FRONTIER ISSUES: PITFALLS IN DEVELOPING AND MARKETING MULTIMEDIA PRODUCTS

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I. INTRODUCTION

In principle, licensing for a multimedia production is no different than licensing for a film or television show. However, the operative phrase is *in principle.* As a practical matter, there are two significant differences in licensing for multimedia. The first is the sheer volume of licenses that must be negotiated. It is not uncommon for a multimedia developer to negotiate over a hundred separate agreements.

The second difference is the lack of a "track record" for pricing multimedia licenses. Content owners are almost unanimously asking top dollar for licenses—amounts that may make sense in the world of feature films or network television, but not in today's multimedia projects.[1] There are no winners when the costs are so high that there is no market for the content.

The following sections provide an overview of licensing practices, including an analysis of various contract terms common to all forms of licensing,[2] followed by specific information required by those licensing particular types of materials for use in multimedia works, including: text;[3] moving images;[4] still images;[5] music and sound;[6] and computer software.[7]

In appropriate instances, it may be possible to obtain a license directly from the artist or copyright owner. In many cases, however, it will be necessary to negotiate with a guild, union, or trade association that represents the artist or copyright owner, further complicating the process.

1 *See* Steven Rappaport, *Translating Digital Age Language*, BILLBOARD, Jan. 8, 1994, at 6.
2 *See generally infra* part IV.
3 *See infra* part V.
4 *See infra* part VI.
5 *See infra* part VII.
6 *See infra* part VIII.
7 *See infra* part IX.

II. COPYRIGHT LICENSES

As multimedia projects generally consist of a combination of text, audio, video, graphics, and computer software, a license or release will be needed for all copyrighted works used in the project, unless the work is owned by the producer,[8] is in the public domain,[9] or its use can be classified as a "fair use."[10]

Care must be taken to ensure that the rights to all necessary elements of the work have been obtained. For example, if the producer is licensing a video clip that contains music along with the pictorial content, the producer should not merely assume that the person from whom it is licensing the video also controls the rights to the music. The producer of the video may have only the limited right to use the music in the video, and, therefore, cannot grant the right to use the music in another medium, such as multimedia.

In this situation, the producer should try to protect itself by requiring that either (1) the licensor provide written documentation establishing its right to license the music or (2) the licensor include specific warranties and indemnification provisions in the license to protect the producer from any third party infringement claims. In addition, the licensee should perform, if possible, a copyright search of each element of the work.

Of course, where all of the elements are authored or owned by one party, there is no reason to license each element separately—a single license that specifically covers all elements will be sufficient.

III. DEALING WITH CONTENT PROVIDERS

With the advent of multimedia producers, there are now new licensees telling content owners that the rules are changing. However, the content owners still control the copyrights and other

8 Where the producer personally creates the materials, there is no question of ownership. However, where the producer hires others to create the materials, there may be a question as to ownership. Unless the creator is clearly an employee of the producer, the producer should obtain a written agreement from the creator to insure that the producer owns all copyright rights in the work. This agreement can be a "work-made-for-hire" agreement, see 17 U.S.C. § 101 (1988)(definition of "work-made-for-hire"), a copyright assignment, or a combination of both.

9 While the term *public domain* is widely and loosely used to mean "free to use without infringement," it is important to determine why a work is considered to be in the "public domain." Certain materials that are in the public domain can be used freely and distributed worldwide without concern. Other materials may only be in the public domain in the United States, but still protected by copyright elsewhere in the world. Thus, the mere fact that something is generally considered to be in the "public domain" does not obviate the need to determine whether it is protected by copyright in any territory in which the multimedia work is to be distributed, and to obtain the necessary licenses or releases for those territories.

10 *See* 17 U.S.C. § 107 (1988) (fair use provisions).

rights to the content. Many of these owners refuse to acknowledge that the rules are changing, and are trying to apply the traditional rules to multimedia. Other owners recognize that the business is changing, but are not willing to proceed until they understand the rules better and can control the business.

A. *Locating Content*

It is not just the rules, but the business itself that is changing. The enormity of this change will begin to reveal itself when system compatibility becomes irrelevant and information delivery becomes ubiquitous. Information indexing and retrieval systems design is entering a new phase where discrete parts of images and other types of information can be accessed via the audio or visual value of the desired information, not just the text. For example, without knowing the name of the Eiffel Tower, a system user will be able to retrieve pictures and information about the Paris landmark just by drawing its form with a mouse or pen on a tablet or screen. By humming a tune, the user will be able to obtain the name of the song being hummed.

Current systems catalog information by title, author, and general-to-specific subject categories, and cross-reference those tags with key internal terms. If the user knows only the author and the subject, for example, Freud and dreams, it is possible to find a title, *The Interpretation of Dreams*, the date of the book, and other identifying terms, such as "symbols."

Film indexing works similarly, with the director serving as the author. The American Film Institute (AFI) catalogues films in such a way that a researcher can find an entry by genre and subgenre, for example, western and western musical. Once a specific entry is located, all credit information is available. However, only key actors and other key data are cross-referenced.

Historical photographs and other visual information and music conform to the standard cataloguing procedures. Generic images, film, music, and sound found in most stock houses, libraries, and production archives are even more meticulously cross-referenced to permit quick delivery of the requested materials.[11]

B. *Obtaining Clearances*

It is often difficult to locate the many creative people who hold the copyrights and other rights in the pre-existing material to

11 *See, e.g.*, Elizabeth Whisnant and Mary Ann Skinner, *The Power Inside: Creating and Using In-House Databases in the Newsday Library*, EDITOR & PUB. MAG., Sept. 5, 1992, at 24.

be used in a multimedia project. It is generally believed by most designers that easy access is the key to keeping people honest. In other words, people will do the right thing if doing so is not too terribly complicated.

Today the sheer number of agents, lawyers, publishers, licensing societies, unions, and guilds increases the frustration of trying to create new products in a new market because these players are necessary absent an infrastructure or workable set of standards.

IV. CONTENT LICENSING PRACTICES

While licenses for different types of content will vary, there are certain terms common to all license agreements. The most important of these terms is discussed below.

A. *Scope of Rights Granted*

Licensing arrangements must carefully and unambiguously set forth the rights granted to the multimedia producer. A typical, broad "grant of rights" clause might state: The Licensor grants to the Licensee the right to use, modify, adapt, reproduce, and distribute the Work, or any portion thereof, throughout the world during the full term of the copyright as part of and in connection with the multimedia work titled X.

This language is extremely broad and not specific as to what subsidiary rights are granted, if any. If read literally, the grant only applies to reproduction and distribution of the work and does not apply to other rights, such as incorporating the work in a film or broadcasting the work on television. To avoid potential problems, the grant should be specific and the agreement should also contain a "reservation of right" clause in favor of the licensor, such as:

> All rights in the Work not specifically granted to the Licensee, now or hereafter known, developed or in existence and whether or not competitive with the rights granted herein, are reserved to the Licensor in all forms of media throughout the world for the Licensor's use or disposition at his sole discretion, without obligation to the Licensee.

If properly drafted, these clauses will prevent any disagreement between the parties as to which rights were granted by and which were reserved to the Licensor.

B. *Exclusivity*

When a multimedia project is created from many generic elements, these elements may be acquired on a non-exclusive basis—

which means that others can also license the same content for use in their multimedia work. When an item is essential to the success of a project, however, then it is important to obtain an exclusive license to the material. Indeed, many projects would have no value unless they involved an exclusive license.

Licensors are naturally reluctant to give exclusive licenses to their works, since it ties up the work, and makes the licensor totally dependent on the quality of the product and the marketing expertise of the multimedia producer. It also precludes the licensor from entering into more lucrative projects that might come along in the future.

One way of ameliorating the problems associated with exclusive licenses is for the licensor to insist on certain provisions in the license:

1. an automatic conversion of the license from exclusive to non-exclusive if the licensee fails to meet certain sales or revenue goals;

2. a large up-front payment, which may either be a flat fee or an advance against royalties;

3. a minimum guaranteed royalty per quarter or year, which may increase over time, and which must be paid regardless of actual sales;

4. the right to terminate the license entirely if sales or royalty goals are not met; and/or

5. limiting the exclusivity to a specific term, medium, territory, platform or other market, and reserving all other markets to the licensor.

C. *Limited Versus Unlimited Rights*

A grant of *unlimited rights* to a work, like a song or book, means that the producer has the right to use the work in a multimedia product without any limitation on the market, term, or territory. A *limited rights* clause, on the other hand, will specify the product, platform, market, term, and/or territory in which the work can be exploited.

A limited rights clause is one way to reduce licensing costs, which enables the multimedia producer to complete a specific project within budget and with the required content. If a particular licensee does not need certain rights, the licensee should not be required to pay for them, unless those rights will have no value independent of the rights granted. The limited rights granted can be either exclusive or non-exclusive. The content owner retains

the right to license the remaining rights as he or she deems appropriate—even to the competitors of an existing licensee.

D. *Adaptation and Moral Rights*

The right to adapt pre-existing material for a multimedia project should be expressly stated in the license. The multimedia producer will want no restrictions on the kinds or number of changes it can make to the licensed materials. The artist and/or copyright holder may disagree and seek to limit the adaptation rights granted.

If any adaptation rights are granted, they should also include a waiver of moral rights held by the creator in the licensed properties, particularly if the producer plans to market the resulting product outside the United States. While some jurisdictions do not permit a contractual waiver of moral rights, the waiver should be included for those jurisdictions in which such waivers are permitted.[12]

E. *Marketing Rights and Obligations*

All license agreements should provide the right to distribute the product once it has been completed. To make sure that the product receives the exposure necessary to succeed in its intended markets, the producer should contractually identify its right to use the licensed content in the promotion of the product. It may be necessary to acquire other rights in the content, like merchandising rights, in order to achieve the desired level of exposure. In today's marketplace, cross-merchandising schemes are important strategies for increasing product awareness.

F. *Fees and Royalties*

Whether licensing text, still images, moving images, or music, there are no rules for pricing of material. The price is whatever a willing licensor and willing licensee agree upon.

Even if the material is in the public domain, a producer may nonetheless have to license the use of source material of sufficient quality, and may have to pay a high fee to do so. While it is generally less expensive to obtain public domain feature film clips, for example, than similar materials still under copyright, any per-

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12 *See* P. GELLER and M. NIMMER, INT'L COPYRIGHT LAW AND PRACTICE §§ 6[2]-6[3] (1989); Paul Edward Geller, *French High Court Remands Huston Colorization Case*, ENT. LAW REP., Aug. 1991, at 8.

former appearing in those clips may still demand a substantial fee for the use of his or her distinctive image or voice ("persona").

Even the search necessary to determine the public domain status of a work will add to the budget of a multimedia project. Consequently, it is not just the cost of the license itself which should be factored into the project's budget, but the entire process of obtaining clearance of all rights.

Payments for the use of materials may be made in the form of a fixed fee, a royalty, or a combination of both. The type of arrangement and the amount and form of payments will depend upon many factors including: the popularity of the pre-existing materials; the popularity of the multimedia developer; the type of rights granted and the use to be made of the materials; and the amount of material being used.

A *fixed fee*, as the name implies, is a set fee paid for the use of the materials—usually paid at the execution of the license.[13] It may be paid, however, in installments over a period of time. A fixed fee is neither tied to the total revenues earned by the producer nor the total number of units sold. Under a fixed arrangement, the licensor shares neither the risk nor the profits in the new work.

Royalties are fees based either on the earnings received by the producer from the sale or licensing of the work, or on the number of CD-ROMs sold. The amount of royalties can be based upon the value of the content to the producer (i.e., the value received for the use of the content). In other instances, where sales of the multimedia work will displace other revenues, the content owner might receive upon the diminished value of the content to the content owner. Royalties are an accepted method of sharing the risks and the profits of a new work.

Unlike a fixed fee arrangement, which is a short term relationship that terminates upon payment, a royalty arrangement is more akin to a "marriage." Such an arrangement may last as long as the work is being sold.

A third possibility, and one that is common in multimedia projects, is a combination of the two forms of payment—an upfront payment and future royalties as well. Content providers often demand upfront payments:

> 1. to cover costs (administrative and attorneys' fees) incurred in negotiating the license and providing the source materials;

[13] A front-end fixed fee payment is called a *buy out*.

> 2. to ensure that the multimedia producer is serious about developing the product; and
>
> 3. to ensure that it recovers something for the content even if the project is never completed or is unsuccessful.

The license should specify whether the initial payment is an *advance* against royalties, which the producer is permitted to recoup from royalties otherwise due to the licensor, or whether it is a payment in addition to future royalties.

The amount of royalties will generally depend upon the relative bargaining strengths of the parties. One issue that may arise when dealing with licenses is whether the royalties should be granted for a flat percentage of revenues, should be based on a per-unit-sold basis, or possibly a combination of both. Other issues the parties will have to address include whether the basis for royalties will be the retail price or the wholesale price of the product, and the possibility of withholding a percentage of royalties in anticipation of customer returns.

G. *Term and Termination*

In most cases, the length of a license ("term") will depend upon the relative bargaining power of the parties. A licensee generally will seek the longest term possible in order to recover its investment and maximize its profit.

The licensor likely will want to keep the term shorter than the licensee desires. In this manner, the licensor can increase the license fees or royalties if the product is successful, or relicense the content at a higher price after the license expires.

Termination provisions also may deal generally with a party's failure to comply with the terms and conditions of the contract, or may specify the particular acts or omissions that will trigger a right of termination. Termination might occur either with or without notice and allows the party an opportunity to cure the breach.

Of course, termination does not have to be the sole remedy. Other remedies may include a contraction of granted rights (e.g., converting an exclusive license to a non-exclusive license), an increase in license fees and/or costs, or other negotiated modifications in the license terms.

The parties also may agree to arbitrate a dispute so that minor problems and misunderstandings do not result in termination.

H. *Markets, Territories, Media, and Platforms*

When licensing content for use in a multimedia project, it is

essential to define: 1. the types of markets to be exploited; 2. the territories in which the product may be sold; 3. the platforms on which the products will operate; and 4. the types of media on which it can be distributed.

Under consideration at this time are not only the commodity or disk-based products, but interactive television as well. With licensing it is possible to define a narrow market such as a CD-ROM product to run on an Apple Macintosh computer in the non-broadcast educational market.

It might not be important to obtain the international rights if the domestic rights are sufficient. Conversely, it may be critical to widen the territorial base to fully exploit a product before it becomes obsolete.

Licenses are most desirable for the life of the copyright. However, term limitations are common in the publishing business and may become the norm in the multimedia market. For example, photographs or illustrations are commonly licensed for magazine articles or covers on a one-time-and-use basis. A licensee should not assume that music, text, or imagery licensed for use in a particular product for a particular market can be reused for another product or market without a specific license grant to that effect.

In the traditional entertainment industry, a territorial grant for the United States is usually interpreted to include Canada, Mexico, and U.S. military installations anywhere around the world.[14] Other territories are negotiated on a region-by-region basis, usually defined by the scope of the distributor's ability to distribute the product into these different regions of the world. In the computer field, however, this is not the case.

Therefore, the agreement should be specific as to the territory and the rights granted to avoid misunderstanding in the event that multiple distributors are used.

I. *Warranties and Indemnification*

The terms of the contract that provide for warranties and indemnification are an extremely important aspect of any license agreement. A typical warranty and indemnification clause may read as follows:

> The Authors jointly and severally represent and warrant that the Authors have the power and authority to enter into this Agreement as the owner and copyright holder of the work; that the work is original except for material in the public domain and such excerpts from other works as may be included with the written permission of the copyright owners; that the work does not contain any libelous material or injurious instructions; that the work does not infringe any trade name, trademark, trade secret, or copyright; and that the work does not invade or violate any right of privacy, personal or proprietary right, or other common law or statutory right.
>
> The Authors shall jointly and severally indemnify the licensee and hold it or its assigns, harmless from any and all losses, damages, liabilities, costs, charges, and expenses, including reasonable attorneys' fees, arising out of any breach of any of the Authors' representations and warranties contained in this section.

Generally, the courts will strictly construe these clauses[15] and, in some cases, may only find liability if there has been reliance on the clause by the other party.[16] It is therefore imperative that the warranty and indemnification clauses be carefully drafted.

J. *Title/Non-infringement*

Unless specifically disclaimed in writing, there is an implied warranty that "the title conveyed shall be good, and its transfer rightful."[17] This warranty arises by operation of law and requires no specific statement in the contract. This is important because the licensee may have a claim against the licensor for breach of this warranty if the license is used by a third party claiming ownership of all or a portion of the title to the work.

K. *Authority to Grant Rights*

In the entertainment industry it is common for distribution agreements to grant the distributor the exclusive right to distribute the work on "any device now known or later developed."[18] Major distributors will not permit a specific carve-out of multimedia rights. Therefore, the question is whether this language prohibits

[14] For more on licensing and installations, see Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., 632 F.2d 680 (7th Cir. 1980); *see also* Thomas W. Hazlett, *Duopolisitic Competition in Cable Television: Implication for Public Policy*, 7 YALE J. ON REG. 65 (1990).

[15] *See, e.g.*, Loews v. Wolff, 101 F. Supp. 981 (S.D. Cal. 1951).

[16] Columbia Broadcasting Sys. v. Ziff-Davis Publishing Co., 553 N.E.2d 997 (N.Y. 1990).

[17] U.C.C. § 2-312(1)(a) (1994).

[18] *See* Michael Madow, *Private Ownership of Public Image: Popular Culture & Publicity Rights* 81 CAL. L. REV. 125 (1993); *see also* Kenneth R. Corsello, Note, *The Computer Software Rental Amendment Act of 1990: Another Bend in the First Sale Doctrine*, 41 CATH. U. L. REV. (1991); Fred Cate, *Cable Television and the Compulsory Copyright License*, 42 FED. COMM. L. J. 191 (1990).

the copyright owner from licensing the multimedia rights to another. Currently there is no case law directly addressing this issue.

V. Licensing Text

Text may be incorporated as an integral part of the multimedia work itself, or it may be included to give the user assistance in using the work. Of course, rights to text that are written by the multimedia producer or its employees do not have to be obtained. However, if other copyrighted text is to be included, the owner of the rights must grant the producer a license or assign the necessary rights in the text to permit its incorporation into the new work.

A. *The Publishing Industry*

Many large publishing companies are extending their traditional paper publishing into the multimedia arena. High-level undertakings among corporate executives are increasing and some impressive relationships between computer firms and publishing companies have already developed. However, these relationships are strategically no different than emerging deals between the worlds of publishing and entertainment. For the most part, both the owners of media manufacturing and distribution networks and their authors/copyright owners have like-minded strategies. Publishers control the infrastructure upon which the represented copyright holders depend for artistic and economic survival. Many publishers also control the copyrights through contractual relationships with their authors.

One area in which the strategies of publishers and copyright holders differ fundamentally is non-fiction. Non-fiction is different because the consumption of information in the global business, government, academic, and scientific communities depends upon the free flow of that information. Our global culture would be immobilized without these various groups having access to research and new developments to meet their expected levels of transactions and advancement.

B. *Licensing and Distribution*

There are two practical means today for distributing large quantities of text. A CD-ROM containing text can be distributed like any other CD-ROM. Text can also be distributed online using computer networks.

The computer networks which now serve the business, government, academic, and scientific communities reflect a continuing

effort toward a global information infrastructure. When accomplished, this will change the very foundation of communication and education. These networks operate on a subscription basis with users paying a fee gauged by the kind of use (e.g., searching, copying, excerpting) executed or by the number of users at a site.

Many publishers are seeking financial arrangements with these networks to offset the effect this form of information access will have on their revenue from traditional publishing. In the future, however, it will be possible for a writer to eliminate the publisher entirely by licensing text directly to the network provider.

New media systems will not displace traditional publishing. Instead, they will stimulate the creative process used for publishing in traditional forms and will increase literacy and traditional readership.

When licensing fictional texts, a multimedia producer probably will be negotiating with the copyright holder through a literary agent and/or publisher. Non-fiction writers are less likely to have agents, but the publisher may control the rights, especially in particular markets. Many possible combinations of ownership and control make licensing of text difficult.

The primary fact to consider is that neither the writer nor the writer's agent will jeopardize the relationship with the publisher, who is actively exploiting the writer's work in printed form. This situation will change when the CD-ROM or network infrastructure make it possible to license text directly from the writer.

C. *Pricing*

There are no rules for pricing text. The price is whatever the party controlling the text and the party seeking to license the text agree upon. There are some general factors, however, that the parties should consider in negotiating the price for a license.

The pricing of text normally will be based upon the volume and popularity of the text used. Fiction is usually more costly than non-fiction. A popular non-fiction book in its twentieth printing, however, may cost considerably more than some unknown fictional work.

Securing the rights to use, adapt, and distribute the text in a multimedia product through its primary and secondary markets can occur through a straight purchase agreement or through an arrangement known as an *option*. An option is a contractual arrangement whereby payment is made toward the purchase of a

property in order to secure the right to exploit it for a given and usually limited period of time (the *option period*).

This option period allows the producer to arrange the financing and license any additional content required for the project before committing to the full license fee. Only text which is essential for a new media project will justify this kind of expenditure. Securing the rights to text should be considered an essential part of the development cost.

Royalties may be part of the payments made to a copyright holder for its text, particularly if it is central to the project. Yet it is questionable whether a small portion of text justifies more than a flat fee. Any royalty structure should permit the producer to recoup its production costs before royalties become significant. In arrangements where an advance is paid against royalties, the producer will recoup the advance before any additional royalties are paid.

Royalties can be a fixed amount per unit sold or a percentage of revenues or profits; they are usually paid quarterly or semi-annually. Because of the entertainment industry's reputation for creative bookkeeping, royalties are almost always based on gross profit or revenue.[19]

Although most licenses are granted for the duration of the copyright, any limitation on the term of the grant will give the copyright holder the opportunity to renegotiate the license as the multimedia market matures.

Licensors should be given a reasonable right to audit the books of the multimedia developer if royalties are involved. Because of the cost of tracking and calculating royalties, a licensee may want to negotiate a *buyout* of rights.

D. *Property and Marketing Rights*

The holder of a license does not become the copyright owner. Instead, the licensee merely purchases the permission to use the material.

If the work is central to the project, the purchase, option, or license should be for the exclusive rights to the story, the title, the characters, and any concepts of plot or theme which are unique to the telling of that story in the multimedia market. Non-exclusive rights to text are appropriate where the marketability of the project

[19] For greater analysis on 'gross profits' and 'revenue', see Alois Valerian Gross, Annotation, *Measure of Damages and Profits to which Copyright Owner is Entitled under 17 U.S.C.S. § 504(b)*, 100 A.L.R. FED. 258 (1994).

will not be compromised. If the project revolves around a particular printed work (e.g., a CD-ROM game based upon a current novel), however, the possibility of another multimedia project adopted from that same work could substantially impair the profitability of the first project. To protect against these concerns, exclusive rights should be demanded.

The writer will often be willing to license only limited rights—the right to use the text only in a specific product category and/or market—for a particular time period, and/or within a specified geographic region or territory. This means that the license may be limited to, but exclusive for, CD-ROM or other disk-based products, their platforms, and primary markets. The writer may reserve rights for the interactive television market for later licensing.

Since multimedia is often considered a new form of publishing, any license should carefully stipulate whether any display of the text or any publication, like a manual will accompany the new media program. Any reprint rights should be included in the adaptation rights. It is also prudent to acquire sequel rights to subsequent episodes of a story including the principal characters.

In purchasing the rights to any story, the producer should try to secure the Right of First Refusal or Last Refusal to any sequel. Under the Right of First Refusal, the writer must first offer the rights to the multimedia producer, who can refuse to buy them at the price offered. Nonetheless, if the writer then sells the rights to another producer, the writer is obligated to prove that the sale was for a greater price than the one first offered. The Right of Last Refusal allows the multimedia producer to match any other offer for the rights to the sequel property.

VI. LICENSING MOVING IMAGES

Licensing film or television clips requires understanding the process of making film and television, the hierarchy of skill categories involved, and the unions which represent these skilled workers. The hierarchy or stratification within each union can be understood if one understands the Star System, which functions to give over-scale benefits to those actors, directors, writers, cinematographers, and other professionals who are considered indispensable to a motion picture project.[20]

[20] There is a great deal of literature devoted to the 'star system' and its image in Hollywood. *See, e.g.*, HOLLYWOOD'S MOVIE STAR SYSTEM: AN HISTORICAL OVERVIEW IN THE AMERICAN MOVIE INDUSTRY: THE BUSINESS OF MOTION PICTURE 79, 84-85 (G. Kindem ed. 1982); RICHARD GRIFFITH & ARTHUR MAYER, THE MOVIES 46-47 (1957); DANIEL J. BOORSTIN, THE IMAGE: A GUIDE TO PSEUDO-EVENTS IN AMERICA 57 (1967).

The same system pays a minimum union wage to the other members of each union. Many members in the upper levels of the unions and guilds collect royalty and residual payments on their work in addition to production fees. These fees, royalties, and residuals must be factored into the cost of licensing a film or video clip.

A. *Properties*

It is standard entertainment industry practice to license materials used in original film or television productions for the duration of the owners' copyrights for use in other types of products. Unfortunately, this does not mean that the original agreements authorize the film/television producer to license clips for a new media production. In fact, most of the agreements do not even contemplate multimedia or interactive products. Therefore, it is unclear whether the producer has any rights to license such clips for multimedia use.

B. *Right of Publicity*

Another aspect of the clip that must be cleared is the actors' persona. Each performer owns his distinctive image and voice, if the clip uses only a narrator without the image.[21] It is an established right for a performer to profit from his persona's use (and reuse). This property right is established by the right of publicity. The unions have contractually established the Rule of Reuse with those signatory motion picture companies which have signed the unions' basic agreements.

A multimedia producer must get clearance from any recognizable actors or actresses who appear in the clips. Such clearance is independent of the clip itself and is necessary regardless of the copyright status. Even if the clip is in the public domain, clearance may still be required for any reuse of the performer's persona. Locating and contacting performers is often difficult. The first step is to determine whether the production was originally done on film or videotape.

When the clip is from a film, the union in the United States is the Screen Actors Guild (SAG); if it originated on videotape, the appropriate union is the American Federation of Television and Radio Artists (AFTRA). If, however, the production originated in the industrial or educational category, both SAG and AFTRA can

[21] *See* Madow, *supra* note 18.

claim jurisdiction over videotape, and the multimedia producer must decide which union to contact. Many performers belong to both unions.

The unions can also be used to locate a performer's heirs or estate executor, who may be the agent, to negotiate any required fee. Some established actors may not want to bother negotiating a fee, but would rather have a finished copy of the final project. Actors with small parts or non-speaking parts seen in older films may be difficult to trace if they are neither credited nor listed in the American Film Institute's catalogue of films. This may occur especially if the actor is deceased. In such cases, the multimedia producer must decide whether the risks of possible claims by such actors or their heirs outweigh the desirability of using that particular clip.

C. *Literary Materials*

Original material from which any motion picture or television program or series was adapted requires clearance. When the composition is a literary source, such as a book, magazine or newspaper article, play, or other text, a multimedia producer must obtain a license to use and adapt the material for the new media.

Although the script is considered an intrinsic part of a movie and its clips and, therefore, does not require separate licensing, the writer may have retained rights in the work. This could mean, for example, that the multimedia producer must obtain a clearance to publish or display any part of the script on the display screen and/or to print the text in a manual accompanying the finished product. It is also possible that certain separate rights may also require clearance, such as the Radio Rights (the aural broadcasting rights). The Writer's Guild of America (WGA) is the conduit to screenwriters and television writers.

D. *Animation*

A license of any cartoon or animation will probably include all the discrete parts of the animation, that is, the characters and the story on which the animation was based. Nevertheless, should the material exist prior to the production (e.g., a newspaper comic strip turned into an animated film), the cartoonist, animator, animation house, or licensing organization may hold the rights to the material from which the production was adapted. These rights holders are usually listed in the credits of the derivative motion picture.

E. *Licensing Considerations*

Many of the licensing provisions for video or film material are identical to those of other types of licenses. However, there are certain provisions in video licenses that deserve special consideration.

There are three main categories of film and television archives. The first are major corporate holdings, like Ted Turner's vast collection, which includes the acquisition of older studio libraries. Turner's corporation, based in Atlanta, owns the Warner Brother's collection up to 1950. Warner Brother's, a division of Time-Warner, still owns the rest of the collection. There are intercorporate relationships and intracorporate relationships which have an impact on the licensing of collections and their clips.

An outside multimedia producer desiring to use some of Warner Brother's film clips would submit a written request, which defines the project, for the clips. After submitting the written request and gaining approval from Warner's corporate channels, the producer would be asked to pay $4,000 per minute for video clips and $250 each for still pictures (stills). If the prices are not discouraging enough, there may be limitations on the number of clips that can be licensed.

Another type of major organization which has holdings to license is the academic archive, like those at UCLA and the Library of Congress.

The last type of organization which can license film and video clips is the smaller specialty company. These companies generally carry public domain material. They also act as agents for copyrighted collections on either an exclusive or nonexclusive basis. They carry vintage (older and classic film and video), as well as generic, contemporary stock footage. Most of these smaller companies carry public domain material which is generally superior quality to that which can be found in a video store. Often these companies have purchased a pristine 16mm or 35mm print (copy) of a film to assure the best transfer (to video) possible.

Licensing video rights is closely related to licensing rights to text. One factor that is different, however, is that if there is music on the soundtrack of the video clip, those rights must be licensed separately.

1. Term, Territory and Markets

The smaller film libraries will continue to be the primary source for many multimedia producers. The way most of these libraries work is by charging each production and its market category for the use to be made and the territory in which it will be distributed. In other words, each category—theatrical film, network or cable television program, industrial film or video, or music video—is priced differently and is also priced by the minute or units of minutes used in a single production.

In addition, these libraries will charge a research fee for making selections to assemble a demo tape with a time code window (editing numbers at the bottom of the video image). Depending upon the volume of the purchase (number of clips and the total running time), the research fee may be included in the overall price. Generally, a fee covers the cost of searching by title, director, genre, and subject through a collection for the desired items. The total price may also include a lab fee covering the cost of transferring the film to the type of tape format required by the multimedia producer.

Once the multimedia producer has chosen footage from the demo tape, that footage is then copied onto another tape (master tape), and the producer is billed for the amount of footage ordered. These tapes can cost from $100 to $300 and up to $1,500 for twenty to thirty minutes of film clips.

These fees are based on the use of the material in only a single multimedia production. This fee could be in the form of a royalty, although that is not currently done.

2. Property and Reuse Rights

While a clip license is generally for the life of the copyright, this is not always the case. Most of the big, and many of the smaller, film and video libraries keep close track of the copyright status of their collections as part of their service. Occasionally, someone fails to review a copyright properly.

Although anyone can go to the video store and obtain a copy of a public domain film, an archive will usually have a better copy of the film, as well as information about the copyright. The archive license is for the use of a copy of their master print of the film. Because they also keep the documentation on the public domain status, they can tell whether the film is in the public domain only in the U.S., or if it is in the public domain worldwide.

In addition to issues concerning territorial rights, the use of a clip from a public domain movie may also require permission from any identifiable actors and actresses, the owner of the underlying screenplay, background music, etc. This requires paying whatever

fees can be negotiated, plus potential additional fees to the appropriate union(s). All feature film clips and clips from television programs are complex in the layers of information they contain.

There will be cases where a feature film will provide most of the characters, story, and action needed to dramatize the multimedia title. In such a situation, the underlying literary material on which the film (or video) is based, the rights the screenwriter may still control in the material, the actors' rights, the music rights, and any other preexisting material integrated into film must be licensed or cleared.

Another problem is identifying all of the uncredited elements of the film image. Credited parts of the image that may require clearance are clips from other films or videos, music, animation, and other preexisting works of art. However, it is the occasional element in an image, such as the copy of the Rembrandt painting hanging on the wall in the movie *Harvey*, which may be missed. Film and television historians, especially those with art history backgrounds, are indispensable to projects with a density of underlying rights.

Any fee paid to a freelance, non-union performer, writer, or other rights owner is as open to negotiations as the fee paid to a union performer, writer, cartoonist or animator. Although price logically might be predicated on the volume or amount of the image seen, voice heard, or text used in the multimedia project, the lack of guidelines throws logic to the wind.

3. Market Rights

The multimedia producer must secure the adaptation rights to all of the materials to be used in the new product. The grant of rights should stipulate that the material being licensed can be changed in any way appropriate for the new media product and its marketability.

Owners of underlying rights, like actors and musicians, who are concerned with maintaining their marketable image may have some objections to adaptations. The producer should be prepared to assure owners that the modifications to the work will not reflect negatively on their image.

Writers, on the other hand, may have different objections to adaptations which may dismantle the plot and rupture the flow of the drama. If the multimedia work is being planned for foreign markets, it is imperative to obtain a waiver of moral rights, by which

the right to object to any changes in the material is waived, from the writer(s) and the director(s).

When a fairly substantial investment is made to obtain the rights to materials for use in a multimedia project, it may be in the best interest of the producer to obtain exclusive rights to the materials. For example, exclusive rights to the text and any sequel(s), a cartoon or animated series which is episodic in nature, or serial which has an ongoing story like soap operas should be obtained. Exclusive rights prevent others from undermining the original producer's investment. Any material which also carries with it some part of a grand conceptual schemata should also be licensed, if possible. Any material whose use by others would not compromise the development of the multimedia project can be acquired for use on a nonexclusive basis.

The grant of exclusive rights may be limited to the multimedia market. The grant can be limited to just one kind of multimedia, such as CD-ROM and/or on specified platform(s); or can extend to interactive television. The rights can be further restricted to a specific territory, such as the United States. They can even be restricted to a particular time period.

Unlimited rights would allow the multimedia producer to exploit both domestic and international territories in some commodity-based product, such as a CD-ROM, or other platform-based system like CD-I, as a Primary Market, while reserving other markets, like interactive television, to the licensor. Rights are generally acquired by territories and by markets.

VII. Licensing Still Images

Still pictures for use in multimedia can be divided into two main categories: photography and graphic arts. Although these two main categories began as separate entities, there has always been a partnership of sorts between the photographic side and the more figurative side of still pictures, especially within the domain of painting and the graphic arts.

Currently, photojournalists resist licensing their work for use in any digital medium where editorial practices may compromise the integrity of the work. Photojournalists regard any digital medium to be a threat to the veracity of the photographic image. While photojournalists do have an important and extremely valid point with their campaign to control the boundary between photofiction and photoreality, their position seems to disregard a practice which has been going on almost since the origin of pho-

tography. This practice involves the interplay between photography and illustration.

Graphic artists also share this fear, and not without justification. The fear is compounded by image-hungry multimedia producers who want sizable discounts for volume licenses. Naturally, there is tremendous resistance to what artists see as a something-for-nothing attitude which is impervious to the risk and investment they have made in developing skills, buying equipment, and delivering their trade to the consumer. Indeed, there is something about licensing imagery that negates the individuality of each image carefully composed and painstakingly produced.

Photographers or graphic artists may feel a competitive squeeze from the clip market. In fact, many new media producers compare the prices of film and video footage (which are essentially a series of still pictures) with the prices for still pictures. For example, when a photograph is priced at $300, a producer figures its price is very high compared with that of a generic film clip of the same subject, which goes for half the price and includes fifty or sixty "pictures." This kind of calculation ignores the photographer's practice of seeking, capturing, and reproducing only the most dramatically composed moment.

Each category of still image production must be recognized for its own unique practices and the value it delivers. At the same time, there will be increasing pressure for photographers and graphic artists to change their practices to meet the needs of producers.

The first half of the 1990s has been, and continues to be, a transition period from traditional distribution systems for still images to online systems with high speed and high resolution delivery. However, contact with most graphic artists and photographers is still made through the artist's representative, professional society, publisher, or stock agency. Graphic artists or photographers who work for a publisher probably will not own the stills they have produced. The publisher will set the licensing fees and conditions for their use, if it grants rights at all.

By locating the freelance graphic artist or photographer and dealing with him directly, depending upon the type of artist-agency relationship, there may be some room for negotiating fees. However, most freelance professionals have exclusive relationships with agencies. This means that the artists cannot cut the agency out of the negotiations. In the future, online network fees should reflect the reduced expenses that agencies will incur in adequately repre-

senting their artists and delivering their work to the many different types of user-clients.

A. *Pricing, Purchasing and Royalties*

Many collections which are in the process of changing over to online access are offering CD-ROMs to multimedia producers as a first step in the transition. The process of licensing pictures on CD-ROM works much like it traditionally has, but with the notable exceptions of cost, handling and speed. After reviewing a catalogue (or CD-ROM) of low-resolution images, the licensee selects images from the collection. These images are made available in high-resolution form after the licensee pays a fee which is based upon product and market use, territory, and term of license. Royalties may also be required in connection with any broad license rights, such as a license period of longer than five years.

These conditions basically have not changed. What has changed is:

1. The volume of materials in the catalogue for review;
2. The publishing and distribution costs of the catalogue; and
3. The cost of providing the selected (high-resolution) images for both the agency and producer. Traditionally, slides or some other costly medium was used to provide the image to the licensee. Now, customizing the master CD-ROM with the selected images is faster and considerably cheaper, not to mention easier to handle, than all those individual slides. Kodak's Photo CD is quickly becoming a standard for catalogues prepared by collections.

B. *Property and Market Rights*

Freelance photographers and graphic artists traditionally retain the copyrights to their work. Only artists in a work-for-hire situation are unlikely to control the copyright to their work. In such cases, the multimedia producer will be dealing with the publisher for a license.

When dealing with stock agencies, the company will be the exclusive agent for its artists, and will have the right to license images for them. The territory of that exclusivity may, however, vary. There will seldom be an opportunity to negotiate directly with the artist without an intermediary involved.

Photographers and graphic artists must agree if a multimedia producer is to have the right to adapt a work for new media, that is, digitize it, change it, or transform it in a manner appropriate to the medium. If there are to be limits on adaptation rights, for exam-

ple, with resizing by cropping (shrinking by trimming edges) or reverse cropping (expanding to add elements), these limitations should be specified. By agreeing to grant unlimited adaptation rights, the artist essentially waives his or her moral rights in the image. The new media producer should have a written waiver of moral rights if the product is to be marketed internationally.

The other moral right sought by artists is the right of attribution, which means that the artist must be correctly identified as the artist of the work.

If the license is international, you should expect to pay more than you would for domestic territorial rights. If the term is for the life of the copyright or in perpetuity, then also expect to pay accordingly. A multimedia producer may want to shop around to find a stock agency willing to license a volume of images on a royalty basis. This type of arrangement is only possible when a sizable number of images comes from a single source. Otherwise, paying royalties on thousands of individual images is simply not feasible due to the accounting costs involved.

Seldom will images be licensed on other than a nonexclusive basis. Only when a second license would jeopardize the marketability of the product is there a basis for negotiating an exclusive license. The costs can be controlled by setting limits on the exclusive rights to certain territories, products, and markets. The license provisions can detail the product, the platform on which it can be used, and whether the product is strictly for the educational market; or, it might be limited to interactive multimedia, but unrestricted as to disk-based and interactive television systems. There are numerous ways in which the product and market can be limited.

The alternative is to obtain unlimited rights for all territories, markets and products, although this can be a nonexclusive license. Certainly the initial cost will make limited and nonexclusive rights the norm for still images, as it is for other content licensing.

VIII. Licensing Music/Audio

Licensing the multimedia rights to audio in the form of speaking or background sounds is similar to licensing text. For example, the reading of a copyrighted work will require obtaining the rights to use the underlying work. Any audio or sound that is original to the producer of the multimedia work, or is a work made for hire, can be included in the work without obtaining a license. For the use of any other sound or sound effects owned by another, including the use of lyrics from a copyrighted song, a license must be obtained.

The music business is complex because there are many entities which control different elements of music.[22] First there are songwriters, performers, and instrumentalists, the creators of the music. Second, there are the songs which consist of (1) the composition (the notes) and (2) the lyrics (the words sung to the notes). The vocal and instrumental performance of a song make up the third aspect of music. Each of these elements must be cleared for reuse in a new production.

It is important to determine which type of license is appropriate for a particular multimedia work, because there are many different forms of music licenses:

1. *Mechanical license.* If only the song is to be played without being synchronized to video, the developer only needs to obtain a mechanical license.[23] Since virtually all multimedia works will consist of both audio and video, mechanical licenses will normally be inapplicable. However, some CD-ROM titles permit the user to use the disk either as a CD-ROM, with both audio and video, or to play only the music on a typical CD player. There exists the issue, therefore, of whether the developer will require a mechanical license to permit the disk to be played in a solely audio mode.

2. *Synchronization license.* Where the music is to be synchronized with video, a synchronization license is needed.[24]

3. *Videogram license.* This form of license is used when music is synchronized with video and distributed on a tape or disk. Many multimedia projects are being developed using this form of music licensing.[25]

4. *New media license.* This form of license is specifically directed at new forms of music distribution, including CD-ROMs.

It is unclear which of these licenses will be required for the use of music in a multimedia work, particularly one that will not be disseminated (broadcast) over a computer network or "performed" in a public place. It would seem that synchronization rights and/or performance rights will be necessary.

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[22] A detailed discussion of the music business is beyond the scope of this Article. For an excellent analysis of the music business and music licensing, see A. Kohn & B. Kohn, The Art of Music Licensing (Prentice Hall Law & Bus. eds. 1992).

[23] A mechanical license is a license that authorizes one to make reproductions of musical compositions for distributing them to the public for private use. A. Dean Johnson, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 Fla. St. U. L. Rev. 135, 164 n.201 (1993).

[24] Kohn & Kohn, *supra* note 22, at 46.

[25] *Id.*

When licensing the use of a film clip, the owner of that clip may or may not also be able to grant the right to use the music on that clip. If not, the multimedia producer must obtain the music rights separately.

In addition, if any of the music is to be changed, adaptive rights may have to be obtained directly from the copyright owner. Many copyright owners do not grant permission for any adaptation of the music,[26] and those that do are often very particular about any changes that will be made, requiring written approval of any changes before they can be used.

Since music is performed by singers or instrumentalists, there are also unions which represent these artists, ensuring that they are treated fairly and paid for their work by those who want to use their material. The unions oversee the contractual relationships which their members establish with producers and other entities.

Other groups which must be acknowledged are the performing rights societies, which collect fees for small performing rights on the broadcast of the music in a public place (also called broadcast rights), and other agencies or societies which collect other rights fees.

Music will be a significant part of multimedia in the future as it is now. Certain kinds of virtual reality may even redefine the music business concept of *grand rights*, that is, the dramatic rights associated with the usage and performance of music on a stage or in a motion picture.[27] Theme parks, modern museums, entertainment mini-cities, shopping centers and malls where people can walk through and experience live performances taking place elsewhere on the planet are bound to modify many current licensing concepts.

Most licenses for pre-existing music are negotiated through the societies, the publishers' agents, or directly with the publishers. Contracts can be arranged directly by the multimedia producer or through a licensing agent, whom the producer may prefer to hire to obtain the necessary clearances. There are many agencies which specialize in music clearances, as well as freelance specialists and boutique agencies, which clear all kinds of rights for producers.

The performing rights societies which license dramatic and public performing rights in the United States are ASCAP (American Society of Composers, Authors & Publishers), BMI (Broadcast

[26] It remains a mystery why many contemporary artists have an aversion to permitting the use of their music in commercial advertising. *Id.* at 501.

[27] *Id.* at 744.

Music, Inc.), and SESAC (Society of European Stage Authors & Composers).

Mechanical and other rights are licensed by national societies and other organizations such as SDRM in France, STEMRA in the Netherlands, NCB in the Scandinavian countries, and the Harry Fox Agency, a subsidiary of the National Music Publishers' Association in the United States.

Each society or agency is built on a different set of alliances and, subsequently, upon a different marketing strategy. For example, even though both ASCAP and BMI license broadcast rights, ASCAP is owned by the songwriters and publishers, while BMI is owned by radio and television broadcasters. To successfully travel the way through the labyrinth of music licensing, one must know these alliances and their strategies and what to avoid as much as what to do.

Skilled clearance specialists know how to clear the necessary rights without overclearing, that is, without paying more than necessary for the material. These specialists have access to artists, their publishers, and any subpublishers who may be involved in licensing arrangements. The clearance issues are complex and can grow exponentially as the number of entities involved in the licensing process grows.

Access to copyright holders can be made through any one of the licensing entities or through U.S.-based unions such as AFTRA, the AFM (American Federation of Musicians), and the Songwriters Guild of America (which is actually a trade association). AFTRA covers the singers and the AFM covers the instrumentalists, many of whom are also songwriters. Easy access to inexpensive production music, ambient sound, and sound effects can be obtained through music/sound libraries. The music/sound is bought on a one-time, fixed-fee basis, is royalty-free, and is available on CD, CD-ROM, and other formats for use in multimedia productions.

A. *Pricing, Purchasing and Royalties*

Generic production music and sounds can be fairly inexpensive for projects intended for the non-broadcast market. The pricing changes, however, when the products are targeted for other markets, such as broadcasting. For example, CD-ROMs which work on both Macintosh and PC-based systems and can be used in perpetuity for non-broadcast purposes, containing music and sounds are currently available for approximately $100 each. Since most of the vendors of these products also own the music, they can

be flexible on licensing its use in multimedia projects, even beyond the non-broadcast categories of today's markets.

Licensing copyright-protected music and popular arrangements of music in the public domain can be expensive. Additionally, there are no standards by which to judge what is appropriate for a particular multimedia product or market. Royalty arrangements are either scheduled for payment when the products are sold or are paid in advances against back-end royalties, meaning that the producer can recoup the advances from royalties otherwise due. However, sometimes the copyright owner will require a fixed upfront fee which is not recoupable against future royalties. Such fees are often justified as required to cover attorneys' fees, the costs of creating the disk or tape containing the licensed music, etc.

A royalty rate is usually based upon (1) a fixed royalty per unit sold; (2) a pro-rata percentage of the wholesale price per unit sold; or (3) a combination of both.[28] Since royalties are problematic for everyone, it is often more cost-effective simply to buy out all use rights—that is, pay a flat fee for the right to exploit the song in connection with a specific multimedia work without any future royalties. By setting limitations on the type of product and platform, the specific market, the territory, and perhaps even the term of the license, it is possible to keep the upfront fees within reasonable limits.

In any negotiation, it is important to recall that licensing royalties on music evolved in the early part of this century from the displacement of musicians by recording and playback technologies, which denied the musicians revenues from live performances. Now, toward the end of the century, technology is once again sending shock waves through the creative community for the same reasons.

Where the music comprises a significant portion of the creative material or where the music is critical to the project's success, there must be a relationship founded on an understanding that profit-sharing involves both risk and investment-sharing.

B. *Property and Market Rights*

Since interactive multimedia is an audiovisual medium, sorting through the issues associated with music property rights requires, to some degree, an understanding of the process of combining music and sound with visual material. In other words, it

[28] *Id.* at 566-67.

is important to understand that most film and television program music is added to the image at the stage of production known as post-production, although some videotaped shows have live, on-screen music performances.

The combined audiovisual rights are called *sync rights.*[29] A multimedia producer must get permission from the music publisher and/or the songwriter(s) to use the sync rights (even if the music is non-synchronous with the image) in connection with any pre-existing work. Sync rights are usually paid for in flat fees, as are reuse fees paid to the performer's unions. For any singers appearing in connection with the clips, contact AFTRA; for any instrumentalists, contact the American Federation of Musicians.

The same performer's unions are involved with master rights or the *master use* license. The term comes from the process of making a recording in a studio; this is called mastering.[30] Controlled by record companies, these rights cover the reproduction of a record or portion of a record in a multimedia project. In other words, if the producer wants to take a song or portion of a song off a pre-existing record by the process known as a "needle drop" (accomplished by dropping the needle on a record to play the section), then master rights are required to cue or align the song to an image.

There is some overlapping with respect to the mastering process, since a master is also created for the soundtrack (actually, music track) of a movie or television program, just as it serves to create the records, CDs, and audiotapes that popularize the songs found in movie and video productions. Consequently, there are cases where clearing both sync and master rights are required for the music in an audiovisual work. The music publisher or the publisher's agent can inform the producer as to the types of clearances necessary for the project.

For most multimedia projects presently in production, clearing the sync and/or master rights may be all that is needed to reproduce the desired music in a new media work. However, there are many exceptions. For example, if a multimedia project involves the reproduction of music contained on CDs, audiotapes, or

[29] A "sync" right is the right to control whether the copyrighted music is incorporated in the soundtrack of a pre-recorded program prior to the broadcast of the program. United States v. American Soc'y of Composers, Civ. No. 13-95, 1993 U.S Dist. LEXIS 2566 (S.D.N.Y. Feb. 26, 1993).

[30] When a sampling artist wishes to make copies of a recording containing the sampled sound recording of another, permission will be required from the copyright owner of the sound recording. the permission, if granted without further conditions, will normally be in the form of a *master use license.* KOHN & KOHN, *supra* note 22, at 824.

records for use in the product, then mechanical rights will be needed.

Another exception is the use of audiovisual material from a film, television show, or music video which has dramatized a song or used its title—as Hollywood musicals have done throughout the years. In such a case, the multimedia producer must secure the grand rights, that is, the dramatic performing rights, to reuse clips of the production which elaborated the story expressed in the lyrics of the song. The producer will also need to secure the sync rights to use the image and music together in the project.

If the multimedia product is then broadcast into a public place via interactive television, the producer will also need to have small performing rights. In the United States these are licensed by ASCAP, BMI and SESAC. The public performing rights, also called small performing rights, cover both the broadcasting of radio and television into public places and the non-dramatic performance of music on a concert stage, in a night club, bar, or similar environment.[31]

When a multimedia product is intended for use in a bar, an arcade, or other public gathering place, where the music might be broadcast through a sound system, the consensus is that the best method of clearing music for this type of use is with a *blanket license*.[32] Such a license requires an annual fee, with pricing based on the square footage of the site(s) and the type of business, i.e., whether the business established is a hotel, bar, arcade, or other. There may be other methods for evaluating the cost, but none of the societies has made any determinations for this type of multimedia usage at the present time.

Any license to use music in a multimedia project should include adaptation rights to permit appropriate modifications to the music. The distribution rights (the right to distribute the manufactured product) should also be acquired. If the product is intended for international markets, a waiver of the artist's moral rights should also be obtained.

In the future, multimedia products will be more widely advertised; therefore, it is important to license the music for use in the advertising of the product in any and all venues.

Licenses are traditionally made on a nonexclusive basis in the

31 "Rights of public performances" means the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, sometimes referred to as "small performing rights." United States v. ASCAP, 1950 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. Mar. 14, 1950).

32 *See generally* KOHN & KOHN, *supra* note 22, at 637.

music business. Although it is common to obtain limited rights for specific markets, terms, and territories, a term that is less than the life of the copyright can be problematic when trying to renew an expired license. It may be desirable to pay the cost of a long-term license, rather than risk not being able to renew the license on reasonable contract terms when the initial term expires if the music is of great value to the multi-media product.

It may also be valuable to obtain worldwide territorial rights. However, there are many contingencies to consider, especially when there are continuing royalties. In many cases, subpublishers have the right to license in specific territories; a large number of these subpublishers are government-controlled. Yet, the failure to secure international rights at the outset of the relationship, when there is an opportunity to do so at a reasonable cost, may invite escalated fees and royalty conditions at a later date. To buy out unlimited rights to exploit the product in all territories and markets in perpetuity may initially cost more, but will more than likely save long-term headaches and offer flexibility in essential marketing decisions.

IX. LICENSING COMPUTER SOFTWARE

A multimedia work may contain a variety of software in addition to the audiovisual content. Some of this software will undoubtedly be developed by or on behalf of the producer. The ownership of this software is governed by the same rules as ownership of text. However, many multimedia works will contain software that was developed by third parties and must be licensed for inclusion.

This software may be a tool used to develop the multimedia work or perhaps a "runtime" package, specifically designed for incorporation into multimedia works in order to perform some common functions often required by multimedia developers.

Licensing software is not much different than licensing text. In many ways a program resembles a novel. But because software requires testing and has special problems in end-user licensing, software requires careful consideration in licensing.

In situations where an independent developer is used, a work-made-for-hire agreement should be prepared. The software developer should also execute a copyright assignment agreement.

Because the multimedia producer may have to disclose its proprietary or trade secret information to an independent software developer in connection with the preparation of multimedia

software, the independent developer should be required to sign a confidentiality agreement.

Once the software is completed it will need to be tested to make sure that there are no bugs or programming errors. This is known as beta testing and is done by sending the software to various computer literate people who agree to test the software for the developer.

After final testing of the multimedia software and complete integration of its parts, the final work is ready for distribution. Although many people believe that when they go to a computer store and purchase a piece of off-the-shelf software they own it, in fact, they are usually only licensing it from the manufacturer. It is unclear whether the multimedia industry will adopt shrink-wrap licenses for use with its products, or whether it will distribute the products without licenses, relying solely on copyright law for protection.

A. *Shrink-wrap Licenses*

Most mass-marketed software is distributed through retail stores, bookstores, and by mail. It is not feasible to obtain individually signed license agreements in these situations. As a result, vendors usually include a pre-printed "license" in the package. It may be a separate document placed loosely in the box, it may be printed in the manual, or it may be printed on an envelope containing the magnetic media on which the software is stored. The idea is that by opening the envelope and using the software, the purchaser has agreed to abide by the terms of the license. There is serious doubt as to whether these shrink-wrap licenses are enforceable, although most software vendors continue to use them.[33]

Many of the software tools used in developing multimedia works are distributed with shrink wrap licenses. It is important to review the license to determine what rights are available with regard to the software. When the package will be used to create the work, but none of the copyrighted expression of the software package (e.g., computer programs, display screens) will be contained in the final multimedia work, there is little concern. However, in situations where some of the copyrighted materials from the software tool will be included in the final work, the developer must determine whether such incorporation is permitted at all, and if so, whether an additional license fee will be required.

[33] State "shrink-wrap" laws attempt to protect software publishers' property interest in their software by making "shrink-wrap" license agreements enforceable. The copyright owner gains several advantages from licensing software rather than selling it. Page M. Kaufman, Note, *The Enforceability of State "Shrink-wrap" License Statutes in Light of* Vault Corp. v. Quaid Software, Ltd., 74 CORNELL L. REV. 222 (1988).

B. *Run-time Licenses*

In many situations, it will be necessary for a multimedia developer to include some third-party code or display material in the final multimedia work so that it can operate on all computers of a particular type.

For example, for a work developed for the Apple Macintosh, which uses the latest version of Quicktime for movie clips, any user of the work may need a copy of that particular version of Quicktime on his computer. To the extent that end users have an earlier version of Quicktime that cannot run the movie clips, they will be very disappointed with the work. Therefore, the multimedia developer will want to include at least the "playback" (also called "run-time") portion of the particular version of the Quicktime program on the disk in addition to its multimedia title. This is necessary to insure that any Macintosh user with System 7 will be able to use the work, even if he has an out-of-date version of Quicktime on his computer. Since Apple Computer, Inc., is the owner of the Quicktime program, the developer needs to determine whether it can incorporate a run-time version of Quicktime on its CD-ROM, and if so, whether an additional royalty is required.

When run-time licenses are required, they may be royalty-free; require a single, lump-sum payment for unlimited distribution; or more commonly, require a per-unit royalty payment.