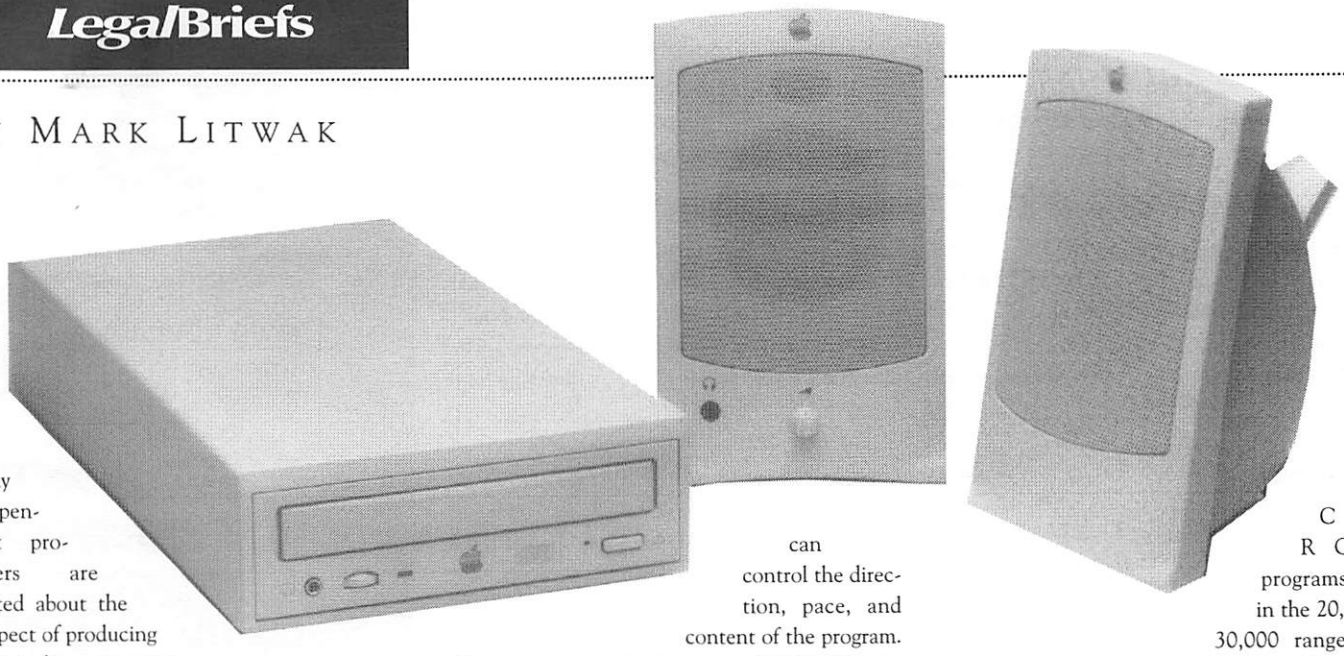
BY MARK LITWAK



GETTING THE GOODS FOR MULTIMEDIA

PART 1: LICENSING TEXT

Multimedia producers —like film and videomakers—have a complex web of licensing requirements to sort through in the course of a production.
Photo: John Greenleigh, courtesy Apple Computers

Many independent producers are excited about the prospect of producing multimedia programs. With a relatively modest investment in software, owners of personal computers can become desktop moguls. Distribution may become as simple as transmitting e-mail to a central depository.

This two-part article will explore some of the legal ramifications of producing multimedia programming. There are many legal hurdles to overcome in making even a simple multimedia piece. Moreover, the law has not kept pace with technology, and there are important issues that remain unresolved.

Since interactive programming requires more content than linear programs, hundreds of releases and/or permissions may be required to produce a single program. Determining and securing all the necessary releases and rights for a multimedia project can be a tiresome and complicated endeavor.

The multimedia producer wears several hats, blurring the traditional roles of writer, director, composer, editor, costume designer, and software developer. The legal issues cross several disciplines—publishing, telecommunications, computer, and entertainment law—and can become exceedingly knotty. They encompass intellectual property rights (copyright, patent, trademarks, titles), torts (right of privacy, right of publicity, defamation & unfair competition), and contract law.

Before delving into a discussion of the law, it is necessary to define the medium. Multimedia works are those based on multiple media sources, such as video, text, audio, photos, graphics, and animation. They are typically stored in digital form on magnetic or optical software. Some multimedia programs are interactive, meaning the user can control the direction, pace, and content of the program. Current programming is based on CD-ROM technology. CD-ROMs are compact, durable, have large storage capacity (600 megabytes of information), are inexpensive to manufacture, and transfer information quickly.

Obstacles to Licensing

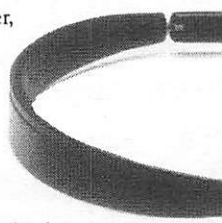
Many producers want to incorporate pre-existing work into their multimedia productions. This may involve putting a dictionary on a CD-ROM or producing a disk incorporating music by Mozart with accompanying text and photos. There are several problems one encounters when trying to license pre-existing works:

1) *Uncertain market:* Content owners still don't know what to charge to license material for multimedia. CBS is reportedly charging $15/second for material in its library. Many companies have adopted a wait-and-see attitude, afraid to sell rights at below market rates. Of course, if companies continue to stand on the sidelines, the market will develop slowly.

The amount of money a producer can afford to pay and recoup his or her investment is relatively small at this time because of the limited market for the end-product. Today only a few million computer users have CD-ROM players. Retail sales of CD-ROM programs are in the 20,000 - 30,000 range, although the market is expected to expand greatly.

2) *Clearance problems:* Owners may not hold all the necessary rights to their properties. Multimedia and electronic publishing did not exist when most contracts were negotiated, so the question of who owns such rights may be unclear. Moreover, old contracts may have been lost or may be difficult to locate.

3) *Fear of digitalization:* Some owners are concerned that if they let their work be digitized, it will be easily pirated. In digital, the image is converted into a series of pixels or dots. Once a work is digitized, subsequent generations can be copied without any loss in quality. The image can be manipulated and changed so it doesn't look like the original. Multiple images can be metamorphosed into new hybrids, a practice called "morphing." Moreover, ready access to computer networks and bulletin boards can compound the damage by making it easy and inexpensive to distribute pirated works to vast numbers of users.



Refusing to allow one's work to be digitized, however, does not necessarily prevent thievery. A determined pirate can steal an image by simply scanning it into a computer.

Assuming the owner of a work is willing to license it for multimedia use, a multitude of legal issues may arise. In this article, some of the issues regarding the licensing of text-based materials are reviewed. In the October 1994 issue of *The Independent*, this overview will continue with a look at the legal issues involved in licensing film, video, and television footage. The information

than any other city in America.

The Department of Cinema and Photography at Ithaca College attracts students mainly from the Northeast. The program secures many advantages from its location within the School of Communications: a five-year-old, $12 million state-of-the-art facility; Los Angeles and London campuses; internship opportunities all over North America and Europe; and a full range of co-curricular opportunities—a television station, three radio stations, a newspaper, and a professional film and video unit.

The program is renowned for its rigorous 16mm-only production sequence, which advances students toward increasing technical complexity. The program has its own lab and sound mixing studio, with a crew of technicians to repair and run equipment. Senior film projects average between $2,000-4000, with a few projects running around $10,000.

Both degrees in cinema—B.S. and B.F.A.—require equal parts critical studies and production. "We insist on it," says chair Bill Rowley. "Production and theory are synergistic components of the study of cinema."

Although most students are interested in fiction filmmaking, Rowley says, "There is an extremely healthy group of documentary and experimental work, as well as work that crosses over genres."

As for independent filmmaking, Dean Thomas Bohn observes, "We are probably characterized by it, if you look at our faculty, who for the most part come out of experimental, documentary, and independent narrative production and theory." The film journal *Jump Cut* is edited at Ithaca by John Hess.

The department hosts numerous independent filmmakers, together with industry guests, with its Cross Currents, Distinguished Speakers in Communication, and Women Direct film series.

"As they begin their education, students have their eyes on mainstream commercial film," Rowley says, "but our job is to help them see indies as role models so they can express themselves and their ideas without having to compromise for purely economic reasons."

Patricia R. Zimmermann, an associate professor at Ithaca College, is the author of Reel Families: A Social History of the Discourse on Amateur Film, *forthcoming from Indiana University Press. Research assistance: William Hooper*

provided here is relevant to all producers, whether they work in film, video, or multimedia.

Copyright

Copyright law protects the work of authors, including literary and dramatic works. To incorporate such work in a multimedia program, a producer should:

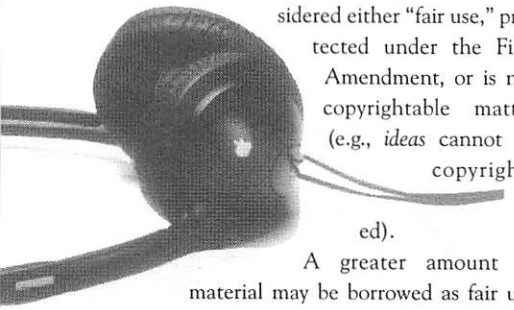
1) Determine whether the work is copyrighted or in the public domain. This can be difficult. A search of copyright records is rarely conclusive, as many works protected by copyright law may be unpublished and/or unregistered.

2) If the work is in the public domain, you may use it without permission of the author. Works in the public domain include those created by the United States Government, those by authors who have abandoned their copyright, and those with expired copyrights.

To determine whether a copyright has expired, you must refer to the law in effect when the material was published or created. Under pre-1978 copyright law, a copyright lasted 28 years and could be renewed for an additional 28-year period.* Some copyright owners renewed their copyrights, while others did not. Under the prior law, failure to put a copyright notice on a work could place the work in the public domain.

Once a work goes into the public domain, its copyright cannot be revived. However, some works in the public domain in the United States may be protected by copyright law in other countries. Determining copyright protection in foreign countries can be difficult, as most countries do not require registration or deposit of copyrighted works.

3) If the work is copyrighted, you need permission to use it unless your use is considered either "fair use," protected under the First Amendment, or is not copyrightable matter (e.g., *ideas* cannot be copyrighted).



A greater amount of material may be borrowed as fair use from nonfiction than fiction works. For example, a producer can borrow historical facts from a previous work without infringing upon the author's copyright.

4) If you need to license rights, make sure the licensor has the necessary rights to grant. This can

* When the law changed in 1976, those copyright owners with works in the second renewal period were given an extension of 19 years added to the second term, for a total copyright of 75 years. Current copyright law grants copyright for the lifetime of the author plus 50 years.

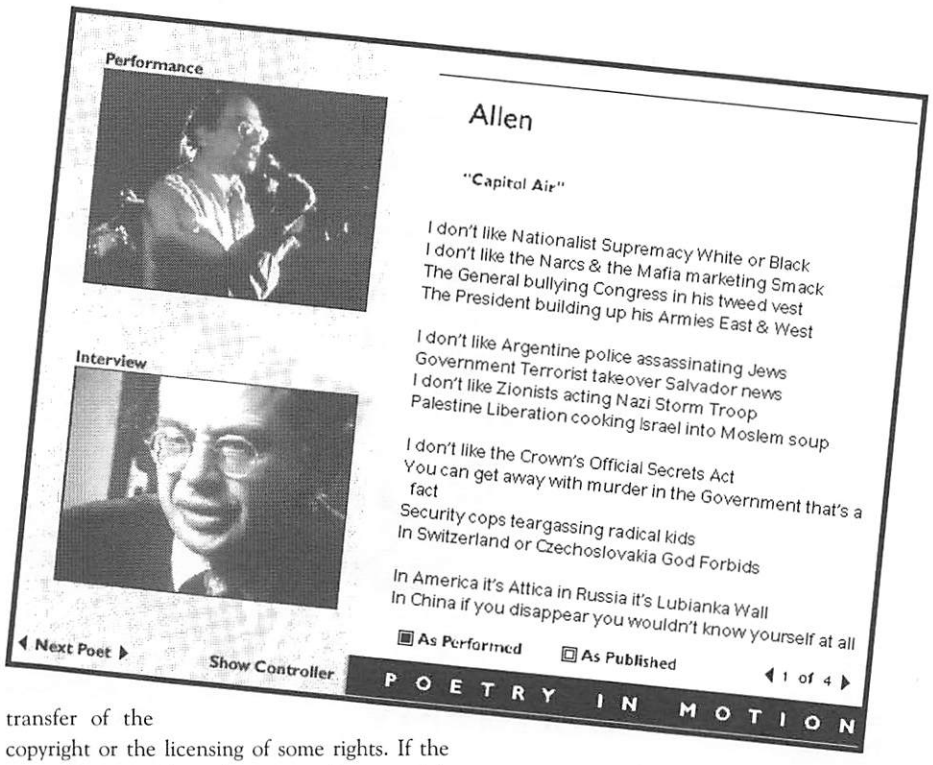
be hard to determine, since the copyright may be jointly held, interests may have been transferred to third parties, and ownership may be unclear when the work was created by one person for another (i.e., a work-for-hire). A book author, for example, may have granted movie rights to a studio. A screenwriter working as an employee probably doesn't own the copyrighted script she or he wrote; the studio will own it. A copyright search is advisable, as it may reveal a transfer of the copyright or the licensing of some rights. If the copyright report shows the purported owner of the literary property is not the copyright holder, or if the copyright has been sold to another, you will not want to proceed with the license from someone who is not the current copyright holder.

Private research companies can check additional sources of information for copyright, title, and trademark conflicts. These companies review catalogs and reference works listing publications, movies, sound recordings, and products.

However, reports supplied by the Copyright Office and private research companies do not offer a conclusion as to ownership of a copyright. They merely disclose whether a work has been registered and those transfers of rights that may have been recorded. The opinion of an experienced attorney is often desirable.

Obtaining rights to literary works can become even more complex if the works have incorporated other copyrightable material. For instance, a book may include photos duplicated with permission of the photographer. The book author probably doesn't own the copyright or any electronic rights to those photos and therefore cannot grant those rights to a multimedia producer. You would have to track down the photographer and request permission.

When text is taken from a script created by a Writer's Guild member for a studio, other issues may arise. While WGA members usually do not own the copyright to works-for-hire, they may have certain reserved rights, such as dramatic, publication, sequel, and merchandising rights (which are defined in the Writer's Guild Minimum Basic Agreement). This division of rights is called "Separation of Rights."



Titles

Titles are not copyrightable but can be protected under state and federal unfair-competition laws. The gist of an unfair-competition action is mislabeling or misdesignating a product (or service) in such a way as to cause consumers to be confused over its origin. Once a title comes to be associated in the public mind with the work of a particular producer, it acquires what is known as a "secondary meaning." For instance, moviegoers associate the words "Star Wars" with the work of George Lucas. Those who attempt to trade on this secondary meaning by adopting the same or a similar title may be liable for unfair competition and trademark infringement.

You should conduct a title search to determine if there are any conflicts with your intended title. If someone has used the title you want on a similar product or service offered in your geographical area, you should not use that title unless it has been abandoned or you have obtained a release.

When creating a title, a highly fanciful or original one is preferred because it is not likely to infringe on other titles. It will also be easier for you to protect the title.

Trademarks

One kind of unfair competition is trademark infringement. Merely mentioning a trade or service mark in a multimedia work is not an infringement, however, unless the mark is used to mislead the public as to the origin of manufacture. Thus a producer could use the word "Xerox" or "IBM" in a story without infringing those marks. However, if they were used to imply that a multimedia work was published by Xerox or IBM, the use would be actionable.

Characters

Characters, especially those represented in visual form (e.g., cartoon characters), can be protected under copyright law. Personality traits of a character, however, are not copyrightable.

The use of a character in a fictional work can be problematic if the character: 1) infringes on someone else's copyrighted character or 2) resembles an actual person, and the portrayal is defamatory or invades the person's privacy. These pitfalls can be avoided by licensing the use of fictional characters or obtaining a depiction release from living individuals. Another solution: change the name and description of the character so they are not identifiable with the original.

As a character's name, image, and dress can be considered trademarks, characters may also be protected under trademark and unfair competition laws. Conduct a character search to determine if there are any living or fictional characters with the same or similar names.

Some multimedia projects require that producers secure rights to preexisting text. Among Voyager's text-based projects are Art Spiegelman's Holocaust story, *Maus*, and its Poetry in Motion series, which grew out of a film series by Ron Mann. Courtesy Voyager

Tort Liability

If the material borrowed is defamatory or invades the rights of privacy or publicity, the borrower (as well as the original author) will be liable. When licensing rights, one should have the owner of the original material "warrant" (promise) that the work does not infringe any of these rights. You should also request an indemnification clause; this way, if the warranty is breached, you can obtain reimbursement for damages and attorney fees. Additional protection can be obtained by purchasing Errors and Omissions (E&O) Insurance.

Defamation

A defamatory statement is one that harms the reputation of another so as to lower him in the opinion of the community or to deter third persons from associating or dealing with him. For example, communications that expose a person to hatred, ridicule, or contempt, or reflect unfavorably upon one's personal morality or integrity are defamatory. One who is defamed may suffer embarrassment and humiliation, as well as economic losses such as loss of employment or the ability to earn a living.

The law of defamation can be very confusing, because common law* rules developed over centuries and are subject to constitutional limitations. One needs to read a state's defamation laws in light of various constitutional principles. For example, recent U.S. Supreme Court decisions have imposed significant limitations on the ability of government officials and public figures to win defamation actions. If a state's law is inconsistent with the Constitution, the law is invalid.

Sometimes a person can publish a defamatory remark with impunity, because protecting people's reputation is not the only value we cherish in a democratic society. When the right to protect one's reputation conflicts with a more important right, the defamed person may not be able to recover damages for the harm to his reputation.

The most important privilege (defense) from a producer's point of view, is truth. If your program hurts someone's reputation, but what you said was true, you are absolutely privileged. An absolute privilege cannot be lost through bad faith or abuse. So even if you maliciously defame another, you will be privileged.

Keep in mind that while truth is an absolute defense, the burden of proving truth will sometimes fall on the defendant. So if you make a defamatory statement, you should be prepared to prove its truth. And that may not be easy to do.

There is also a conditional common law defense of fair comment and criticism, which applies to communications about a newsworthy person or event. Conditional privileges may be lost through bad faith or abuse. This defense has been largely superseded, however, by a constitutional privilege for statements about public officials or public figures.

Public figures, such as celebrities or public officials, have a much higher burden to bear in order to prevail in a defamation action. There are two types of public figures. One is a person who has achieved such pervasive fame or notoriety that he or she is a public figure for all purposes. Other public figures have only been drawn into a particular public controversy and will only be considered public figures for a limited range of issues.

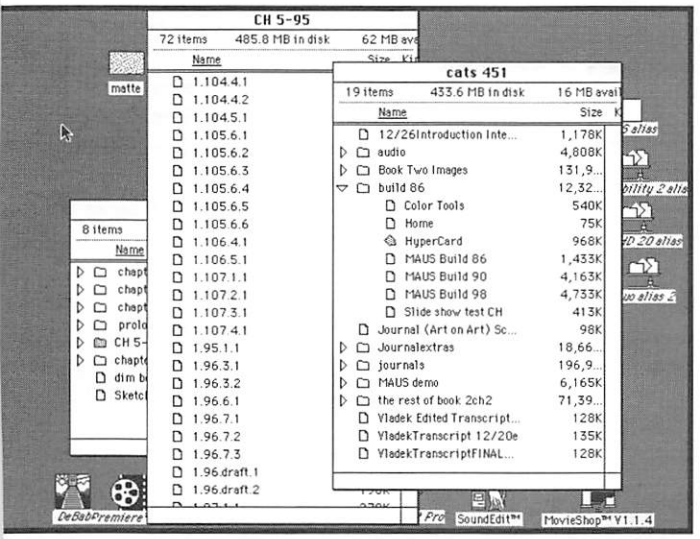
For a public figure or official to win a defamation case, they must prove the defendant acted with "actual malice." This term means the defendant intentionally defamed another or acted with reckless disregard for the truth. Plaintiffs find it difficult to prove actual malice, which is why so few celebrities bother suing the *National Enquirer*. To successfully defend itself, the *Enquirer* need only show it acted without malice. The newspaper can come into court and concede that its report was false, defamatory, and the result of sloppy and careless research. But unless the celebrity can prove that the tabloid acted recklessly, the court is obliged to dismiss the case.

The multimedia producer should take the following steps to protect against a defamation suit:

1) Be especially careful about portraying living individuals who are not public officials or figures.

2) Make sure you can prove any defamatory statements are true. Annotate your script with your information sources so you can

* Common law is the law of precedent that arises from cases decided by courts. Another type of law is statutory, or law that has been enacted by a legislative body, like Congress.



document its truth and show you acted without actual malice.

3) Obtain releases whenever possible. It never hurts to have a release even if it is not legally required.

4) Have your attorney closely review your script for potential liability before production. If you can change the names and setting without detracting from the story's dramatic value, do so. You may be able to avoid liability for defamation this way. However, if a person depicted is identifiable from the circumstances, liability may result. Similarly, a disclaimer in the credits, such as "Any resemblance to people, living or dead, is purely coincidental...." will not protect you if viewers nevertheless believe the movie depicts an identifiable living person.

Right of Privacy

The right of privacy is the right to live one's life in seclusion, without being subjected to unwarranted and undesired publicity. In other words, it is the right to be left alone.

Like defamation, the right of privacy is subject to constitutional restrictions. Unlike defamation, a cause of action for invasion of privacy does not require any injury to one's reputation.

Many defenses to defamation also apply to invasion of privacy; truth, however, is not a valid defense. Express and implied consent are: If a person voluntarily reveals private facts to others, he or she cannot recover for invasion of privacy. Likewise, revealing matters of public record cannot be the basis for an invasion of privacy action.

Privacy actions typically fall into four factual patterns:

1) *Intrusion into one's private affairs.* This category includes such activities as wiretapping and unreasonable surveillance. The intrusion must be highly offensive. Most people, for instance, would find it offensive to discover a voyeur peering through their bedroom window. On the other hand, a salesman knocking on your front door at dinnertime may be obnoxious, but not offensive enough for legal action.

2) *Public disclosure of embarrassing private facts.* A person who publicizes a matter concerning the private life of another is subject to liability for invasion of privacy, if the matter a) would be highly offensive to a reasonable person, and b) is not of legitimate concern to the public. In other words, if it is not newsworthy.

3) *Appropriation of another's name or likeness.* Legal action in this area seeks to compensate plaintiffs for the emotional distress, embarrassment, and hurt feelings arising from the use of their name or likeness on a product. Suits over the invasion of one's right of publicity, in contrast, seek to compensate plaintiffs for the commercial value arising from the exploitation of their name

and likeness.

A person cannot always control the use of his name and likeness. While you can prevent someone from putting your face on their pancake mix, you cannot stop *Time* magazine from putting your picture on the cover. Again, using a name or likeness that's newsworthy would not be actionable.

4) *False light.* Publicity placing a plaintiff in a false light is actionable if the portrayal is highly offensive. This is similar to a defamation, but harm to reputation is not required. An example would be a political dirty trick, such as placing the name of a prominent Republican on a list of Democratic contributors. Although this person's reputation may not be harmed, he has been shown in a false light.

Right of Publicity

The right of publicity allows a person to control the use of his or her image, name, and likeness (including voice and signature) in a commercial setting. Again, you cannot put a picture of another person on your spaghetti sauce without permission. The right of publicity is typically exploited by celebrities who earn large fees from endorsing products.

To avoid liability, you should secure from every person appearing in a program a signed release giving you the right to use their name, voice, likeness, and identity in all media worldwide in perpetuity. You may also want the right to use the image in advertising and ancillary spin-off products.

Keep in mind that a person's identity may be infringed when their nickname or something closely associated with them is portrayed. Johnny Carson once sued a company marketing a toilet under the name "Here's Johnny!" The court held that the company has misappropriated Carson's identity by use of the phrase.

Union/Guild Permissions

If the writer is a member of the Writer's Guild of America (WGA), the multimedia producer may have to sign a union contract. The WGA, however, allows a production company to become a Guild signatory for one production only with minimal requirements.

Mark Litwak, an entertainment attorney and law professor in Santa Monica, is author of Reel Power: The Struggle for Influence and Success in the New Hollywood *and* Dealmaking in the Motion Picture and Television Industry. *This article is an excerpt from the upcoming* Litwak's Multimedia Producer's Handbook *(Silman-James Press).*

The second part of this article, which will appear in the October issue, covers the licensing of motion pictures, photographs, architecture, fine art, and computer software.