TUTORIAL

SUMMARY

- **Recommends discovering and documenting the origins of each work used in our products to ensure that we hold the appropriate rights**
- **Advises working with counsel and contract negotiators to ensure that all requisite licenses, releases, and other documents are obtained**

Walking the Labyrinth of Multimedia Law

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With the pace of recent advances in digital technology, high-technology production capabilities are now in the hands of organizations of all sizes. Multimedia is the buzzword used to describe this new cottage industry. With this new technology, we can easily capture graphics, add sound to our software offerings, or display full-motion video on computer screens. We can now create mass-market computer products, books, and advertisements quickly, simply, and inexpensively.

The dark side to this technological revolution is the legal side. Creators of graphics, video, audio, and other media can hold myriad legal rights in their works. What is especially troubling is that these rights can abound in works that many would otherwise consider to be in the public domain. Whenever we use works created by someone outside of our company, we must obtain permissions, licenses, waivers, releases, or other documents from the people who hold these rights. Not walking this legal labyrinth exposes us and our companies to lawsuits.

This article describes why developers of multimedia products face a more complex legal landscape than do developers of "few-media" products. It describes the laws that pertain to multimedia. And it discusses how we, as developers of multimedia products, might walk the legal labyrinth and protect ourselves and our companies from lawsuits

WHY THE LABYRINTH?

Developers of multimedia products face a legal labyrinth because they are dealing with more types of media, thus more types of laws, legal rights, and procedures for transferring those rights.

Different laws apply to different media

Multimedia products can contain several of the following types of media:

- Text
- Graphics
- Film or video
- Audio
- Animation
- Software
- Recorded or generated music
- Narration
- Recorded or generated sound

A different set of laws—and the rights granted by those laws—can apply to each type of media. For example, the law of copyrights, trademarks, and moral rights might apply to a single graphic. Those laws can grant copyrights, trademarks, and the moral rights of attribution and integrity to the creator of the graphic. However, whether those laws actually grant the rights depends on the content and commercial value of the graphic and the country or state in which the creator of the graphic resides.

For more complex types of media, such as film, more types of laws can apply—and can grant a dizzying assortment of rights to people who contributed to the film's making. Figure 1 shows what types of laws can apply to various media.

Compounding this complexity is that even a relatively short multimedia project, such as a product advertisement, can contain dozens of images, pictures, voices, and music clips (Tanenbaum 1994).

Each industry has its own established procedures and fees

The elements that we use in multimedia products mainly come from the film, television, music, broadcasting, publishing, and computer industries. These industries have had the relative luxury of slowly evolving technology and thus

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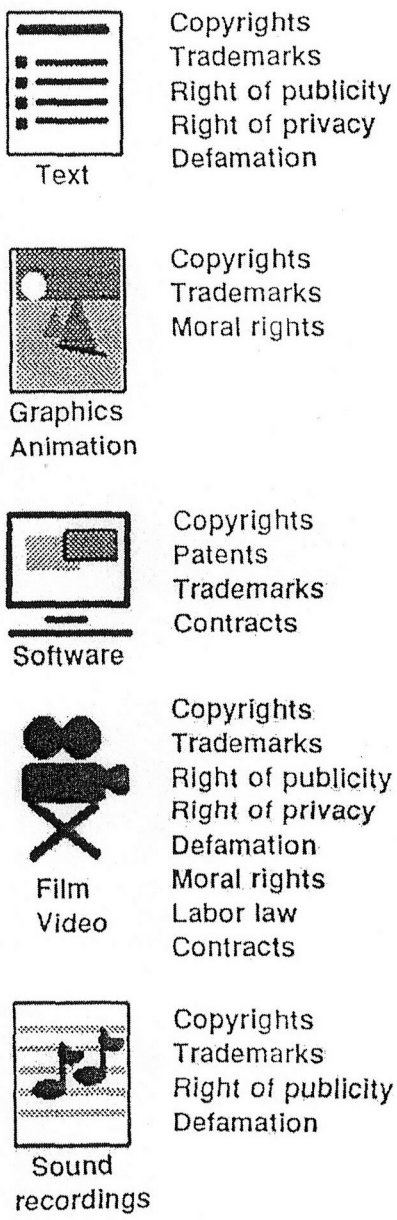


Figure 1. Laws that apply to various types of media.

years to develop the media and their own application of laws and procedures. Before we can use one of their elements, we generally must obtain a license, following their procedures and paying their fee rates.

For example, the rules governing the application of copyright laws to music are well established, and organizations such as ASCAP exist as clearinghouses through which we can obtain the rights to recorded songs. Before we can include a recorded song in our product, we need to license from the appropriate clearinghouse the right to perform the song. The license might cost a reasonable one-time fee, or it might be an astronomical five percent of the price of our multimedia product (Tanenbaum 1994). This axiom holds true for movies, plays, television shows, and even many forms of computer software.

However, the evolution of multimedia technology has been fast and furious. So while we have the technical ability to draw easily from the entertainment and computer industries in the development of multimedia products, the cumbersomeness of licensing procedures and the costs of licenses have often made it unfeasible for us to license elements from them.

WHAT ARE THE LAWS?

Previous sections of this article mention some of the laws that apply to multimedia. This section states the basic tenets of these laws.

Copyrights

Virtually all types of media are protectable by copyright. When someone creates a work, a copyright attaches to original, tangible expressions that the person contributed to the work. The owner of the copyright has several exclusive rights that allow the owner to control the use of the work:

- Right to reproduce (copy) the work
- Right to distribute it
- Right to use it in derivative works (for example, translate it, edit it, or base a motion picture on it)
- Right to perform it
- Right to display it (for example, display it on a computer monitor)

Under present U.S. law, a copyright for a newly created work lasts for a minimum of 50 years. Once the copyright expires, the work enters the public domain (Radcliffe 1994; Chickering and Hartman 1987).

The very nature of a multimedia work usually involves the use or copying of existing works in a new work, as well as the creation of new material to which new copyright rights attach.

Clips from movies or television broadcasts, music, photographs, paintings, sculptures, books, letters, and software programs are common examples of existing works which find their way into multimedia products. The use of the phrase "find their way" is being kind. The re-use of such works typically involves an overt act of copying, either by taking and digitizing the works or by including the already digitized works in the multimedia project. Unless the copyrights in those materials have expired or the materials have otherwise entered the public domain or the use falls into a "fair use" category, use of such materials in a multimedia product infringes the owners' copyrights.

Fair use In certain circumstances, we can use copyrighted works without the copyright owners' permission under a "fair use" defense. Generally, this defense allows us to reproduce a copyrighted work and use it our own work if our use

- Advances the public's knowledge or culture
- Will not affect the potential market for the copyrighted work (Dorr and Munch 1990)

To determine whether a use is fair, courts look at four factors:

1. The purpose of the use (including whether the use is commercial or is for nonprofit educational purposes)

2. The nature of the copyrighted work

3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole

4. The effect of the use on the potential market for or value of the copyrighted work (Dorr and Munch 1990).

Generally, fair use is only found for certain uses. These include criticism and review, satire and parody, news reporting, teaching, research, and scholarship (Nimmer 1993).

Works for hire Another concern is whether the creator of a work or the creator's employer owns the copyright. The general rule is that the employer is considered the creator and thus the copyright owner of "works made for hire." As to salaried employees employed in the regular course of business, their creations are considered works for hire, and the copyrights vest in their employer. If the hiring party doesn't have the right to control the manner and means of product development, the maker of the work is considered an independent contractor. Unless a provision is in place with independent contractors that confirms that the work being created is a work for hire, the hiring party may have a license to use the work but won't own the underlying copyright (Nimmer 1993; Reid 1989).

Contracts and license agreements

Contract law can apply to many aspects of the development of multimedia products. As discussed above, written agreements are the best way to remove all doubt of copyright ownership when our multimedia products include works created by outside developers.

Written contracts also play a part when our multimedia products include pieces of code from the software authoring tools used to develop our products. Most authoring tools are licensed (rather than sold) under shrink-wrap license agreements. Under these agreements, when we open the software's packaging (break the seal or cellophane wrapper) or use the tool, we implicitly agree to the terms of the license agreement. And the terms for different tools are seldom the same. Some agreements require that our multimedia products display the copyright notice of the company that created the tool. Others require payment of "runtime" royalties for the right to redistribute products that include portions of the tool. Whatever the case, we need to ensure that we comply with the terms of these agreements.

Patents

Software-related patents are growing in number and in their importance to all software developers. Patent infringement may be the most difficult legal entanglement to avoid because we might not be aware that we are infringing someone's patent. Further, patent infringement can occur even if we don't copy someone else's product.

A patent can be granted on any machine, process, or article (or improvement of these) that is new and useful and not obvious. Software-related patents typically involve processes embodied in software or combinations of a software process and hardware. Patents can cover the way a software application presents data to users, the techniques by which users manipulate data, and the functions carried out by a computer processor in response to user commands.

With respect to multimedia, the recent uproar over a patent issued to the creators of Compton's online encyclopedia is still being felt. Of concern to multimedia developers was the apparent scope of the patent. The Compton's patent ostensibly protected techniques used by a multimedia software application to search for data. Under patent law, if our applications used similar search techniques, our companies would owe royalties. The U.S. Patent and Trademark Office recently muted this uproar by taking the extraordinary step of reconsidering the issued patent on its own and essentially gutting its scope.

But the uproar was understandable, given the potential damage that can be done to a software company by a finding of patent infringement. For example, Stac Electronics recently won a $120 million award from the Microsoft Corporation for Microsoft's infringing use in its operating system of Stac's patented data-compression techniques.

Trademarks

Trademark law is another area of law that we must consider when preparing multimedia projects. When we use trademarks of outside companies in our multimedia products, we can't use the trademarks in a way that suggests that those companies are endorsing our products. Further, we can't use trademarks in a way that might cause confusion as to the origin or producer of the multimedia product.

We can run into this problem if our products display a visual that includes an outside company's trademark. A general rule of thumb is that the trademark can appear in the background of the visual, but it shouldn't appear in the foreground as the object of focus.

Defamation, privacy, and publicity

When we include people in our multimedia products, defamation and the rights of privacy and publicity become a concern.

Defamation Defamation can occur if our multimedia products include untrue statements about a person or company that hold that person or company up to hatred, contempt, or ridicule. As developers of multimedia products, we need to be aware of defamation. But defamation is probably the easiest legal problem to avoid.

Right of privacy We might invade someone's right of privacy if we do the following:

- Disclose confidential or embarrassing facts about someone in a multimedia product
- Present a person in a false or misleading light (People's Bank and Trust 1992)
- Use a person's name, photograph, or recorded voice in a product sold to the public without that person's consent (Schifano 1993; Bowling 1992)
- Intrude on a person's physical or mental solitude or seclusion, such as by trespassing on the person's property and videotaping the person through a window (Holsinger and Dilts 1994)

The right of privacy derives from common law and state statute, and thus it varies from state to state. Also, the right of privacy is tempered by fair-use style defenses and the First Amendment to the U.S. Constitution, especially relative to freedom of the press and the right of the press to publish what is considered news (Holsinger and Dilts 1994; Dora 1993). Generally, we can avoid claims of violating someone's right of privacy by obtaining a written permission from each person shown or heard in our products.

Right of publicity The major problem for multimedia projects is the right of publicity. The use of a celebrity's name, voice, or likeness without the celebrity's permission can violate the right of publicity. While it is often easy to obtain permissions without cost from private individuals, consent from public figures is hard to obtain and often expensive.

Because multimedia hasn't been around for long, not many published court decisions touch on claims of defamation or violation of the rights of privacy and publicity from multimedia products. But related cases show that the threat of lawsuits is real. The recording artist Tom Waits recovered $2.6 million against Frito-Lay for violating his right of publicity when it used a sound-alike in a Frito-Lay commercial (Waits 1992). The astronomer Dr. Carl Sagan recently threatened to sue Apple Computer for appropriating his name when the company code-named a new computer model after him. On hearing of the threat, Apple Computer changed the code name to "BHA" (or "Butt-Head Astronomer"), and Sagan sued for defamation (*Wall street journal* 1994).

Moral rights

Moral rights are a relatively new area of law, and are related to but separate from copyright law. In the U.S., moral rights primarily apply to visual works of art sold in limited editions. Moral rights include the rights of integrity and attribution.

Right of integrity The right of integrity grants an artist the right to prevent another from distorting or mutilating the artist's work or from altering the work in a way that prejudices the artist's honor or reputation.

Right of attribution The right of attribution grants an artist the right to claim authorship of a work that the artist created, or to prevent another from attributing to the artist a work that the artist didn't create (Tanenbaum 1994).

Overseas (particularly in France) and in some U.S. states, moral rights apply to audiovisual works and to other media as well as to visuals (Damich 1994; Nimmer 1993).

So far, the issue surrounding the colorization of black and white films is the most memorable moral rights controversy. However, moral rights may become an active issue because the visuals that appear in multimedia works are so easy to alter. Thus, we may need to become diligent about obtaining waivers from the creators of works before altering their works to any extent.

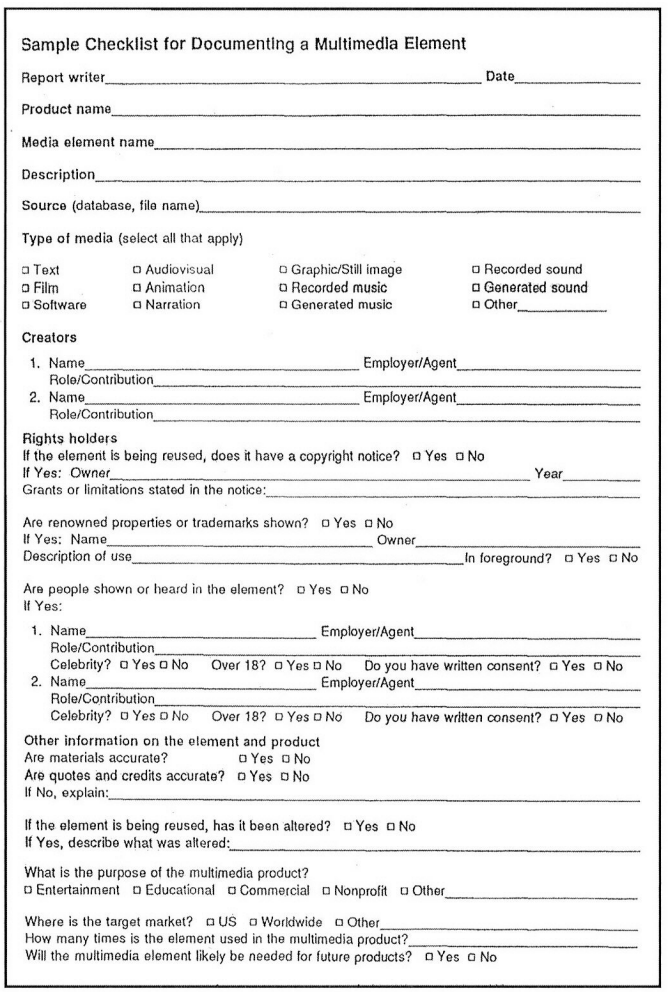
Labor law

One final area of law that we need to be concerned about is labor law. Using film or television clips in a multimedia work may require us to obtain licenses or releases from entertainment guilds. Further, we need to pay residuals to actors or artists who contributed to the film or program's making, or pay fees to union pension funds.

HOW CAN WE WALK THE LABYRINTH?

To discover that a multimedia product has legal problems after the product is complete risks the entire production effort. The owners of existing rights can use the courts to block distribution or threaten us with costly litigation so that we'll agree to the right holders' terms. The time to discover and deal with real or potential disputes over rights is during the planning and production stages of a multimedia product, while there is time to negotiate for reasonable terms or to change the product.

To ensure that a product doesn't infringe on others' rights, we suggest that you determine what media elements are part of your multimedia product, who contributed to their making, and who owns rights in them. Then document your



Sample Checklist for Documenting a Multimedia Element

Report writer_____ Date_____

Product name_____

Media element name_____

Description_____

Source (database, file name)_____

Type of media (select all that apply)

◻ Text	◻ Audiovisual	◻ Graphic/Still image	◻ Recorded sound
◻ Film	◻ Animation	◻ Recorded music	◻ Generated sound
◻ Software	◻ Narration	◻ Generated music	◻ Other_____

Creators

1. Name_____ Employer/Agent_____
   Role/Contribution_____
2. Name_____ Employer/Agent_____
   Role/Contribution_____

Rights holders
If the element is being reused, does it have a copyright notice? ◻ Yes ◻ No
If Yes: Owner_____ Year_____
Grants or limitations stated in the notice:_____

Are renowned properties or trademarks shown? ◻ Yes ◻ No
If Yes: Name_____ Owner_____
Description of use_____ In foreground? ◻ Yes ◻ No

Are people shown or heard in the element? ◻ Yes ◻ No
If Yes:

1. Name_____ Employer/Agent_____
   Role/Contribution_____
   Celebrity? ◻ Yes ◻ No Over 18? ◻ Yes ◻ No Do you have written consent? ◻ Yes ◻ No
2. Name_____ Employer/Agent_____
   Role/Contribution_____
   Celebrity? ◻ Yes ◻ No Over 18? ◻ Yes ◻ No Do you have written consent? ◻ Yes ◻ No

Other information on the element and product
Are materials accurate? ◻ Yes ◻ No
Are quotes and credits accurate? ◻ Yes ◻ No
If No, explain:_____

If the element is being reused, has it been altered? ◻ Yes ◻ No
If Yes, describe what was altered:_____

What is the purpose of the multimedia product?
◻ Entertainment ◻ Educational ◻ Commercial ◻ Nonprofit ◻ Other_____

Where is the target market? ◻ US ◻ Worldwide ◻ Other_____
How many times is the element used in the multimedia product?_____
Will the multimedia element likely be needed for future products? ◻ Yes ◻ No

Figure 2. Sample checklist for documenting a multimedia element.

findings and provide that information to legal counsel and possibly to your company's contract negotiators.

Counsel and contract negotiators can take over from there and clear the rights—or tell you what works can't go into your product because rights to them aren't obtainable or available at attractive prices.

Your end basically consists of the following six steps. (Figure 2 provides a checklist that you can use when following the steps.)

1. Identify each element

First, determine what types of media go into each element of your multimedia product. Documenting this information can help counsel in checking for clearance of rights. As explained above, different laws and clearance procedures can apply to each type of media.

For elements comprised solely of text or graphics, determining the types of media involved is simple. However, when the element consists of film or video clips, it can get complex. For example, a film clip might consist of several types of media:

- Actors' performances or voice-overs (film, audio)
- Musical performances (recorded music)
- Sound effects (recorded sound, generated sound)
- Animation and special effects (animation)
- Pictures of renowned works of art or architecture (graphics)
- Displays of scripts or newsprint (text) (Scott 1993)

2. Determine the origins of each element

You next need to determine who created each element and who owns it. Counsel uses this information to assess who owns copyrights or other rights in the element (Frank 1994).

Substantial contributors The creators are people who contribute substantially to the making of each element. For textual elements, the contributors are generally the authors. For an audiovisual element, you might have several contributors:

- Script writer
- Novel writer (if the script is based on a preexisting story)
- Actors
- Director
- Producer
- Studio owner
- Property and props owners
- Composer and performers of background music
- Audio and video editors

For elements created in house, you can generally obtain this information by asking coworkers who developed the element or by reading pertinent product plans. For elements obtained from outside sources, such as film clips, you can obtain the information from the credits or from artists' guilds named in the credits.

Named copyright owners For many elements, the creators and named copyright owners aren't the same. For example, if you work for a software company, your company probably owns copyrights in whatever you produce as part of your job.

When you use an existing element—or an element that you or your development team didn't create—you need to examine its copyright notice. In the U.S., the notice generally consists of © or the word *Copyright,* the year of first (and possibly last) publication, and the name of the copyright owner. The notice might also have the words *all rights reserved;* this phrase can protect the copyright owner's interests overseas.

If your multimedia product prominently displays famous property or property created by famous designers, you should identify the property and its owner in your findings.

Some notices state that you can freely use the copyrighted material for educational purposes or in works not sold to the public. You should note these or similar qualifications because they grant you the right to use the material without having to pay royalties or obtain the copyright owner's permission, provided your use falls within the scope of the grant.

Source It's a good idea to note also the database, file name, or other information designating the source of the element. Then if anyone wants to validate what you've documented or wants to use the element again, they won't need to duplicate your efforts in determining the origins of the element.

3. Identify the people shown or heard

If your multimedia product includes pictures of people, their voices, or their names, you should identify the people in your findings. As explained previously, when you include people in multimedia products, defamation and the rights of privacy and publicity become a concern.

For each recognizable person in the element, provide the person's name, employer or agent, and address. Note whether the person is a celebrity or public figure, or a private individual. If the person is a celebrity or public figure, counsel will likely need to obtain a written release. If your product is sold for profit or is used for advertising, counsel will probably want to obtain releases from all people shown or heard in your product (Scott 1993).

Also note whether the person is a minor. In the U.S., this generally means under the age of 18. If the person is a minor, counsel will need to have a parent, guardian, or court sign the written release (Scott 1993).

If the element comes from public records or was shot in a public place, note that as well. It's not an invasion of anyone's privacy to have their picture taken on a public street because the picture is merely a record of what anyone would see (Scott 1993).

4. Identify property and trademarks

If your multimedia product prominently displays famous property or property created by famous designers, you should identify the property and its owner in your findings. The property might consist of renowned works of art or architecture, or actors' costumes created by a well-known designer (Scott 1993).

If you are using clips from an existing film or television show, check the credits for information on properties used for the set. The credits often list any famous properties used in production.

Note that you need to identify famous properties only if your product prominently displays them in the foreground. For example, the movie *Harvey* (1950) shows a painting by Rembrandt, but because the painting rests in the background and is recognizable only to those who study the movie carefully, the painting is rightfully not mentioned in the credits (Scott 1993).

You should identify famous properties because counsel might need to contact the owners and obtain their written permission.

You should also identify in your findings any trademarks or service marks used in the multimedia product. As with instructional manuals and other published materials, the marks and their owners might need to be called out in the text.

5. Flag potentially untrue, retouched, defamatory, or embarrassing materials

If your product includes people or statements about people or businesses, you need to be sensitive as to how they are presented. Depending on the state laws that apply, a person shown, heard, quoted, or referred to in your product might have an action for defamation or for violation of the right of privacy if your product presents the person in a false light or in an offensive way.

Although actions of this type are unlikely for multimedia products, an action can arise, for example, if your product

- Misquotes a person
- Places a picture of someone beside controversial materials, and that person had nothing to do with the described controversy
- Includes a retouched photograph that now presents a person in a false or offensive manner
- Names the wrong author or artist in the credits
- Contains untruths about a person or company (Scott 1993)

You should mention in your findings any statements about people or companies that might be inaccurate, defamatory, or embarrassing. You should also mention whether you altered quotes, sound recordings, or photographs of people. Given today's digital technology, it's easy

to alter taped recordings and photographs. You just have to make sure that the alteration doesn't present people in a way that they might find objectionable.

6. Give your findings and plans to company counsel and contract negotiators

Once you've amassed all this information on your multimedia elements, hand it over to company counsel and contract negotiators.

To expedite clearances of rights and to help counsel and negotiators determine what rights they need to secure, it's a good idea also to give them a copy of your development and distribution plans. For a 100-element product that uses several types of media, the plans might cover the following.

Deliverables Describe the product, list the platforms on which it will be available, and state the estimated number of copies to be shipped.

Uses Describe the purpose of the product. For example, is it commercial? Or is it nonprofit and educational? Counsel considers the purpose of the product when deciding whether fair use applies. If the product is nonprofit and educational, you might be able to include selected portions of copyrighted materials without first obtaining the copyright owner's permission or a license.

Markets State where the product will be sold and describe the target audience. For example, a product might be sold in the U.S. and Europe for household entertainment.

Future uses Identify any multimedia elements or software that you plan to use in future products as well as in the current product. If your company doesn't own the element or software, counsel and negotiators will need to negotiate a long-term license instead of a one-time-use license.

Team members Name the members of the development team. If they work for an outside contractor, name their employers as well. Counsel uses this information in assessing whether requisite work-for-hire or other agreements are in place so any elements produced by team members become property of your company.

Schedules Provide the shipment dates so counsel and negotiators will know the date by which they need to clear pertinent rights.

Elements used more than once in the product Identify existing elements that you use multiple times in the product and state the number of times each element is used. Depending on the type of media and the element owner's licensing practices, your company may need to pay for each use in the product (Frank 1994; Scott 1993).

WHAT DOES THE FUTURE HOLD?

As the entertainment industry and attorneys become more comfortable with multimedia, the labyrinth of clearance procedures and laws should become easier to navigate.

At present, we must either develop multimedia offerings entirely in house or commit time and money to securing all the licenses, releases, waivers, and other documents that we need to prevent anyone from claiming that we unjustly used or harmed their person or property.

Some relief is presently available in that sever copyright clearance centers and stock houses offer relatively low-cost film clips, pictures, sound recordings, and other elements. We can obtain from them licenses to use the elements commercially, and not have to worry about infringing on anyone's copyrights. However, some attorneys have raised concerns that recent changes in the laws might mean that we still have to obtain waivers of moral rights (if we want to modify the element) and releases from celebrities shown or heard in the element (Radcliffe 1994).

As the market for multimedia grows, we'll likely find freer—and less costly—access to databases of digitized art and media clips (Scott 1993). We'll find "standard fees" for multimedia developers, which mean that we can pay a reasonable fee for a two minute film clip, instead of having to pay for the entire film. Further, we might find that digitized media come with electronic "finger prints" that provide information on each element's creators a rights holders. So instead of having to discover and document the origins of each element, we'll merely have to contact the named rights holders and negotiate directly for use of the element (Tanenbaum, 1994). TC

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POSTSCRIPT

The legal issues described in this article are still concerns today. The publication of multimedia content on the Internet introduces additional issues.

As to patents, it seems that every few months, another patent is proclaimed the patent that all participants in the Internet will have to license. The Compton's patent mentioned in our article was one of the first such patents. The U.S. Patent Office reexamined the Compton's patent, and the reissued patent should not interfere with development of multimedia projects. However, patent blackmail of smaller companies with a Web presence is emerging as a new obstacle to placement of multimedia elements onto the Internet, with patent owners demanding that smaller companies pay licenses of $25,000, which is much less than it would cost to defend against a patent lawsuit.

As to copyrights, do not assume that content lacking a copyright notice is not copyrighted. Copyright notices are not required for copyright protection. Further, giving attribution to the author of content usually will not fend off a potential copyright infringement claim where the reuse is not educational.

If your multimedia content will be posted on the Internet, ensure that any licenses are worldwide. There might be different owners of patents and copyrights in different countries.

If your multimedia program collects information on users and sends it to, for example, a marketing company, invasion of privacy might be a concern. U.S. laws restrict how you can gather and use such information, and your program might need to disclose privacy policies.

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