

Licensing Content for Multimedia Applications

by Mark Litwak, Attorney at Law

The following is an overview of an IMA "white paper" written by Mark Litwak, an entertainment and multimedia attorney, law professor, and author of several books about the entertainment industry.

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Rapid technological advances have enabled producers to become trailblazers. The law has evolved much more slowly, however, inhibiting producers from fully exploiting the potential of the new medium. Often multimedia producers are uncertain whether pre-existing material can be safely incorporated in their programs. Legal doctrines designed to protect printed text, sound recordings and photographs are being applied, somewhat awkwardly, to a medium based on technology which allows all forms of work to be radically metamorphosed. This article is a survey of some of the legal issues that confront multimedia producers.

There are many legal hurdles to overcome in making even a simple multimedia program. 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 legal issues involve cross disciplines and can become exceedingly knotty. The field encompasses publishing, telecommunications, computer and entertainment law, including intellectual property rights (copyright, patent, trademarks, titles), torts (right of privacy, right of publicity, defamation & unfair competition) and contract law.

Even drafting a simple employment contract can raise a bewildering array of issues. The multimedia producer wears several hats, blurring the traditional roles of writer, director, composer, editor, costume designer and software developer. If you use a computer to manipulate a character's image, changing appearance, dress

and the background scenery, you have performed functions traditionally handled by the writer, director, editor, costume designer and set designer.

LICENSING OBSTACLES

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

1) *Uncertain Market:* Content owners don't know what to charge to license material for multimedia use. 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 that a producer can afford to pay and recoup his 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.

2) *Clearance Problems:* Owners may not hold all 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 and can be difficult to locate.

3) *Fear of Digitalization:* Owners are concerned that if they let their work be digitized, the work will be easily pirated by others. In digitalization, 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. And the image can be manipu-

lated and changed so that it doesn't look like the original. 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 stop 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. Here is an overview of some of the issues of licensing content:

TEXT

Whether the multimedia producer is licensing fiction or non-fiction, the principal legal issues are:

Copyright

Copyright law protects works of authors, including literary and dramatic works.

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 of some product or service.

Characters

Characters, especially those represented in a visual form such as cartoons characters, can be protected under copyright law.

Tort Liability

If the material borrowed from invades rights of other people because it is defamatory or invades their rights of privacy or publicity, the borrower as well as the original author will be liable.

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.

Right of Privacy

The right of privacy has been defined as 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.

Right of Publicity

The right of publicity is the right of a person to control the use of his or her image, name and likeness in a commercial setting.

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.

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MOTION PICTURES

When a multimedia producer wants to incorporate existing film or television footage in a new work, many of the same copyright, character, trademark, title and defamation issues mentioned in the text discussion apply. The matter can become even more tangled when there are multiple owners of rights in a motion picture.

PHOTOS AND STILL IMAGES

Still images are copyrightable and the same copyright, trademark, character and tort issues that arise with the use of motion pictures apply here as well. Likewise, copyright defenses predicated on fair use or the First Amendment can be invoked.

Some photos are clearly in the public domain, such as those in the National Archives in Washington, D.C. For other photos the licensee should request the licensor to warrant that the licensor has all rights to a particular photo, including releases from any identifiable persons in

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the photos, and indemnify the licensee if a claim should arise from a third party.

The license to use a photo should include a waiver of moral rights. Permissions may be obtained for some photos from the Graphic Artists Guild or the American Society of Media Photographers.

MUSIC

The same copyright, trademark and tort issues that apply to use of a motion picture apply here as well. Determining copyright ownership can be particularly complex as there may be several simultaneous copyright holders in a piece of music.

The multimedia producer will need to obtain a mechanical license if music is going to be used without an accompanying image. If the music is used in synchronization with a video image, then a synchronization (sync) license will be needed. If the program will be distributed on videograms (disks or tape) or CD-ROMs, the producer will need a license for those uses as well. When music is modified an adaptation license may be needed.

ARCHITECTURE

When images of buildings are reproduced in a multimedia program, is there an infringement of copyright? Congress recently accorded copyright protection to architecture, placing it a separate category from pictorial, graphic and sculptural works.

FINE ART

If art work is incorporated in a multi-media production, a license may be needed. Pictorial, graphic and sculptural works of art are copyrightable and displaying them in a program without permission could be an infringement.

A multimedia producer who incorporates art work in a program could be liable if the work is distorted, which may occur if the work is digitized and metamorphosed into a new form.

COMPUTER SOFTWARE

A multimedia work will contain computer software to operate the program. This software can be developed by the multimedia creator or

licensed from another. Since software is copyrightable matter, it cannot be freely borrowed.

A multimedia work comprised of a series of images could be classified for copyright purposes as either a motion picture (if the images are moving) or an audiovisual work. Video games are considered audiovisual works. A virtual reality display might be considered a motion picture.

DEFENSIVE TACTICS

The multimedia producer is wise to consult with an entertainment attorney with expertise in multimedia production to determine what licenses may be needed. This review should be undertaken early before a lot of time and effort are invested developing a project. A competent attorney can suggest ways the producer can reduce costs and potential liability.

Insurance

To protect oneself from potential liability, the multimedia producer should consider purchasing Errors and Omissions (E & O) insurance. E & O insurance will protect the insured from his negligence when it gives rise to claims of defamation, invasion of privacy or publicity, copyright and trademark infringement and breach of contract arising from submission of materials to the producer.

Protecting the Multimedia Work from Infringement

The multimedia producer will want to take steps to ensure that his work is not pirated by others. Although copyright registration is not required, it is desirable. Registration for U.S. authors is necessary before instituting an infringement action, and only authors with registered works can recover statutory damages and attorney fees.

CONCLUSION

New technology allows producers to break down prior limitations on creative expression. Unfortunately, the complex state of the law deters rapid development of this new medium. Many complex legal issues are likely to arise when a producer incorporates existing works.

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Multimedia Law Handbook Now Available from IMA

To be successful, multimedia developers and publishers must understand the legal issues involved in creating and distributing multimedia products, from clearing rights to content in products to choosing titles for release. The IMA receives constant inquiries on these issues, and we understand the need in the marketplace for clear, objective information on which companies like yours can rely. Legal advice in this area is costly, so the IMA decided to take action.

As a service to its members, and as part of the efforts of the Intellectual Property Project, the IMA is pleased to make available the *Multimedia Law Handbook: A Practical Guide for Developers and Publishers*, by Dianne Brinson and Mark Radcliffe. The IMA is providing this handbook to all IMA members as a practical guide. It is written for the non-lawyer with sections covering production relationships, post-production issues and title distribution. Included are numerous related draft contract forms in print form as well as on PC-compatible and Macintosh diskettes.

Last month, a copy of the *Multimedia Law Handbook* was sent to the primary contact at each IMA member company in good standing. If you would like to order copies of the handbook for your staff members, development partners or clients, the IMA is offering the book package - with both diskettes - for \$90 through November 30, 1994. After that, the price will be \$100 per copy with both diskettes (plus shipping: \$5.00 to North America and \$10.00 outside North America).

The *Multimedia Law Handbook* normally retails for \$104.90 with either the PC or Macintosh diskette (\$134.85 with both diskettes).

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Multimedia producers can minimize liability by creating programs entirely from scratch or by only borrowing works that are clearly in the public domain, or available under the Fair Use doctrine or the First Amendment. If the multimedia producer is planning to incorporate outside works, or is producing material that may infringe on another's rights, an attorney knowledgeable in multimedia legal issues should be consulted early and E & O insurance should be purchased.

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