POTHOLES ON THE INFORMATION SUPERHIGHWAY: A ROAD MAP TO LEGAL ISSUES IN MULTIMEDIA PRODUCTIONS

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■ INTRODUCTION

The news media has proclaimed that the multimedia revolution is upon us. Multimedia technology will supposedly change the way we work, entertain, communicate, and educate ourselves. Telephone, cable, and entertainment companies are frantically jockeying for advantage as they prepare to invest billions to plug our homes, schools, and offices into the information superhighway.

This article will explore some of the legal ramifications of producing multimedia programming. While state-of-the-art technology permits the development of diverse and innovative programs, 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 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 and 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 one uses a computer to manipulate a character's image, changing appearance, dress, and the background scenery, one has performed functions traditionally handled by the writer, director, editor, costume designer, and set designer.

Before delving into a discussion of legal principles, one should first 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 media. Some multimedia programs are interactive, meaning that the user can interact and control the direction, pace, and content of the program. Current programming is based on CD-ROM technology. Modern CD-ROMs have large storage capacity (six hundred megabytes of information), are inexpensive to manufacture, compact, durable, and transfer information quickly.

■ 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.

UNCERTAIN MARKET

Content owners do not know what to charge to license material for multimedia use. CBS Inc. is reportedly charging fifteen dollars a second for material in its library. Many companies have adopted a wait-and-see attitude because they are 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 still 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. Retail sales of CD-ROM programs are typically in the twenty thousand to thirty thousand range, although the market is expected to expand greatly.

CLEARANCE PROBLEMS

Owners of existing works may not hold all the necessary rights needed to exploit their properties as multimedia programs. Multimedia and electronic publishing did not exist when most contracts were negotiated, so the question of who owns such rights may be unclear. As a practical matter, old contracts may have been lost and can be difficult to locate.

A multimedia producer, for instance, cannot buy the right to put content on a CD-ROM disk if the seller does not own those rights. The language of many contracts does not specifically address multimedia rights because multimedia is a new medium. A contract might provide that a novelist is granting a studio the right to turn a novel into a motion picture. The grant of rights may include "all allied rights." Under this language, who now owns the electronic publishing rights to the novel? The studio may claim the rights arguing that it is an "allied right." The writer may disagree, contending that the parties never intended to transfer electronic publishing rights because electronic publishing did not exist when the contract was made.

When a studio gives a multimedia producer a license to use its footage in a new interactive program, the grant may be no more than a quit claim release. Here, the studio sells only those rights that it *may* own, without promising that it owns any rights. The multimedia producer will need to examine the contracts that purportedly gave the studio these rights in order to de-

termine the extent of the rights the studio owns. The studio, however, may not want to reveal the contents of its contracts.

Whether a studio owns the right to exploit a film as a multimedia project will often turn on the language in the contracts that the studio used to acquire rights to works incorporated in the film. The case law in this area is confusing and somewhat contradictory. In one line of cases, the courts assume that a licensee may use a property in any manner that appears to fall within the scope of the contract granting those rights.[1] In these decisions, the courts assume that a grant of rights covers new uses or new media if the words conveying the grant are susceptible to that interpretation even if such new uses are not specified.[2] Thus, an assignment of motion picture rights to a play has been held to include the right to broadcast the film on television even though television did not exist at the time the contract was made.[3]

In another line of cases, the courts assume that a grant of rights only extends to those uses that are clearly within the scope of the rights conveyed. In *Cohen v. Paramount Pictures Corp.*,[4] a composer granted to a production company the right to use his music in the film "Medium Cool." The grant included the right to use the composition by means of television including exhibition by pay television and subscription television. The contract reserved to the composer all other rights. When Paramount began to distribute the film in the form of videocassettes, the composer sued on the grounds that his prior grant of rights did not include exhibition by home video. The Ninth Circuit Court of Appeals agreed.[5]

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. Furthermore, the image can be manipulated and changed so that it does not 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 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.

■ LICENSING CONTENT

TEXT

Whether the multimedia producer is licensing fiction or nonfiction the principal legal issues are as follows:

Copyright

Copyright law protects works of authorship such as literary works, musical works, paintings, photographs, and computer programs.[6] These creations are "things" created by people. They are referred to as intellectual property since they are products of the mind. Copyright should not be confused with personality rights (*i.e.*, right of publicity and right of privacy), that people may possess to protect the use of their names, voices, and personae.

Federal copyright law applies in all the states. Today, state copyright law is largely preempted by the federal law, although state law may provide a remedy in those areas that the federal law does not preempt. For instance, state law could protect works that are ineligible for federal protection because the works are not fixed in a fixed medium of expression.

Copyright laws are territorial in their application. This means that United States copyright law applies only within the United States. The United States has joined several international copyright conventions that protect American works from infringement abroad. These treaties likewise protect the work of foreign authors in the United States.

To be eligible for copyright protection, a work must meet four criteria: 1) It must be original; 2) it must be an "expression of an author;" 3) it must be of a nonutilitarian nature; and 4) it must be in a fixed, tangible medium of expression.

The producer who desires to incorporate a literary work in a multimedia program should consider the following factors. First, the producer should determine whether the work is copyrighted or in the public domain. This can be difficult since a search of copyright records is rarely conclusive. Many works protected by copyright law may be unpublished and/or unregistered.

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If a work fails to meet one of the above mentioned four criteria, it is not copyrightable and thus in the public domain. However, it is not always readily apparent whether a work has met the criteria. For example, a basic tenet of copyright law is that ideas[7] are not protectable, only the expression of ideas. In other words, the embellishment upon an idea can be protected but not the underlying bare idea itself. The craftsmanship of the author, the particular manner in which an author expresses herself, not the underlying facts and ideas, is what copyright law protects.

It may be difficult to determine when an idea is sufficiently embellished upon in order for the work to be entitled to protection. While a single word is not

an expression, and an entire book is an expression, what about a synopsis? Is this an "idea," or more? In *Takeall v. Pepsico, Inc.*,[8] the court declined to find that the short phrase, "You Got the Right One, Uh-Huh," used in a Pepsi commercial, was copyrightable.[9]

Note that an author is unable to protect an expression of an idea if the idea can only be expressed in one or in a limited number of ways.[10] Note also that while a work may be protected under copyright law, elements of the work may be borrowed. For instance, historical facts and stock scenes (scenes à faire)[11] are unprotected, and can be taken from copyrighted work without violating the author's copyright.

Copyright law protects both the literal text of a work and its structure and organization.[12]Thus, a borrower of material who closely paraphrases the original may be liable for copyright infringement although the precise text of the two works differ. The key test is whether the works are "substantially similar."

In determining whether two works are substantially similar, some courts use a two-part test. First, the works are compared objectively, using external criteria and analysis and sometimes expert testimony. The second part of the test subjectively determines how the ordinary observer would view the works.[13]

When evaluating whether a work is in the public domain, multimedia producers should keep in mind that a work of an American author in the public domain in the United States could be protected under the copyright laws of other nations. Since the market for CD-ROMs and computer programming is worldwide, American producers want to be able to market their products in all nations. Determining whether a work is in the public domain worldwide can be exceedingly complex.

Consider, for example, Charlie Chaplin's copyright claim to the 1925, silent film "The Gold Rush."[14] The film was first published in the United States. Chaplin, a British citizen, brought suit in Switzerland where he was a resident. Swiss copyright law did not directly apply since it only protected works by Swiss nationals and works first published in Switzerland.

Switzerland does protect other works, however, by virtue of its international treaties. The United States and Switzerland have a 1924 bilateral agreement, but it only applies to works of United States and Swiss nationals. Both countries are signatories to the Berne Treaty but the United States did not join until 1989, long after the film was published. Great Britain was also a member of Berne, and Chaplin was a citizen of Great Britain, but the 1908 version of Berne applied only to works first published in a Berne country which the United States was not. Thus, Chaplin apparently did not have a valid copyright claim.

The 1908 version of Berne, however, extended copyright protection to works simultaneously published in a Berne signatory country. The film was published in Canada, a Berne country, in 1925. The Swiss court found this to be a simultaneous publication. Since Berne applied, the law of Switzerland applied. Under Swiss law, copyright lasts for the life of the author plus fifty years, and Chaplin's copyright remains in force. The United States, on the other hand, only protected this work for twenty-eight years. Therefore, the film was protected in Switzerland although it was in the public domain in the United States.[15]

A work may be protected abroad yet be in the public domain in the United States. The copyright in the classic Italian film "The Bicycle Thief" was determined to have expired under United States law since it was not properly renewed in the United States. The movie was first published in Italy in 1948[16] and it remains protected there because copyright lasts for fifty years from the first public showing in Italy.

Content borrowers need to be concerned with other foreign laws as well. Some countries, such as France, expressly recognize the moral rights authors have in their work. These moral rights prevent others from changing the author's work, or taking the author's name off of it, even if the author has sold the physical work and the copyright to another. In *Huston v. Turner Entertainment*,[17] American director John Huston was determined by a French court to be the author of the American film "The Asphalt Jungle," although under American law his employer was deemed the author.

If a work is in the public domain, one can use it without permission from the author. Works in the public domain include those created by the United States government, works created by authors who have abandoned their copyright, and those works in which the copyright has expired.

To determine whether a copyright has expired, one must refer to the law in effect when the material was published or created. Under the copyright law in effect before 1978, copyright lasted for twenty-eight years and could be renewed for an additional twenty-eight-year period.[18] Some copyright owners renewed their copyrights while others did not. Under 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.[19] As explained previously, some works may be in the public domain in the United States but protected by copyright law in other countries. Determining copyright protection in foreign countries can be difficult, since most countries do not require registration or deposit of copyrighted works.

If a work is copyrighted, one needs permission to use it unless the use is considered a fair use, or the use is protected under the First Amendment, or what is taken is not copyrightable matter (*e.g.* ideas).

A greater amount of material may be borrowed from nonfiction works than fictional works. Clearly, a writer can borrow historical facts from a previous work without infringing the first author's copyright. Moreover, since factual works, unlike works of fiction, may be capable of being expressed in relatively few ways, only verbatim reproduction or close paraphrasing will be an infringement.[20]

On the other hand, the multimedia producer should use caution in borrowing from fictional works. In one recent case, the book *Welcome to Twin Peaks: A Complete Guide to Who's Who and What's What*, was deemed an infringement of the television series "Twin Peaks." The book contained detailed plot summaries and extensive direct quotations of at least eighty-nine lines of dialogue.[21]

Finally, if one needs to license rights, the producer should make sure the licensor has the necessary rights to grant. This can be difficult to determine, since a 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 does not own the copyrighted script he wrote;

the studio will own it.

A copyright search is advisable. A copyright report may reveal a transfer of the copyright, or the licensing of some rights. If the copyright report shows that the purported owner of the literary property is not the copyright holder, or if the copyright has been sold to another, the multimedia producer will not want to buy a license.

Private research companies can check additional sources of information for potential copyright, title, and trademark conflicts. These companies may review catalogs and reference works that list publications, movies, sound recordings, and products. Keep in mind that the reports supplied by the Copyright Office and from private research companies do not offer a conclusion as to ownership of a copyright.

Copyright laws are territorial in their application. This means that United States copyright law applies only within the United States. The United States has joined several international copyright conventions that protect American works from infringement abroad. These treaties likewise protect the work of foreign authors in the United States.

These reports merely supply the information needed to determine the status of a copyright. The opinion of an experienced attorney is often desirable.

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

When text is taken from a script created by a Writer's Guild of America (WGA) 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 in the material such as dramatic, publication, sequel, and merchandising rights. These rights are defined in the Writer's Guild Minimum Basic Agreement (MBA). 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 mis-labeling or misdesignating a product (or service) in such a way as to cause confusion to consumers as to the origin of its manufacture.[22] Once the title of a work comes to be associated in the public mind with the work of a particular producer, it acquires what is known as a "secondary meaning." Others who attempt to trade on this secondary meaning by adopting the same or similar title, may be liable for unfair competition and trademark infringement.[23]

One should conduct a title search to determine if there are any conflicts with a proposed title. One can order a title report which may disclose other products or services that have used the same or similar title. If someone has used the desired title on a similar product or service in the same geographical area, that title may not be used unless it has been abandoned or a release has been obtained.

In creating a title, a highly fanciful or original one is preferable because it is not likely to infringe other titles. Such a title will also help the creator protect the title from subsequent infringement.

Trademarks

One kind of unfair competition is trademark infringement. Merely mentioning a trade or service mark in a multimedia work is not an infringement. If the mark is used to mislead the public as to the origin of manufacture of some product or service, however, there is an infringement.[24] Thus, a producer could use the word "Xerox" or "IBM" in a story without infringing those marks. However, if those marks were used in such a way to imply that a multimedia work was published by Xerox or IBM, the use would be actionable.

Characters

Characters, especially those represented in a visual form such as cartoon characters, can be protected under copyright law.[25] Individual personality traits of a character, however, are not copyrightable.[26]

The use of a character in a fictional work can be problematical if the character: 1) Infringes on someone else's copyrighted character, or 2) resembles actual persons and their portrayal is defamatory, invades their privacy or, may be an instance of unfair competition.[27] These pitfalls can be avoided by licensing the use of fictional characters, and obtaining depiction releases from living individuals. Another solution is to change the name and description of characters so they are not identified with the other fictional character or living individuals.

Characters can also be protected under trademark and unfair competition laws. A character's name, image, and dress can be a trademark.[28] One can conduct a character search to determine if any living or fictional characters with the same or similar names exist.

Tort Liability

If the material borrowed 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. When licensing rights, one should have the owner of the original material warrant that the work does not infringe any of these rights. The licensee should also request an indemnification clause so that if the warranty is breached, the licensee 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, those communications that expose another to hatred, ridicule or contempt, or reflect unfavorably upon their personal morality or integrity are defamatory.[29]

The law of defamation can be confusing as the common law[30] tort rules are subject to constitutional limitations. To determine the state of the law, one must read a state's defamation laws in light of various constitutional principles such as those expressed in *New York Times Co. v. Sullivan*,[31] *Gertz v. Robert Welch, Inc.*,[32] and *Philadephia Newspapers, Inc. v. Hepps*.[33]

There are several important defenses and privileges to defamation, including truth. If a program hurts someone's reputation, but what was said is true, the communication is absolutely privileged. An absolute privilege cannot be lost through bad faith or abuse.[34] So even if one maliciously defames another, the communicator will be privileged.

While truth is an absolute defense,[35] the burden of proving truth sometimes falls on the defendant.[36] Multimedia producers should be prepared to prove the truth of any defamatory statements in their work.

There is a conditional common law privilege of fair comment and criticism.[37] This privilege applies to communications about a newsworthy person or event. Conditional privileges may be lost through bad faith or abuse. This privilege 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, such as a senator, have a much higher burden to bear to prevail in a defamation action.[38] There are two types of public figures. One is a person who has achieved such pervasive fame or notoriety that he is a public figure for all purposes. Other public figures have only been drawn into a particular public controversy and will be considered public figures for a limited range of issues.[39]

For a public figure or official to win a defamation case, they must prove that the defendant acted with "actual malice."[40] Actual malice is a term of art that means that the defendant intentionally defamed another or acted with reckless disregard of the truth. Plaintiffs find it difficult to prove actual malice. That is why so few celebrities bother suing *The National Enquirer*.

To determine whether a copyright has expired, one must refer to the law in effect when the material was published or created. Under the copyright law in effect before 1978, copyright lasted for twenty-eight years and could be renewed for an additional twenty-eight-year period.[18] Some copyright owners renewed their copyrights while others did not. Under prior law, failure to put a copyright notice on a work could place the work in the public domain.

To successfully defend itself, the *Enquirer* need only show that it did not act with 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 *Enquirer* acted recklessly, the court is obliged to dismiss the case. Mere negligence is not enough for liability.

The multimedia producer should take the following steps to protect against a defamation suit: 1) Take special care when portraying living individuals who are not public officials or figures, 2) make sure the communicator can prove that any defamatory statements are true by annotating scripts with the sources of information, documenting the truth of any derogatory statements, and showing that the statements were made without actual malice, 3) obtain releases whenever possible (it never hurts to have a release even if it is not legally required), and 4) have an attorney closely review all scripts for potential liability before production. If the multimedia producer can change the names of subjects and the setting without detracting from the dramatic value of the story, the producer should do so. If a person depicted is identifiable from the context, however, liability may result.[41] Similarly, a disclaimer in the credits such as "Any resemblance to people, living or dead is purely coincidental . . ." may not protect a producer if viewers nevertheless believe the movie is depicting an identifiable living person.

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.[42]

Like defamation, the right of privacy is subject to constitutional restrictions. The news media is not liable for statements that portray another in a false light if the statements are newsworthy unless they are made with knowing or reckless disregard of the truth (*i.e.*, actual malice).[43]

Other defamation defenses apply to invasion of privacy as well, but truth is not a defense. Express and implied consent are valid defenses. One who voluntarily reveals private facts to others cannot recover for invasion of privacy. Likewise, revealing matters of public record cannot be the basis for an invasion of privacy action.[44]

Privacy actions typically fall into four factual patterns:[45]

1) Intrusion into One's Private Affairs. This category includes such activities as wiretapping and unreasonable surveillance. The intrusion must be highly offensive. Whether an in-

trusion is highly offensive depends on the circumstances. Most people would find it offensive to discover a voyeur peering through their bedroom window. On the other hand, a salesman knocking on one's front door at dinnertime may be obnoxious but will not be offensive enough to state a cause of action.

2) Public Disclosure of Embarrassing Private Facts. One who gives publicity to a matter concerning the private life of another is subject to liability for invasion of privacy, if the matter publicized is of a kind that would be highly offensive to a reasonable person, and is not of legitimate concern to the public. In other words, it is not newsworthy.[46]

An example of this type of invasion of privacy would occur if someone digs up some dirt on another person, publicizes it, and the information is not of legitimate interest to the public. The First Amendment will protect producers, however, if they reveal newsworthy facts about others, even if the subjects are private individuals and they prefer to keep the facts secret.[47]

3) Appropriation. An action for appropriation of another's name or likeness is similar to an action for invasion of one's right of publicity. The former action seeks to compensate the plaintiff for the emotional distress, embarrassment, and hurt feelings that may arise from the use of one's name or likeness on a product.[48] The latter action seeks to compensate the plaintiff for the commercial value arising from the exploitation of one's name and likeness.[49]

As with the right of publicity, a person cannot always control the use of his name and likeness by another. While a subject can prevent another from putting his face on their pancake mix, the subject cannot stop *Time Magazine* from putting his face on its cover. Thus, the use of someone's name or likeness as part of a newsworthy incident would not be actionable.

4) False Light. Publicity which places a plaintiff in a false light will be actionable if the portrayal is highly offensive.[50] This type of invasion of privacy is similar to a defamation action but harm to reputation is not required. An example of false light invasion of privacy could entail 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 is the right to control the use of one's image, name, and likeness[51] in a commercial context. To avoid liability, multimedia producers should secure from every person who appears in a program, a signed release giving the producer the right to use their name, voice, likeness, and identity in all media worldwide in perpetuity. The producer may also want the right to use the image in advertising and on ancillary spin-off products.

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 had misappropriated Carson's identity by use of the phrase.[52] Vanna White won a suit against an advertiser who broadcast a commercial with a robot that resembled her.[53] An actor may have the right to control the use of his or her screen personae, and the characters they portray, even if they do not own the copyright to those characters.[54]

Union/Guild Permissions

If the writer is a member of the 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, as discussed below.

■ *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 previously mentioned in the text discussion apply. The matter can become even more tangled when there are multiple owners of rights in a motion picture.

For example, a film may be based on a copyrighted book. It could incorporate music, the copyright to which is jointly held by a composer, musician, and record company. Permissions may be needed from actors to use their images and voices, and from owners of rights to special effects, animation, and works of art incorporated in the film. And what if the motion picture incorporated stock footage clips? This footage was probably licensed for use in the original film only.

If a film is based on a book, the studio probably bought the "movie rights" from the book author but the studio will not necessarily own any derivative rights, such as electronic publishing rights.

Movie studios may only agree to license clips from their films on a quitclaim basis—without any warranties as to ownership of the various rights needed. It can be arduous for the producer to determine the identity of all the copyright owners and license the appropriate rights. This may prove impossible if the film clip owner will not reveal the contents of its contracts, or if the contracts have been lost or destroyed.

If the film is based on another work, such as a book, the right to use the book may have expired unbeknownst to the film clip owner. Under federal copyright law prior to 1978, a copyright lasted twenty-eight years and could be renewed for an additional twenty-eight years.[55] If the author of a book licensed movie rights to a studio, and if he died before the second copyright term began, his estate would own the copyright to the second term.[56] The studio would not own such rights, even if its contract with the author purported to transfer such rights. This is the issue discussed in the "Rear Window" case.[57]

The "Rear Window" case is of concern to multimedia producers because it may limit use of copyrighted material they license. If a producer incorporates work created before 1978, which is still in its first twenty-eight year copyright term, the producer may find that rights to the work can end abruptly if the author dies and his estate refuses to relicense it. The estate may refuse permission to use the work even if the author agreed to assign the second term to the producer.[58]

Another potential problem arises when distribution rights to a film clip

are shared by several parties, as when a studio owns domestic rights and foreign rights have been sold to other distributors. Can the owner of such foreign distribution rights prevent a multimedia producer from distributing a program with the clip in foreign territories? The answer is unclear.

If a film has been designated as culturally, historically or aesthetically significant under the National Film Preservation Act of 1988,[59] and added to the national registry, additional restrictions may apply. This Act was passed in response to the movement to colorize old black and white movies. Under the Act, twenty-three films a year can be added to the registry. While modifications of these films are not prohibited, a disclaimer must be added.

Another issue arises when a multimedia producer wants to incorporate footage of a crowd scene in her work. While filming a person in a public place is usually not an invasion of their privacy,[60] incorporation of a recognizable person's identity in a film may be an infringement of their right of publicity.

Whether a use is infringing depends upon whether the image is used in a commercial context, such as on a product, or in a newsworthy context, such as in a magazine or documentary program.[61] The latter use is protected under the First Amendment. Thus, producers should avoid incorporating a person's image in a purely commercial program or in advertising for such a program unless a release has been obtained.

The right of publicity is not limited to a person's image. Performances and objects closely associated with one's identity may also be protected. The appropriation of a photo of a race car with distinctive markings for use in a cigarette ad was held to be an infringement of the driver's identity even though he was not shown.[62]

The unauthorized use of a celebrity's persona or voice can also violate state and federal laws against unfair competition and trademark infringement. In *Waits v. Frito-Lay Inc.*,[63] the voice of singer Tom Waits was imitated in a Frito-Lay commercial. Although Waits's actual voice was not used, the court held that this use amounted to a false endorsement of a product. The court stated that a distinctive attribute of a celebrity could amount to an unregistered commercial trademark.

Of course, a person's right to restrict the use of their name, likeness, and voice has to be balanced against the rights of others (*i.e.*, journalists and filmmakers) under the First Amendment. Suppose a newspaper publisher wants to place a picture of a sports figure in its paper. Is permission required? What if 60 Minutes wants to broadcast an expose of a corrupt politician? What if Kitty Kelley wants to write a critical biography of Frank Sinatra?

In each of these instances, a person's name and likeness is being used on a "product" sold to consumers. Products such as books, movies, and plays, however, are also forms of expression protected by the First Amendment. The First Amendment allows journalists and writers to freely write about others without their consent. Otherwise, subjects could prevent any critical reporting of their activities. When one person's right of publicity conflicts with another person's rights under the First Amendment, the First Amendment rights often prevail.

When a use is newsworthy, or in the context of a documentary, biography or parody, the First Amendment will usually protect the producer. In *Hicks v. Casablanca Records*,[64] Casablanca Records made a movie called "Agatha" about the mystery writer Agatha Christie. The film portrayed her as an emotionally unstable criminal. An heir brought suit alleging infringement of Christie's right of publicity.

The court held that Casablanca's rights under the First Amendment were paramount to the estate's rights. The court reasoned that the First Amendment outweighed the right of publicity here because the subject was a public figure, and the events portrayed were obviously fictitious.

When a multimedia producer wants to license a motion picture clip portraying an actor(s), the producer should contact the Screen Actor's Guild (SAG) or the American Federation for Radio and Television Artists (AFTRA) to seek permission to use the actor's image. If the performance was first recorded on film, contact SAG; if the performance was first recorded on videotape, contact AFTRA.

The unions will supply the name of the actor's agent who can then be contacted to obtain permission to use the clip. When an actor's name is unknown it may be difficult to match his or her image with the names listed in the credits. Moreover, if an actor is not a guild member, or is deceased, it may be difficult to locate the holder of the rights.

In working with unions and guilds, the multimedia producer should recognize that a system of fees and royalty payments for electronic publishing is just developing. Some guilds have been willing to sign One Production Only (OPO) deals with multimedia producers that do not require them to become guild signatories for all productions. The Writer's Guild, for instance, allows a production company to become a Guild signatory for one production by signing a Letter of Adherence. This letter agreement does not mandate minimum scale payments or compliance with most guild rules. The producer need only agree to make pension and health fund payments.

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.

It can be especially difficult to determine whether a photo is copyrighted and the identity of its owner. Many photos are not registered with the copyright office. Even if registered, a search can be tiresome since a photo may not have a title or the title may not accurately reflect the image.

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 the photos, and indemnify the licensee if a claim should arise from a third party. Photographers may own the copyright to their photos but do not necessarily have releases from their subjects giving the photographer the right to use the subject's image in other media and for other purposes.[65]

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

The same copyright, trademark, and tort issues that apply to use of a motion picture apply to music as well. Determining copyright ownership can be particularly complex as there may be several simultaneous copyright holders in a piece of music. For example, the composer may own the copyright to the composition, the lyricist may own the copyright to the lyrics, and the record company may own the copyright to a recording.[66]

Right of publicity issues can also arise. The recent Bette Midler case[67] prohibited the use of a sound-alike voice of a celebrity as an invasion of Midler's Right of Publicity. An ad agency had asked Midler to sing the song "Do You Want To Dance," for a car advertisement. After she declined to participate, the ad agency hired one of Midler's former backup singers to record the song imitating Midler's voice and style. When the advertisements were run, many listeners thought the song was being sung by Midler. The ad agency obtained permission to use the song from its copyright owner but did not have Midler's consent to imitate her voice.

The court held that this imitation of Midler's voice infringed upon her rights. The court reasoned that when a distinctive voice of a professional singer was widely known and was deliberately imitated in order to sell a product, a tort had been committed in California. The court limited the holding to the facts, and cautioned that not every imitation of a voice to advertise merchandise was necessarily actionable.

The multimedia producer will need to obtain a mechanical license to reproduce a musical composition on a CD-ROM disk when the music is going to be used without an accompanying image. If the music is used with a video image, then a synchronization (sync) license is 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. A dramatic adaptation license, for example, would permit the multimedia producer to dramatize a song's lyrics. Thus, the lyrics could be used as the basis for a screenplay or motion picture.

If printed copies of sheet music or lyrics accompany the CD-ROM, a print license will be needed. If the title of a song is used, a license may be needed to avoid a claim of unfair competition.[68] If a portion of a musical play or opera is included on a CD-ROM, a license of "Grand Rights" should be obtained in order to use the creative elements in the work, including dialogue, scenery, choreography, and costumes.

Public performance rights are generally not needed. That is because most CD-ROM programs, unlike music performed in nightclubs, or broadcast by television or radio, will be used privately. Query whether sending a song over the Internet is a public performance.

There is no such thing as a standard fee to license music for multimedia productions. The more desirable the song, the greater the fee. The more rights requested, the greater the fee. Background or incidental use of song should cost less than a featured performance of the song. Music publishers generally charge a fixed royalty per unit sold, a percentage of the wholesale price per unit or some combination. There may be one-time fixing fees and/or advances. Flat fees or buyouts may be used for works that are unlikely to sell many units, and whenever the producer wants to avoid a continuing obligation to account to the owner of the rights.

Before committing oneself to use a particular piece of music, the multimedia producer is well advised to determine what rights are needed, who owns those rights, and whether the rights are available at a reasonable cost. Music that is not available or too expensive may need to be eliminated from the proposed production. The owner of music rights is not required to issue a license for a musical work to be reproduced or adapted in a CD-ROM. The compulsory license provisions of the Copyright Act do not apply to the production of multimedia programs.[69]

A producer who incorporates work without first securing permission may incur the expense of re-editing his work to delete the music. If the CD-ROM has been marketed, the owner of the music can obtain substantial damages, reimbursement of attorney fees, and an injunction pulling the offending product off store shelves.

The issue of digital sampling has become a hot issue in the music industry. An increasing number of artists have borrowed portions of pre-existing musical works to incorporate in their own works. The musical group Vanilla Ice, for instance, sampled the melody from the Queen-David Bowie work "Under Pressure." After the song became a hit, litigation was initiated. The suit was settled for an undisclosed amount.[70]

Sampling is accomplished with a computer synthesizer which creates a digital recording that can then be manipulated. Tone, pitch, and rhythm can be changed, and the work can be combined with other recordings. The resulting work may not sound at all like the original work from which it was sampled.

The samplers reason that borrowing a single note or short excerpt from another work is not an infringement because: 1) What has been taken is not

The "Rear Window" case is of concern to multimedia producers because it may limit use of copyrighted material they license. If a producer incorporates work created before 1978, which is still in its first twenty-eight year copyright term, the producer may find that rights to the work can end abruptly if the author dies and his estate refuses to relicense it. The estate may refuse permission to use the work even if the author agreed to assign the second term to the producer.

an expression of an author (*i.e.*, no more than an idea); or 2) the taking is protected under the fair use doctrine; or 3) the use is protected under the First Amendment.

In the recent case of *Acuff-Rose Music, Inc. v. Campbell*[71] some of these issues were raised. Here, the group 2 Live Crew parodied the Roy Orbison song "Pretty Woman." The Court of Appeals, Sixth Circuit, found that 2 Live Crew's use of the prior work was copyright infringement and not a fair use as a matter of law.[72] The United States Supreme Court disagreed, and reversed the lower court, stating that the use of the prior work could be a fair use, and whether it was, needed to be determined on a case-by-case basis.[73]

While it is doubtful that taking a few notes from another work could be deemed an infringement,[74] there is no firm guideline that establishes how much can safely be taken. Only a few cases have grappled with the issue of how much a digital sampler can remove under the fair use doctrine.[75] If the borrowed excerpt is recognizable to others, it is arguably an infringement. Thus, artists who borrow small amounts of other people's music may be liable for copyright infringement. There is no truth to the widespread belief that six or eight bars of music can be borrowed with impunity.

The identities of copyright owners can be obtained through the performing arts guilds (SAG/AFTRA), the Songwriter's Guild of America (a trade association) or American Federation of Musicians (AFM) (AFTRA covers singers and AFM covers instrumentalists). Publishers can be contacted directly or through the Harry Fox Agency, which acts as a licensing agent for many publishers.[76]

Rights may need to be secured from a variety of parties including the composer, lyricist, publisher, agents, record companies, unions and in some cases the heirs or assigns of the aforementioned. Songwriters often sell or assign their copyright to a publisher who then controls the rights. The publisher will then share royalties derived from the song with the songwriter. In some cases the publisher may need to obtain the songwriter's approval before licensing the work. Record companies usually retain rights to their recordings, but they may need to obtain artist approvals for some uses.

Because of the complexity of licensing music, producers may want to retain a rights and permissions agency (*i.e.*, a clip clearance company) to negotiate and secure the necessary rights.

Public domain music can be used without payment.[77] Those compositions that were published more than seventy-five years ago are clearly in the public domain, and some compositions published less than seventy-five years ago may have fallen into the public domain. Some musical works, while in the public domain in the United States, may be protected elsewhere. Keep in mind that while a composition may be in the public domain, a recording of that composition may not be. In such a case, the multimedia producer will have to either locate a recording in the public domain, which may be quite old with poor sound quality, or hire musicians and create a new recording of the composition.

The multimedia producer will need to obtain a mechanical license to reproduce a musical composition on a CD-ROM disk when the music is going to be used without an accompanying image. If the music is used with a video image, then a synchronization (sync) license is needed.

The expense and burden of licensing can be avoided by commissioning original music for the CD-ROM. Here, the producer must be careful to make sure all rights are obtained. If the composer is an employee for hire, the copyright to the work product will be owned by the employer (producer). A written employment contract is needed. If the employee incorporates any existing material in his work, rights to that material must be secured.

Inexpensive music and sound effects can also be licensed from music libraries on a one-time fixed fee basis.

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 in a separate category from pictorial, graphic, and sculptural works.[78] The copyright in an architectural work, however, is limited. The copyright owner cannot prevent others from publicly displaying pictures and photographs of buildings visible from a public place.[79]

Of course, even if a producer does not need permission to include a building's image in a program, that does not mean the producer can trespass on another's property to capture that image. Moreover, showing a recognizable image of a building in a defamatory context could harm the reputation of a company or individuals.

FINE ART

If art work is incorporated in a multimedia production, a license may be needed. Pictorial, graphic, and sculptural works of art are copyrightable[80] and displaying them in a program without permission could be an infringement. Remember that ownership of an item of art work does not necessarily include ownership of the copyright to it. Thus, the owner of the physical item may have the right to sell it but does not necessarily have the right to reproduce it. The latter right is part of the copyright. Note also that California law provides that when a work of art is sold, the right to reproduce it is reserved to the artist unless that right is transferred in writing and the writing specifically refers to the right of reproduction.[81]

Suppose a piece of sculpture appears momentarily in the background of a scene. Is permission of the copyright owner necessary? Probably not. The maker of school room charts and wall decorations that appeared in the background as scenery in a "Barney and Sons" videotape recently sued for

copyright infringement.[82] The charts and decorations appeared only fleetingly and were often obscured by the actors. The court refused to issue an injunction against the producers of the videotape on the grounds that the use was so minimal that it was not infringing. The fact that the video was educational in nature was an important factor in finding a fair use. If a producer features art work in the foreground, however, a release should be obtained.

When Congress passed the Visual Artists Rights Act of 1990,[83] the United States expressly recognized certain moral rights that artists have in works of visual art such as paintings, drawings, sculpture, and still photos. Moral Rights include the Right of Paternity, which is the right of an author to claim authorship to her work and prevent the use of her name on works she did not create, and the Right of Integrity which prevents others from distorting or mutilating her work.

Moral Rights differ from copyright. While the copyright to a work may be sold, the artist's moral rights may prevent the buyer from removing the artist's name or modifying the work. While the United States generally does not recognize moral rights, many of the moral rights granted artists in other countries are protected here as violation of our unfair competition and defamation laws.

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,[84] it cannot be freely borrowed unless it is in the public domain.

The Fair Use Doctrine has been successfully invoked to protect programmers who reverse engineer another's program although the process entails making a reproduction of the entire work.[85] In Sega Enterprises Ltd. v. Accolade Inc.,[86] a video game developer disassembled a copyrighted program in order to make a compatible game.

In *Apple Computer, Inc. v. Microsoft Corp.*,[87] the court held that the "look and feel" of Apple's interface is not protectable expression.[88] The court was unwilling to give Apple a monopoly over the concept of a user-friendly graphical user interface. Another case, however, has held that the menu commands and menu command structure of the Lotus 1-2-3 spreadsheet program are protected expression.[89] Here, the two spreadsheet menu trees were virtually identical. Thus, computer developers can borrow such ideas as that of using a graphical user interface (GUI), and offer functions similar to other programs. The identical copying of another program's icons, however, will likely be an infringement.

The processing and transmission of computer programs raise interesting copyright issues. One court has held that merely loading a computer program from a disk into the random access memory (RAM) of a computer is a "copying" of the program, and therefore a violation of copyright unless otherwise privileged.[90] In Florida, an operator of a computer bulletin board was sued by Playboy Enterprises when subscribers downloaded some Playboy photos. The photos had been uploaded by subscribers, not by the operator who had no knowledge of the photos until he was served with a complaint. The court found that the transmission of the photos was a public "display" and thus a violation of Playboy's copyright.[91] The fact that the operator was unaware of the infringement was no defense since intent or knowledge is not required for one to infringe another's copyright. Producers who desire to borrow or emulate computer programs should proceed with caution and seek legal advice early.

Software names, logos, and symbols may also be protected under state and federal trademark law. Recently, a federal appeals court held that the title of a newspaper column may be a trademark although the column was not marketed as a separate feature. Thus, a subsidiary component of the newspaper was deemed eligible for trademark protection. By analogy, computer program icons could be protectable trademarks.[92]

Software can also be protected under patent law which protects the "Useful Arts," meaning any new and useful process or machinery.[93] Thus, multimedia software, the process, the hardware, and the machine, are patentable.

A patent must be applied for and granted by the government after a determination has been made that the applicant is eligible for it. If the patent is granted, the inventor receives a seventeen-year monopoly on using, making, or selling the invention.[94] The United States grants patents to the first inventor, not the first person to file a patent application. Therefore, if two parties contest ownership to an invention, the first inventor is entitled to the patent.[95]

A patent cannot be granted when the subject matter sought to be patented and the prior art are such that the subject matter was obvious to people with ordinary skill in that art.[96] It can be difficult to determine non-obviousness in computer program inventions because the Patent Office has lacked extensive records for this type of useful art. A "prior art search" is used to determine the state of the prior art in the field of the invention. If software is developed by an outside contractor, the agreement between the parties needs to specify who will own the copyright and any patent to the work, and which rights are being licensed. The producer should have a written employment agreement with a covenant that the employee or independent contractor assigns all copyrights, inventions (whether patentable or not), and trade secrets developed in the course of employment to the employer.

If software is licensed for use in a multimedia program, the license agreement needs to spell out what uses can be made of the acquired software. Can the software be used to develop a new product? Can it be incorporated into the final work? If a license fee is to be paid, is it a one-time fee for unlimited use or a per unit royalty? Does the owner of the borrowed software share in the copyright of the new work?

■ *DEFENSIVE TACTICS*

The multimedia producer should consult 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. For instance, the attorney could suggest that certain rights not be purchased if the producer is willing to fictionalize a story, rely on the fair use doctrine, change an

individual's identity, or add disclaimers. The attorney can also check the chain of title of all content that has been purchased for inclusion in the program. Recall that if the seller of some video footage, for instance, does not own all the rights needed to use the footage in a multimedia program, the buyer cannot receive all the rights needed irrespective of the terms of the contract.

Some licensors may allow the licensee to review the contracts, releases, and other documents that prove the licensor has obtained all the needed rights. If the licensor will not permit third parties to review their contracts, the most the licensee may be able to obtain is a warranty from the licensor that he owns the rights he is selling. If possible, the licensor should indemnify the licensee for any loss sustained from breach of his warranties.

The licensee will also want the licensor to warrant that the property does not infringe on anyone else's rights (including rights of defamation, invasion of privacy, right of publicity, trademark and copyright) and that there are no claims or litigation outstanding in regard to the property. If the licensor is a corporation or partnership, the licensee may want it to warrant that it has authority to enter into the license.

Besides express warranties found in a contract, there may be some warranties implied by law. The implied warranties of merchantability, for example, may exist even if the contract does not mention it.[97] Products can be sold without a warranty when the seller adds a prominent disclaimer notifying the buyer that the product is sold "as is" without any implied warranties.[98]

■ INSURANCE

To protect oneself from potential liability, the multimedia producer should consider purchasing Errors and Omissions (E & O) insurance. Errors and Omissions insurance will protect the insured from negligence that 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.

Recently, American International Group (AIG), a large insurer, announced that it would offer Patent Infringement Liability Insurance. The insurance includes coverage of expenses and damages, including attorney fees, incurred to defend any lawsuit alleging infringement of a United States patent. The minimum premium, however, is fifty thousand dollars and the minimum deductible is fifty thousand dollars. The insured also has to pay ten percent of all damages and defense costs, and any punitive damages that may be awarded.

Insurance will not protect the insured from acts of intentional wrongdoing such as deliberate infringement or fraud. Therefore, the producer should be prepared to show that he was acting in good faith. He should maintain records of releases and correspondence to secure rights, and copies of letters from counsel in regard to what licenses are necessary.

Insurers will typically require an applicant for insurance to secure all necessary licenses and permissions. Also, a copyright report and title report will be needed, and all employment agreements must be in writing. If music is going to be used, synchronization and performance licenses will be necessary.

If the multimedia script is original, its origins must be determined to ensure that everything in it is original and none of it has been copied from another work without permission. The insurer will then carefully review the project before issuing a policy.

Errors and Omissions insurance will pay for any liability incurred, as well as defense costs. The deductible is often ten thousand dollars or more.

■ CONCLUSION

New technology permits producers to make innovative multimedia programs. 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.

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, a knowledgeable attorney in multimedia legal issues should be consulted early and E & O insurance should be purchased.

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Endnotes

1. 3 Nimmer on Copyright 10-86.
2. *Bartsch v. Metro-Goldwyn-Mayer, Inc.,* 391 F.2d 150 (2d Cir. 1968).
3. *Id.*
4. *Cohen v. Paramount Pictures Corp.,* 845 F.2d 851 (9th Cir. 1988).
5. *Id.*
6. 17 U.S.C. §102 (1994).
7. Copyright does not extend to any idea, procedure, process, system, method of operation, principle or discovery, regardless of the form in which it is described, explained, illustrated or embodied. 17 U.S.C. §102(b) (1994).
8. *Takeall v. Pepsico, Inc.,* 29 U.S.P.Q.2d 1913, 1993 (4th Cir. 1993) (unpublished per curiam decision).
9. *Id.*
10. *Morrissey v. Procter & Gamble Co.,* 379 F.2d 675 (1st Cir. 1967); *Herbert Rosenthal Jewelry Corp. v. Kalpakian,* 446 F.2d 738 (9th Cir. 1971).
11. *Beal v. Paramount Pictures Corp.,* 20 F.3d 454 (11th Cir. 1994); *Engineering Dynamics, Inc. v. Structural Software, Inc.,* 26 F.3d 1335 (5th Cir. 1994).
12. An infringement is not confined to literal and exact repetition or reproduction. *Universal Pictures Co., Inc., v. Harold Lloyd Corp.,* 162 F.2d 354, 360 (9th Cir. 1947).
13. *See Sid & Marty Krofft Television Productions, Inc. v. McDonald's Corp.,* 562 F.2d 1157, 1162 (9th Cir. 1977).
14. This example is taken from International Copyright Litigation in United States Courts: **Lionel S. Sobel, Jurisdiction, Damages and Choice of Law, in Emerging Issues in Intellectual Property Practice, Continuing Education of the Bar** 73 (1994).
15. *The Gold Rush,* 2IIC 315 (Switzerland S. Ct. 1970).
16. *International Film Exch. v. Corinth Films,* 621 F. Supp. 631 (S.D.N.Y. 1985).
17. Sobel, *supra* note 13, at 83 (citing *Huston v. Turner Entertainment,* Cuss. ass. plen. (1991)).
18. When the law was changed in 1976, those copyright owners with works in the second renewal period were given an additional extension of nineteen years added to the second term, for a total copyright of seventy-five years. Current copyright law

grants copyright for the lifetime of the author plus fifty years.

19. Note that the NAFTA Implementation Act can revive copyright to movies first fixed or published in a NAFTA country. The law revives only those movies that went into the public domain between 1978 and February 1989 because they lacked a copyright notice as required under prior copyright law. Since movies published without a valid copyright notice during that time were subject to a five-year cure provision upon publication, the effect of this law is to lengthen the cure provision to the present. Resurrection of the copyright requires filing with the U.S. Copyright Office. N.A.F.T.A. Implementation Act, Pub. L. No. 103-182 §104A.
20. *Apple Computer, Inc. v. Microsoft Corp.*, 821 F. Supp. 616 (N.D. Cal. 1993) (citing *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485 (9th Cir. 1984)).
21. *Twin Peak Prod. v. Publications Int'l*, 996 F.2d 1366 (2d Cir. 1993).
22. *See* The Lanham Act, 15 U.S.C.A. §1125 (1994).
23. *See, e.g., Lutz v. De Laurentis*, 260 Cal. Rptr. 106 (1989); *Metro-Goldwyn-Mayer, Inc. v. Lee*, 27 Cal. Rptr. 833 (1963).
24. A trademark owner's rights extend only to injurious, unauthorized commercial uses of the mark by another and do not allow the trademark owner to quash an unauthorized use of the mark by another who is communicating ideas or expressing points of view. *L.L. Bean v. Drake Publishers, Inc.*, 811 F.2d 26 (2d Cir. 1989).
25. *Walt Disney Prods. v. Air Pirates*, 581 F.2d 751 (9th Cir. 1978), *cert. denied*, 439 U.S. 1132 (1979).
26. *Detective Comics, Inc. v. Bruns*, 111 F.2d 432, 433-34 (2d Cir. 1940); *DC Comics, Inc. v. Filmation Assocs.*, 486 F. Supp. 1273, 1277 (S.D.N.Y. 1980).
27. The Lanham Act should be construed to apply to artistic works only where the public interest in avoiding consumer confusion outweighs the public interest in free expression. *Rogers v. Grimaldi*, 875 F.2d 994 (2d Cir. 1989).
28. *DC Comics*, 486 F. Supp. at 1277.
29. *Kimmerle v. New York Evening Journal*, Inc., 262 N.Y. 99, 102 (1933).
30. The 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 such as Congress.
31. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).
32. *Gertz v. Welch, Inc.*, 418 U.S. 323 (1974).
33. *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986).
34. *McCuddin v. Dickinson*, 300 N.W. 308, 309 (Iowa Ct. App. 1941).
35. An absolute privilege to defamation cannot be lost through bad faith or abuse. *McCuddin v. Dickinson*, 300 N.W. 308, 309 (1941).
36. *See Philadephia Newspapers*, 475 U.S. at 767.
37. *Cohen v. Cowles Publishing Co.*, 273 P.2d 893, 894 (1954).
38. *See Sullivan*, 376 U.S. at 279.
39. *Gertz*, 418 U.S. at 344-45.
40. *Sullivan*, 376 U.S. at 254.
41. *Bindrim v. Mitchell*, 155 Cal. Rptr. 29 (1979). *See Middlebrooks v. Curtis Publishing Co.*, 413 F.2d 141 (1969).
42. *Garner v. Triangle Publications, Inc.*, 97 F. Supp. 546, 548 (S.D.N.Y. 1951).
43. *Sullivan*, 376 U.S. at 279.
44. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).
45. Privacy actions need not fall within one of these four categories to be actionable.
46. *See, e.g., Diaz v. Oakland Trib., Inc.*, 188 Cal. Rptr. 762 (1983).
47. *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222 (7th Cir. 1993).
48. *See* **Restatement Second of Torts** §652C; *Martinez by Martinez v. Democrat-Herald Publishing Co., Inc.*, 669 P.2d 818, 820 (OR. Ct. App. 1983).
49. *See, e.g., Estate of Presley v. Russen*, 513 F. Supp. 1339, 1353 (D.N.J. 1981).
50. *See, e.g., Sharrif v. Martyn*, 613 So.2d 768 (1993); *Cox*, 420 U.S. at 469.
51. Voice and signature are also protected.
52. *Carson v. Here's Johnny Portable Toilets, Inc.*, 698 F.2d 831 (6th Cir. 1983).
53. *White v. Samsung Elec. Am., Inc.*, 971 F.2d 1395 (9th Cir. 1992), *rehearing en banc denied*, 989 F.2d 1512 (9th Cir. 1993).
54. *See McFarland v. Miller*, 14 F.3d 912 (3rd Cir. 1994).
55. The Copyright Act of 1909, 35 Stat. 1075, 17 U.S.C. §1 et seq. (1976 ed.).
56. Assuming the estate renewed the copyright.
57. *Stewart v. Abend*, 495 U.S. 207, 219 (1990).
58. There are some limitations on termination of derivative rights. *See* 17 U.S.C. §304(c) (1994).
59. 2 U.S.C. §178a (1994).
60. Note that publication of a photograph of a person whose underwear was exposed in public was held an invasion of privacy. *Daily Times Democrat v. Graham*, 162 So.2d 474 (1964).
61. *See, e.g., Finger v. Omni Publications Intern*, 566 N.E.2d 141 (N.Y. 1990).
62. *Motschenbacher v. R.J. Reynolds Tobacco Co.*, 498 F.2d 821 (9th Cir. 1974).
63. *Waits v. Frito-Lay, Inc.*, 978 F.2d 1093 (9th Cir. 1992).
64. *Hicks v. Casablanca Records*, 464 F. Supp. 426 (S.D.N.Y. 1978).
65. *See Faber v. Condecor, Inc.*, 477 A.2d 1289 (1984).
66. Only original sound recordings fixed and published as of February 15, 1972, are copyrightable. Earlier recordings, however, may be protected under state law.
67. *Bette Midler v. Ford Motor Co.*, 849 F.2d 460 (9th Cir. 1988).
68. *See Tomlin v. Walt Disney Prods.*, 96 Cal. Rptr. 118 (1971).
69. The compulsory license applies only to phonorecords, not to works that have accompanying audio-visual elements. Moreover, the compulsory license does not cover the right to use music in synchronization with images.
70. Heather D. Rafter, *Digitized Music Adds Notes to Copyright*, **San Francisco Daily J.**, Intellectual Property Supplement, March 30, 1994, at 15.
71. *Acuff-Rose v. Campbell*, 972 F.2d 1429 (6th Cir. 1992).
72. *Id.*
73. *Campbell v. Acuff-Rose Music*, 114 S. Ct. 1164 (1994).
74. *See, e.g., United States v. Taxe*, 380 F. Supp. 1010, 1014-15 (C.D. Cal. 1974).
75. *See, e.g., Grand Upright Music Ltd. v Warner Brother's Records, Inc.*, 780 F. Supp. 1982 (S.D.N.Y. 1991); *Jarvis v. A & M Records*, 827 F. Supp. 282 (D.N.J. 1993).
76. The Harry Fox Agency, 205 E. 42nd St., New York, N.Y. 10017.(212) 370-5330.
77. BZ Rights Stuff, Inc. sells an encyclopedia of public domain music for $249. BZ Rights Stuff, Inc., 125 West 72nd St., N.Y., N.Y. 10023. Phone: (212) 580-0615; Fax: (212) 769-9224.
78. *See* 17 U.S.C. §102 (Supp. V 1993).
79. 17 U.S.C. §120 (1994).
80. 17 U.S.C. §102a(5) (1982).
81. **Cal. Civil Code** §982(c) (1994). *See Playboy Enterprises, Inc. v. Dumas*, 831 F. Supp. 295 (S.D.N.Y. 1993).
82. *Frank Schaffer Publications, Inc. v. The Lyons Partnership*, L.P., Civil Action No. CV 93 3614R (C.D. Cal. 1993).
83. 17 U.S.C. §106A (Supp. V 1993).
84. 17 U.S.C. §101 (1994).
85. *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832 (Fed. Cir. 1992).
86. *Sega Enter. Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992) *cited in*, Christopher Ottenweller, *Emerging Issues in Intellectual Property Practice*, in **Emerging Issues in Copyright Law** pg 91, (CEB Program Handbook, April 1974).
87. *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006 (1992).
88. *Id.*
89. *Lotus Dev. Corp. v. Borland Int'l, Inc.*, 799 F. Supp. 203 (D. Mass 1992), 831 F. Supp. 202 (D. Mass 1993), 831 F. Supp. 223 (D. Mass. 1993).
90. *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).
91. *Playboy Enterprises, Inc. v. Frena*, 839 F. Supp. 1552 (M.D. Fla. 1993).
92. James F. Brelsford, **Trademark Case Will Affect Multimedia**, *San Francisco Daily J.*, Intellectual Property Supplement, March 30, 1994, at 14.
93. 35 U.S.C. §101 (1994).
94. 35 U.S.C. §154 (1994).
95. 35 U.S.C. §154(g) (1994).
96. 35 U.S.C. §103 (1994).
97. **Cal. Commercial Code** §2314 (1993); *see* U.C.C. §2314(c).
98. To be effective the disclaimer should be prominent.