for podcasts? It is clear enough that copyright is not supporting a scarcity model based around the sale of copies for at least a substantial number of podcasts. Several of the crowdfunded series surveyed offer bonus podcast episodes for paying subscribers, however, which seems to satisfy the main criterion of scarcity models (exclusion of non-paying users). There are also clear similarities between this bonus content model and subscription models such as those used by Spotify or Netflix. Copyright in these models likely retains a useful function as something around

which different actors (copyright owners, platforms and authors) can structure contracts.[98] More work could be done on how these models differ with respect to incentives and use of copyright, particularly as these services are seen by some as the future of content distribution.[99]

Conclusion

Considering what copyright can and should do in the digital age is a common theme in contemporary copyright scholarship. Podcasting is important to consider in this context because it is a form of creative expression which has been made possible and widely accessible—both for potential creators and users—by ubiquitous digital technologies. The disconnect with traditional funding models for creative production based around exclusion and scarcity may in turn be a product of the digital environment in which podcasting was created. Perhaps podcasting was able to thrive without a pure scarcity model because it enjoyed a freedom to experiment enabled by low-cost online distribution and accessible digital technologies.

This article has taken a different starting point from earlier legal scholarship on podcasting by emphasizing the positive aspects of copyright law. That is, rather than starting from the question 'how does copyright law limit what podcast creators can do?' This article has instead asked 'what does copyright law do for podcast creators?' This question arises naturally from the consequentialist justification of copyright, which sees it

[98] My thanks to Jessica Lai for raising this point.
[99] See Bottomley, 'Podcasting: A Decade in the Life', *supra* note 22, 165.

as an incentive for creators and publishers. This study found that many podcast creators realize a financial return from their work using methods such as crowdfunding and advertising, which do not require excluding non-paying users (though they may permit it). These methods have a more ambiguous relationship with copyright than simply selling copies of works and raise questions about the role of copyright for digital creative work going forward. The use of crowdfunding business models by podcasters often includes the release of 'bonus content' only available to paying users along with free content, with a resulting model of some abundance, some scarcity. Perhaps this falls short of the promise that abundance models could make all creativity free to users; however, it has provided significant financial support for independent podcast production in the absence of publishers. The more salient question for podcasters and for scholars interested in the medium might be whether this model can continue to do so as the podcast industry continues to consolidate.