11-1-1996

The Content Shop: Toward an Economic Legal Structure for Clearing and Licensing Multimedia Content

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Recommended Citation
Available at: https://digitalcommons.lmu.edu/llr/vol30/iss1/21
THE CONTENT SHOP: TOWARD AN ECONOMIC LEGAL STRUCTURE FOR CLEARING AND LICENSING MULTIMEDIA CONTENT

The magic of myth and legend has come true in our time. One types the correct incantation on a keyboard, and a display screen comes to life, showing things that never were nor could be.

I. INTRODUCTION

With $529 million CD-ROM revenues in the first half of 1995, multimedia is confirmed as an established industry. It is, in one important respect, unique: it is an industry of borrowing. Like a quilt maker, the multimedia producer patches together pieces of other works, the fabric of other art stitched together as a new whole. To be sure, some producers, like weavers, have the ability to fashion a finished quilt from whole cloth, but the whole-cloth quilt, like the completely original multimedia product, is a luxury. Most, and some of the best, creations are built from a network of others’ art.

The definition of multimedia has caused a lot of confusion. In the 1970s and early 1980s “multimedia presentations” were very

5. For example, the Compton’s CD-ROM Encyclopedia contains “5,200 full articles, 26,023 concise capsule articles, 63,503 entries in a fact-index, 65,000 entries in a full database dictionary, 1,500 glossary terms, a thesaurus, and 15,000 graphics comprising photographs, charts, diagrams and animation.” RICHARD RAYSMAN, MULTIMEDIA LAW: FORMS AND ANALYSIS § 1.01[2] n.5 (1996).
fancy slide shows using several projectors, lights, a sound track, and possibly live action or narration. The dictionary still reflects this perception of multimedia when it defines multimedia as the combined use of several media in a single presentation such as an educational presentation using slides, music, film, and lights. The White Paper addresses some of this confusion. Calling multimedia a “misnomer” it notes that in these works, “it is the types or categories of works that are ‘multiple’ or ‘mixed’—not the types of media,” which like a CD-ROM, are singular.

Multimedia has evolved into a technical term that defines both an industry and that industry’s products. One author defines multimedia as “interactive audiovisual computing,” but it is more. It usually means a digital computer product created from a combination of software and more than one form of content, used interactively and in a nonlinear fashion. Its critical traits are a multiplicity of content forms; digital storage and delivery; computer technology; and a nonlinear, interactive style of use. This definition reflects the changing nature of the industry and recognizes that marketed multimedia products may look very different as technology becomes increasingly sophisticated.

Content creators include two and three-dimensional artists, musicians, filmmakers, photographers, writers, performers, and designers. They may originate works specifically intended as multimedia content, or they may create works without contemplating any use outside the original media.

8. Id.
11. Id.
12. This Comment employs the term “content creators” to refer generally to artists, musicians, writers, and all others who create the works that become multimedia content. Because copyright vests initially in a work’s creator, unless otherwise indicated, content creators in this Comment are presumed to own the rights to their works. Content creators will be collectively referred to as “he.”
13. RAYSMAN, supra note 5, § 1.02[1].
14. See Jeffrey A. O’Connell, SELLING TO THE INDUSTRY, IN CALIFORNIA LAWYERS FOR
Unlike the quilt maker who creates anew from the tag ends of daily life, the multimedia producer must stitch together pieces of jealously guarded and highly protected intellectual property. To create a new whole, one must be able to buy the right to use the pieces. Sometimes the producer will encounter the right patch for free in the public domain, but she cannot rely on finding just the right texture in such a random manner. Usually she will have to search for it and purchase it. If the content sought is something unique, she may need to pay handsomely, negotiating a special deal or royalty. Otherwise, the prudent producer will try to strike a bargain, reminding the seller that "[y]ou can never give more than 100% in royalty."

In an industry where the impact of technological capability and capacity is still uncertain, the value of individual components of a single product is monstrously difficult to ascertain. The uncertain ground producers and creators tread makes negotiating the right to use an image, a song, or some other piece of content more difficult. When the product's content consists of hundreds or even thousands of separate items of intellectual property, the tasks and costs associated with negotiating and administering individual licenses can be overwhelming and even paralyzing. The liability, however, of using creative content without obtaining all the proper clearances is enormous: the producer of an infringing product is

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15. It would be almost impossible to create an encyclopedia, dictionary, or history CD-ROM product without including samples of the subjects. How, for example, would one discuss Beethoven without playing his music or Shakespeare without quoting a few lines? In each of these cases, it is easy to quote because the works are in the public domain. But what if the subject was rock and roll or biochemical discoveries? Neither the Rolling Stones nor the Mayo Clinic will turn a blind eye to the use of their property without their permission. See Mark Litwak, Potholes on the Information Superhighway: A Roadmap to Legal Issues in Multimedia Productions, in ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 199 (Robert Thorne & John David Viera eds., 1995-1996 ed.) [hereinafter EPAH].

16. The author will refer to multimedia producers and developers as "she." Technically, multimedia producers and developers hold different positions within the multimedia industry. Practically, these positions may be held by the same person in an entrepreneurial organization, and the responsibilities vary from position to position. For purposes of this Comment, producer and developer are used loosely to indicate the person with decision-making authority about product content.

17. O'Connell, supra note 14, at 11.

18. Id. at 1.

19. Id.

20. Id. at 11.
liable for the rights holder's actual or statutory damages, the value of the infringing producer's profits, and attorneys' fees and costs. An infringing producer is also subject to injunctive relief impounding and destroying the infringing product and requiring recall of all units previously sold. In some instances, the infringing producer would also be subject to criminal sanctions.

These onerous licensing burdens and liabilities have led some multimedia producers to conclude that they must generate completely original content for their products, even when they prefer preexisting content. This impasse fails to serve the producer, the artist or author who desires to profit from his creations, or the consumer stuck with a Hobson's Choice of inferior content or impermissibly high prices.

This impasse is unnecessary. The problems of negotiating and administering licenses for multimedia works are not insurmountable. This Comment focuses on formulating a practical method of protecting the multiple types of works that constitute "content" for multimedia products while fostering the growth of the multimedia industry. Mechanisms for standard licensing and centralized administration will serve multimedia creators, producers, and consumers by promoting more efficient multimedia markets. Creators will gain profit from their works. Producers will benefit because they will not feel compelled to create new content for every new product. Consumers will enjoy increased availability of higher

22. Id. § 505.
23. Id. § 503.
28. Telephone Interview with Scott Neilson, Graphic Artist and Instructor of Digital Image Editing & Visual Communication, The Art Institute of Seattle (Jan. 14, 1996) (on file with Loyola of Los Angeles Law Review) [hereinafter Neilson Interview]. However, a growing number of producers resist the concept that they should pay anything to incorporate protected material. Id.
quality, lower cost products.

A. Historical Background

Conflict over the use of creative works is nothing new. An early Irish king settled the property rights in a manuscript in favor of its author declaring, "[t]o every cow her calf." 29 Although common law recognized authors' rights in unpublished manuscripts, Britain first recognized authors' rights in published works in 1710. That year Britain passed the Statute of Anne—an "Act for the Encouragement of Learning by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies During the Times Therein Mentioned." 30

In 1851 the Societe des Auteurs, Compositeurs et Editeurs de Musique (SACEM), formed in France to provide café owners and musical composers a solution to the café owners' unauthorized use of the composers' works. 31 Café owners needed to provide music to attract patrons so they hired orchestras. The copyright law that required the café owners to pay the composers for playing the music had not been enforced until 1847. 32 Unfortunately, there was neither any way for the composers to contact all the café owners, nor for the café owners to reach each composer to secure permission to use the music. 33 SACEM stepped into the situation to facilitate licensing, administer music public performance li-

29. ARTHUR B. HANSON & CAMBRIDGE RESEARCH INSTITUTE, OMNIBUS COPYRIGHT REVISION: COMPARATIVE ANALYSIS OF THE Issues 6 (1973). This event probably occurred between the fifth century A.D., when writing was introduced to Ireland, and A.D. 1250 because by 1250 three-quarters of Ireland was under Norman control. JOHN O'BEIRNE RANELAGH, A SHORT HISTORY OF IRELAND 14, 38 (1983).

30. HANSON & CAMBRIDGE RESEARCH INSTITUTE, supra note 29, at 5-6.


32. Id.

33. This situation still exists and is complicated by the practice of dividing and assigning copyrights, as evidenced by the continued flourishing of collective administration associations. David Sinacore-Guinn provides an extensive list of collective administration associations. Id. at xlviii-lxiii.; see also STEPHEN M. STEWART & HAMISH SANDISON, INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS, 968-85 (1989) (providing a similar list). For example, in the United States, there are three major societies and one agency that handle music public performance rights alone. The American Society of Composers, Authors & Publishers (ASCAP) was founded in 1914, followed by Broadcast Music, Inc. (BMI), SESAC, Inc., and the Harry Fox Agency. SINACORE-GUINN, supra note 31, at xlviii-lxiii. In addition, the Harry Fox Agency, the American Mechanical Rights Agency, Inc. (AMRA), and SESAC administer music synchronization and mechanical rights for owners and buyers. Id.; STEWART & SANDISON, supra note 33, at 978.
licenses, and distribute royalty payments. SACEM became a beacon for all parties; there was no longer any need for them to find each other when each party could find SACEM. Further, SACEM's collective administration removed the café owners' burden of administering the license fees for the many compositions performed each night while providing composers an income from their work.

SACEM satisfied the very concerns multimedia content creators and producers face today. Like the French café owners, producers have no way of reaching and negotiating with individual creators, and the administrative burden of managing each license might preclude producers' ability to generate multimedia products.

Producers want to use existing works to create a new commercial product. Administering licenses and copyrights distracts from the work of producing new multimedia creations. Producers and developers need the freedom to focus on design and marketing. Consequently, they need a solution to the administrative headache. Conversely, creators and other content owners need assurance they will be compensated properly for the use of their work.

This Comment examines the multimedia licensing process, the administration of licenses, and the balance between creators' and producers' interests. It recommends a blanket licensing and collective administration scheme to enable creators and producers to work together for their mutual benefit.

Part II of this Comment briefly introduces the multimedia industry and looks at the challenges raised by its intense use of content, its plasticity, and its digital character. Part II also examines how the fragmented and international character of intellectual property ownership confuses and complicates rights issues. Part III addresses how mass use affects intellectual property rights and analyzes whether multimedia should be considered a mass use. It then discusses the vast differences in resources and bargaining power between various types of producers and creators within the

34. Collective administration is discussed infra Part IV.
35. SINACORE-GUINN, supra note 31, § 1.0.
36. O'Connell, supra note 14, at 11; see Broadcast Music, Inc. v. CBS, 441 U.S. 1, 4-5 (1979) (discussing the impossibility of licensing music public performance rights on an individual basis). Music is only one component of multimedia so the problem the Court discusses is compounded with respect to multimedia.
structure of the multimedia content marketplace. Part IV looks at
the various types of collective administration from the perspective
of antitrust concerns and multimedia logistics. Part V distin-
guishes between blanket and compulsory licenses, presents the is-
sues surrounding each type, and then discusses licensing in a mul-
timedia context. Part VI proposes a multimedia licensing scheme
aimed at building a mutually beneficial commerce between crea-
tors and producers. The proposed scheme will both surmount the
hurdles involved in clearing the rights to use content and reduce
the cost of licensing by simplifying the negotiation process.

II. BACKGROUND OF MULTIMEDIA AND ITS RIGHTS ISSUES

Multimedia presently includes interactive television, virtual
reality, and disk-based products; it is certain to include other tech-
nologies as these mature. Interactive television is in its infancy
and has largely awaited the standardization of the high definition
television (HDTV). HDTV will be a boon to the entire multi-
timedia industry because its high-definition display, suitable for
both computer and television viewing, will support multimedia's
graphic demands. This product should soon be available in a
standardized form, but will be very expensive until the general
public accepts it as a desirable standard.

37. Richard E. Wiley, Good Fortune With Great Pictures: HDTV Technology Can
Foster Multimedia Applications, in MULTIMEDIA AND THE LAW, supra note 9, at 25, 33.
38. Id.
39. Id.
40. The life-cycle of a technological product market can be illustrated by the con-
sumer market for audio compact disks (CDs). SCOTT, supra note 26, § 1.01[B][4] & chart
1.1. The “early adopters” purchased the first CD players at outrageous prices while few
titles were available. Id. Early adopters represent a tiny percentage of the market char-
acterized by high income, a fascination or obsession with technology, and a willingness to
pay any price. Id. “Early majority” consumers build the market. Unlike early adopters,
the early majority purchase when it is a reasonable gamble that the technology is here to
stay, following the first significant price break. Id. Of reasonably high disposable income,
these people still form a small percentage of the market. The “majority” buy once the
price has dropped into a reasonable range and the benefits of the technology are appar-
ent. Id. This is when the technology becomes a household word. The “late majority,”
afraid that the new technology will go the way of the eight-track tape, are of middle to
lower income, are not technologically focused, and wait until there are major sales on the
technology. Id. The “late adopters” are stragglers, usually with minimal disposable in-
come or little interest. Id. By the time late adopters purchase, the early adopters have
moved on to the next breakthrough. Id. Until the early majority adopts HDTV, it will
not be a significant force in the multimedia industry because market forces dictate that
most products will be designed to sell for the technology in use by the majority of con-
sumers. See id.
Virtual reality (VR) is also in its infancy, but is growing in both research and entertainment applications. VR is a computer generated, simulated, multisensory environment in three dimensions. An immersed VR user perceives the environment as "reality" and interacts with it from a first-person point of view. To achieve this result the user usually dons special gloves, headgear, or sometimes a whole suit, connected to sensors and a computer. Until recently, apart from a few research laboratories, this technology was hardly "real." It was easy to distinguish between reality and virtual reality. Now, however, technology has advanced to such a point that there are virtual reality arcades in which patrons immerse themselves in virtual worlds where they play truly interactive multimedia games. The "feelies" of Aldous Huxley's Brave New World have not yet appeared, and virtual reality has yet to enter the average home. Technological advances, however, may soon allow VR to come knocking at our doors, bringing with it not only excitement but a plethora of moral and legal questions our society has yet to address.

41. SCOTT, supra note 26, § 1.03[D].
42. Id.
44. Id. The Human Interface Technology Laboratory (HITL) at the University of Washington, NASA, and JPL Research have developed much of the current virtual reality technology including the "Cyberspace" system, the DataGlove, and the "DataSuit." Id. at 104. HITL's objective is to "develop natural interface techniques designed for experimental rather than symbolic interaction." Id.
45. Id. In 1990 the available technology could not yet render images at 30 frames per second, which gave the images a "jumpy, staccato-like quality." Id. at 108.
46. Id. at 102.
47. ALDOUS HUXLEY, BRAVE NEW WORLD (1946). (The feelies were supposed to be so "real" that one could feel every hair of a bearskin rug.) See id. at 39.
49. Unfortunately, the scope of this discussion precludes delving into such fascinating questions as the elements of and remedies for torts caused by or in virtual worlds, who holds the intellectual property rights to the realization created by a user interacting with a virtual world, or the moral and ethical questions surrounding virtual reality's effect on blurring the distinction between reality and imagination. "[T]here is every reason to suspect that our ability, as well as our desire, to discriminate between reality and its various representations may be in a permanent state of atrophy." Robin Nelson, Swept Away by the Digital Age, POPULAR SCIENCE, Nov. 1993, at 92, 96. Huxley's Brave New World is an introductory exploration demonstrating the profound ramifications of a societal inability to discriminate between reality and virtual reality. Nor is the idea of societal seduction by virtual reality unthinkable. "Any sufficiently advanced technology is indistinguishable from magic" and magic, whether ancient illusions or psychic hotlines, has
Disk based products are, by far, the most common multimedia products. These come in two basic platforms, "set-top boxes" and "desktop systems." Set-top boxes sit on top of, and interact with, a television set. They are used primarily for video games and are further divided into stand-alone players and video game add-on hardware. These formats are incompatible with each other and with desktop systems.

Desktop systems are generally personal computer based CD-ROM systems, primarily used for game technology, educational, and business applications. The market for desktop systems is growing and diversifying. The compact disk (CD) is an inexpensive, convenient way to store and access tremendous quantities of information. A standard audio CD holds up to seventy-four minutes of digital audio information. A standard CD-ROM holds up to 650 megabytes of data, more than many hard drives and equivalent to 464 high-density floppy disks. Technological improvements have led to another kind of disk, which will arrive in retail stores by late 1996. DVD, or Digital Video Disk, is a dual-sided, dual-layer CD that can store up to 18 gigabytes, about the equivalent of 12,500 high-density floppy disks, in a disk the same size as a standard CD. It is currently intended to replace VCR technology. As the only disk with the speed and capacity to store whole movies, DVD may also prove to be the technological jump that disk based multimedia needs to fully realize its potential. If multimedia producers create projects using preexisting content for DVD, DVD’s capacity will also exacerbate the current intellectual property problems associated with multimedia.

...always had a drug-like seductivity. ARTHUR C. CLARKE, THE LOST WORDS OF 2001 179 (1972).

50. See SCOTT, supra note 26, § 1.01[A].
51. Id. § 1.01[B][3].
52. Id. §§ 1.01[B][3], 1.03[A].
53. Id. §§ 1.01[B][3], 1.03[A][4]-[5].
54. Id. § 1.03[A].
55. Id. § 1.02[A][1]-[3].
56. Id. § 1.02[A][3]. In 1995 CD-ROM software for business eclipsed game software for the first time. Silverthorne, supra note 2, at A12. However, this jump in the second quarter may have been a temporary shift due to the phenomenally successful introduction of Windows95, which was introduced on CD-ROM as well as traditional floppy disks. Id.
58. Id. at 33-34.
59. Id. at 34.
60. Id.
A. Plastic Program Problems

The most common multimedia product is a CD-ROM product based on a "story" that branches at several levels and has multiple endings. Each ending depends on the users' choices made earlier in the program.61 Seen schematically, this type of program resembles a very complex flowchart and is known as a branching program.62 Branching programs offer users the opportunity to mold and remold their experience, giving the program a "plastic" quality.63 The plasticity of a branching program creates intellectual property problems.

All multimedia programs, including branching programs, have two basic components, code and content.64 Code is what makes the program run. It encompasses both the user interface and the platform on which the interface runs.65 The law treats code differently than content,66 and few of the issues addressed here remain unresolved for code.

Content is the heart of the story; it is what sells the product.67 Content is what the user perceives—the story, the rich visual imagery, the sounds, the music.68 It can include video, audio, photographs, text, graphics, animation, art, architecture, and performances. These elements, captured and stored digitally within the program, and used together, become the content.69

The volume and plasticity of the content create three problems. There is the logistical issue of clearing and tracking the

62. Id. at 101-05 (discussing Compton's New Media Patent #5,241,671 entitled "Multimedia Search System Using a Plurality of Entry Path Means which Indicate Interrelatedness of Information" and reprinting the schematic included in the patent).
63. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.08[D] n.145 (1996).
64. SMEDINGHOFF, supra note 10, § 1.2[A]; Litwak, supra note 15, at 218-20.
65. RAYSMAN, supra note 5, § 1.02; SCOTT, supra note 26, § 1.01; see Litwak, supra note 15, at 200.
66. Because it is clearly software, code is subject to the highly sophisticated and defined business world of computer software and hardware. In most jurisdictions software development contracts are governed by Article 2 of the Uniform Commercial Code. See, e.g., RRX Indus., Inc. v. Lab-Con, Inc., 772 F.2d 543, 546 (9th Cir. 1985); Advent Systems Ltd. v. Unisys Corp., 925 F.2d 670, 673-76 (3d Cir. 1991).
67. RAYSMAN, supra note 5, § 1.02[1].
68. Id.
69. See id.; SCOTT, supra note 26, § 1.01.
rights to use each piece.\textsuperscript{70} Then, even if all the content owners agree to license the works for the product, the branching structure of multimedia creates a difficulty in determining the value of each piece. Finally, the medium’s digital nature creates enforcement problems because users may change digital content in ways that make it difficult or impossible to recognize.\textsuperscript{71}

1. Volume problems

A regular, linear story that takes two hours to tell contains two hours of content. A branching story with several possible endings, however, contains many times that amount of content.\textsuperscript{72} For example, suppose an author wishes to produce an illustrated book about Irish Castles. He may know he needs text and “151 illustrations, 15 in colour, plans and a map”\textsuperscript{73} for a book of about 200 pages. The multimedia publisher will replace much of the text with images and consequently will require many more images.\textsuperscript{74} She may need to digitally reconstruct those castles now in ruins. She will need interiors, exteriors, and floor plans of every castle to create the sense that the user is walking through the halls and rooms. She will need to give every castle the attention that the book’s author need only give to a few representational sites. This is because the user may prefer to see the inside of Limerick or Roscommon castles instead of Dublin Castle, although all three are representative of the royal keepless castle.\textsuperscript{75} In addition, consumer expectations are different for multimedia products than for books. The producer, therefore, will almost certainly need to incorporate music, additional color images and video of the site, as well as of arts and crafts such as textiles, furniture, paintings, and sculpture.\textsuperscript{76} The producer adds these elements so that users believe they can realistically explore the rooms and grounds of various castles.

\textsuperscript{70} SCOTT, supra note 26, § 1.01. Most content is subject to copyright protection and usually each piece must be cleared individually. See Litwak, supra note 15, at 200-01.

\textsuperscript{71} For an example of how images change through the morphing process see Holsinger, supra note 57, at 35, illus.27.

\textsuperscript{72} See Johnson-Laird, supra note 9, at 17.

\textsuperscript{73} BRIAN DE BREFFNY, CASTLES OF IRELAND, title page (Thames & Hudson 1992) (1977). Although the architecture of the castles would be in the public domain, their depictions in photos or drawings, as well as their reconstructions, may be protected, even if created for this specific project. If so, these images will need to be cleared.

\textsuperscript{74} SCOTT, supra note 26, § 1.02[c][1].

\textsuperscript{75} DE BREFFNY, supra note 73, at 14-15.

\textsuperscript{76} See SCOTT, supra note 26, §§ 4.01, 5.01, 6.01.
The multimedia producer, therefore, needs many times the content the book’s author needs, as well as many different kinds of content, each with its own set of property rights. Further, the producer will often need more than one kind of right. For example, what if the proposed content includes a piece of traditional Irish music in the program, and the developer wants to use the Chieftains’ song “Boil the Breakfast Early”? The developer will need a master license in the composition as well as a license in the rendition. She must clear the right to the composition with CBS Records and the rights to the album rendition with Claddagh Records, Ltd. This project will require at least two licenses, one to synchronize the recording to the action in the program and a master license to record and distribute the song in the product and, if necessary, to convert the song to a digital format. The project will also require a public performance license through the band’s performing rights society if the product is to be publicly demonstrated, for example, in a trade show. The Chieftains may also have trademarked their name or even the name of the song. Trademark adds another layer of requirements and licenses to the use. If the producer prominently displays or advertises the band’s name, especially if she uses a photo of the band, she may also have to address rights of publicity and privacy. Finally, if the producer borrowed ideas or reconstructions with commercial value and used them in a way that impairs the commercial value to the original creator, the producer may confront unfair competition rules.

78. See discussion infra Part V.A.
79. THE CHIEFTAINS, Boil the Breakfast Early, on BOIL THE BREAKFAST EARLY (© CBS Records 1980, (p) Claddagh Records, Ltd. 1979). The copyrights in the composition and the rendition are displayed on the album cover.
81. Id. § 101 (West & Supp. 1996) (sound recordings do “not includ[e] the sounds accompanying a motion picture or other audiovisual work”); id. § 106(1) (granting exclusive right of reproduction in copies or phonorecords).
83. SCOTT, supra note 26, § 11.01.
84. Id. §§ 11.01, 14.01, 15.01; Jordan Stringfellow and Helene Godin, Setting the Stage: Guidelines for Television Prop Clearances, Ent. L. Rep., Mar. 1994, at 3, 3.
85. SCOTT, supra note 26, §§ 1.02, 17.01.
2. Valuation problems

In the castle book, the author will probably license preexisting photos through a clearinghouse.\textsuperscript{86} Clearinghouses set license fees based on their assumptions about the use, sales, and exposure of the images in a book.\textsuperscript{87}

The multimedia producer will quickly discover problems with this scheme. First, it is difficult to set assumptions about use when one has no way to know what the user will view while progressing through a branching program. It is even harder to determine how many times the user will see each item. If the licensor bases value on the anticipated number of impressions an image is to have, uncertainty hampers the calculation of its license price.\textsuperscript{88}

Ostensibly, in this case, a tapestry typical of the thirteenth century, which is used to illustrate the royal keepless castle, could be viewed in conjunction with each castle. If its license is based on anticipated impressions and the licensor calculates one impression for each castle, its license fee for the tapestry image could be higher than the fee for individual images of the castles it is meant to ornament. This result seems inverted. A stock photo, used in a secondary capacity, should not cost more than the primary subject merely because the user may view it more than once. Further, there is no way in which the licensor can determine how many castles the user will explore, and hence, how many impressions the tapestry will make. Further, if after looking through Dublin in detail, and seeing only the exterior ruins of Roscommon, the user moves on to another type of castle, never viewing Limerick at all, do Roscommon, Dublin, and Limerick have the same value?

The second valuation problem is how the value of photographs in a multimedia presentation compares to the value of the same photographs in the book. Assume license fees were set at $100 per image.\textsuperscript{89} The images for this book would cost $15,100 to license.\textsuperscript{90} If the multimedia producer wants to sell her product at standard retail prices, the images must be priced far below $100 each because of the vastly greater number of images that must be

\textsuperscript{86} See O'Connell, \textit{supra} note 14, at 3-4.
\textsuperscript{87} \textit{Id}.
\textsuperscript{88} \textit{Id} at 3-4.
\textsuperscript{89} This price may be conservative. Images frequently are licensed for hundreds and even thousands of dollars. Neilson Interview, \textit{supra} note 28.
\textsuperscript{90} See \textit{supra} note 73 and accompanying text.
included. Yet the artist may well ask, "Why should I license my photo to you for less than I would charge you to print it in a book?"

Each of these aspects fits into the determination of value, and each is a reason many content owners are waiting on the sidelines until a standard price emerges. The owners' hesitation combined with an incipient attitude in the industry that it is acceptable to use copyrighted material without permission or payment means many deals never close. Failure to close licensing deals creates consequential losses to both content owners and multimedia producers that far surpass the mere loss of income. Not only do

91. SCOTT, supra note 26, § 1.02[c](1) "No matter how successful the CD-ROM is, it will not be successful enough to justify paying $100 per photograph." Id.; Litwak, supra note 15, at 200. "The amount of money a producer can afford to pay and still recoup on [her] investment is relatively small at this time because of the limited market for the end-product." Id. While there may be wide variation in the retail sale price and volume for multimedia products, they will be profitable only when their costs of production are low in comparison to their market prices. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, ECONOMICS 60-61 (13th ed. 1989); see also Michelle Matassa Flores, Corbis Corp adds Ansel Adams to Collection, SEATTLE TIMES, Apr. 2, 1996, at A1 (Corbis Corp. planning to market a CD-ROM of Ansel Adams' work for about $50); Richard Raysman & Peter Brown, Multimedia Licensing, N.Y.LJ., July 13, 1993, at 3 (reporting that Microsoft paid about $500,000, or ten percent of its total project budget, for the licenses necessary to its Encarta Multimedia Encyclopedia).

92. See Neilson Interview, supra note 28.

93. Litwak, supra note 15, at 200. "Content owners do not know what to charge to license material for multimedia use. CBS Inc. is reportedly charging fifteen dollars a second for material in its library." Id.

94. James Martin discusses an ad for the "Rip-Off Artist," a hand-held scanner with which the ad encourages buyers to "lift a photo, logo or drawing and transfer it to a report, manual or article' and to 'rip off graphics (and now text) risk-free."' James A. Martin, Are You Breaking the Law? A Guide to Image Copyright Do's and Don'ts, MACWORLD, May 1994, at 124, 127 (emphasis added). The ad suggests appropriating text by scanning "books, encyclopedias and newspapers." Id. Although it does contain two copyright warnings, it is hard to see anything but a brazen inducement to copyright infringement. See also Source Licensing: Hearing on S.1980 Before the Subcomm. on Patents, Copyrights and Trademarks of the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 255-56 (1986) (statement of Hal David, Pres. of ASCAP) [hereinafter Source Licensing] (urging Congress to eliminate the blanket license for television programming); Scott Collins, Uneasy Writers: ASCAP Chief, Songwriters Fight Plan to Cut Royalties, L.A. TIMES, Mar. 29, 1996, at D1 (discussing restaurant owners' lobbying effort to exempt restaurants from the music public performance license requirement); Mary Eisenhart, Intellectual Property in a Digital World: Who Owns It? Who Controls It? Who Pays For It?, MICROTIMES, Nov. 8, 1995, at 105 (discussing copyright issues facing software developers and multimedia content creators); Neilson Interview, supra note 28 (discussing his students' perception that there is nothing wrong with using a continuous tone scanner to incorporate someone else's work into their project).

95. SCOTT, supra note 26, § 1.02.
creators lose income, but the advent of some kind of pricing standard is postponed, and creators incrementally lose control of their work.\footnote{6}

In light of the technological facts of digital imaging and storage, and the emergence of more new products than any creator could possibly police for infringement, creators’ failure to license willing developers jeopardizes the very right they seek to protect—the exclusive right to exploit their work for a limited time.\footnote{7} But creators are not alone. The identical factors threatening their work also threaten developers whose completed compilations are themselves subject to copyright and other protections as derivative works.\footnote{9} Further, developers tempted to use works without permission face the Copyright Act of 1976,\footnote{99} which explicitly voids the copyright in any portion of a derivative work “in which such material is used unlawfully.”\footnote{100}

Meanwhile, a new breed of artists is emerging who intend to produce content specifically for multimedia.\footnote{101} While these artists may devise standards for pricing new works created for specific products, the market for preexisting works will not necessarily standardize on the same basis. There are a number of differences. For example, a new work’s creation must be compensated, while the creation of existing work has presumably already been compensated.\footnote{102} The fee structure to license preexisting works is also necessarily different than it is for content created pursuant to a work-for-hire agreement\footnote{103} or for a rights assignment. Although

\footnotesize

\footnote{6. See infra, Parts II.A.3, III.A-C.}
\footnote{7. “The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8; 17 U.S.C. § 201.}
\footnote{9. 17 U.S.C.A. § 101 (defining, among other things, derivative works and audiovisual works). Multimedia can be defined as an audio-visual work and thus is regulated under § 101.}
\footnote{100. 17 U.S.C. § 103(a); see 1 Nimmer, supra note 63, § 3.06.}
\footnote{101. For example, InterOctave and Broderbund are companies founded for the purpose of providing professional quality multimedia content, including soundtracks with Hollywood production values. See Bob Safir, Reverberation: Sounding Off, MORPH’S OUTPOST ON THE DIGITAL FRONTIER (InterOctave, San Jose, Cal.), July 1994, at 34 (on file with the Loyola of Los Angeles Law Review.)}
\footnote{102. This presumption will sometimes fail, but it is based on the idea that the multimedia producer saw or heard the work somewhere. Exposure indicates a previous publication, display, or performance that probably was compensated.}
\footnote{103. 17 U.S.C. § 201(b); see discussion infra Part II.B.2.}
the preexisting work would have been created without compensation for multimedia use, the rights licensed to a multimedia producer by owners of preexisting content will probably differ from those granted by employees, independent contractors, or specially commissioned artists. Licensing preexisting works, therefore, not creating new works, will produce the standards for preexisting content.

3. The downstream use problem

Multimedia's digital character accentuates a third hurdle. Creators seek to protect their work and are often leery of licensing it in ways that remove it from their control. Because multimedia is based on digital capture and storage, creators are concerned about what will happen to their works after they appear in a multimedia product. This is known as the "downstream use problem." The digital process converts an image or sound to binary code and stores it as information. Once a work of art is in digital form, one can duplicate it, compress it for storage, combine it with other information, and manipulate it in ways never envisioned by the work's creator, all without depreciating its original quality. This means any work that can be captured, whether an original or a copy, can be digitized and stored as an original image. It can then be sampled, cloned onto another image, or "morphed" with another image. The original works may not be recognizable, but they are an inseparable part of both the intermediary and com-

104. Copyrights in works for hire are owned by the employer, not the employee-creator, 17 U.S.C. § 201(b), and in this case no rights are granted because the producer already owns them. Copyright assignments and exclusive licenses grant, to a slightly lesser degree, the full rights to the producer. The rights holder of preexisting content, however, may have already granted, sold, or licensed significant portions of his rights to other parties, so what is being licensed is not the same in the two cases. See infra Part II.B.2.

105. Litwak, supra note 15, at 201-02.
106. SCOTT, supra note 26, § 1.02[C](5).
107. Teresa Riordan, Writing Copyright Law for an Information Age, N.Y. TIMES, July 7, 1994, at C1, C5.
108. Id. at C1; SCOTT, supra note 26, § 1.01[A](4).
pleted images. In addition, currently available scanner technology includes descreening software that strips the half-tone screening from a printed image, calculates the original colors from the screening, and restores the image to continuous tone. This enables an unlicensed user to scan a printed image, converting it in the process to a continuous tone image ready for clean digitizing and manipulation.

Copyright owners concerned about digital infringement cannot afford to hide in the illusion that their refusal to license the work will protect it. If their work is marketable people will use it, and infringement will be difficult both to discover and to prove. This leaves two basic questions: will the artist have any control over the inevitable use of his work, and will the artist be paid for that use? The practical likelihood of payment increases with the producer’s access to easily and affordably licensed material.

B. Clearing the Content

Clearing the rights to content is the most critical intellectual property issue a multimedia producer faces. It is the process of getting permission to use a work and must be addressed for both new and preexisting content. Using protected works without permission is infringement. An infringement suit can result in judgments far exceeding the product’s value, and damages may include attorneys’ fees and costs. In addition, the rights owner may ask for injunctive relief, including seizure of unsold product and recall of all units sold.

An example may help to illustrate this point. Delrina, a software company, created a computer screen saver that featured the cartoon penguin Opus shooting down flying toasters. Another

111. Litwak, supra note 15, at 202; Holsinger, supra note 57, at 35, illus.27; Neilson Interview, supra note 28.
112. Neilson Interview, supra note 28.
113. Id.
114. See Merians, supra note 110, at 245.
115. See Kohn & Kohn, supra note 3, at 10-14.
117. Id. § 504 (actual damages plus infringer’s profits); id. § 506 (criminal sanctions); id. § 509 (seizure and forfeiture, including “all electronic, mechanical, or other devices for manufacturing, reproducing, or assembling such copies”).
119. Id. §§ 502, 503, 509.
software company, Berkeley Systems, had already made the flying toasters famous in their own screen saver.\textsuperscript{121} Berkeley sued Delrina for copyright and trademark infringement.\textsuperscript{122} Delrina was prohibited from further distributing their product and had to recall all unsold units.\textsuperscript{123} Delrina lost hundreds of thousands of dollars in legal fees and damages.\textsuperscript{124}

A subsequent case, \textit{The Jefferson Airplane v. Berkeley Systems, Inc.}\textsuperscript{125} discussed Delrina. Here, the Jefferson Airplane claimed that the Berkeley Systems’ flying toasters screen saver was itself an infringement of the Jefferson Airplane’s copyright in the cover art for the album \textit{Thirty Seconds Over Winterland}.\textsuperscript{126} The album cover featured an illustration of two winged toasters flying in formation, much like the flying toasters module.\textsuperscript{127} Unfortunately for the Jefferson Airplane, the copyright on their album cover was never properly registered and the court lacked subject matter jurisdiction.\textsuperscript{128} Had the Jefferson Airplane been able to complete the suit and win, Berkeley Systems would have been liable not only to the Jefferson Airplane, but also to Delrina because Delrina could not have infringed Berkeley Systems’ module if it was not protected by copyright.\textsuperscript{129} Of course, Delrina would still have had to address infringement issues with the Jefferson Airplane.

Copyright protects most content.\textsuperscript{130} Copyright, however, is not a deed or some piece of paper that bestows universal, immutable rights on the holder any more than conveyance of the tangible

\begin{itemize}
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.}
\item \textsuperscript{123} \textit{Id.}
\item \textsuperscript{124} \textit{Id.}
\item \textsuperscript{125} 886 F. Supp. 713 (N.D. Cal. 1994).
\item \textsuperscript{126} \textit{Id.}
\item \textsuperscript{127} \textit{Id.} at 714.
\item \textsuperscript{128} \textit{Id.} at 717; see 17 U.S.C. § 501(b).
\item \textsuperscript{129} 17 U.S.C. §§ 201, 204.
\item \textsuperscript{130} Copyright in the United States protects “original works of authorship” that are “fixed in any tangible medium of expression.” \textit{Id.} § 102. Pursuant to the Berne Convention, the Universal Copyright Convention (UCC), North American Free Trade Agreement (NAFTA), the General Agreement on Tariffs and Trade, Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4976 [hereinafter GATT], and other intellectual property treaties and reciprocal proclamations, works protected in one country are likewise protected in other signatory countries. However, beyond certain minimum levels, the protection is generally subject to national treatment, that is, subject to the laws of the country in which enforcement of rights is sought. This coverage may differ significantly from the coverage in the country of origin, especially in terms of duration of copyright. See, e.g., Universal Copyright Convention, July 24, 1971, art. 2, § 1, 25 U.S.T. 1341, 943 U.N.T.S. 178.
\end{itemize}
work conveys its copyright. Copyright is an ownership interest that vests initially in those creators or authors of a work who contribute "copyrightable expression" to the work. It may be a joint interest. It also may be divided, transferred, licensed, granted, or assigned like any other piece of property. In clearing the rights the user must be certain to clear all the necessary rights. For example, a song in a popular recording will have two or three separate copyrights: the first in the composition, the second in the recording of that composition, and the third in the specific rendition that was recorded. Several individuals may jointly hold each of these rights. For example, a single person, a combination of individuals and companies, or an entire band may share one or more copyrights in a song. The parties may divide the ownership interests unevenly, in which case the rights will have to be cleared with at least a majority of the owners, or with owners representing a majority of the ownership interests.

1. New works

Clearing the rights to new works is much simpler than clearing the rights to preexisting works because the affected parties can define the rights before they become fractionalized and confused. A multimedia producer, who is not also the content creator, must first determine whether the new creation is a work made for hire. If it is a work for hire, then the multimedia producer's troubles are over; she owns the work with all its rights and may exploit the work freely. If the new creation is not a work made for hire, the producer must clear the work just as she would any preexisting content. The principal difference is that, because the work is recent, all the interested parties are easier to find.

2. Works made for hire

Works created by the multimedia producer's employees in the

\[\text{References}\]

133. Id. § 201.
134. Id. § 201(d).
137. Id. § 201(d).
138. 17 U.S.C.A. § 101; 17 U.S.C. § 201(b) (governing works made for hire); Id. §205(e) ("nonexclusive license . . . prevails over a conflicting transfer").
139. 17 U.S.C. § 201(b).
scope of their employment are works made for hire.\textsuperscript{140} The Code provides a long list of factors for determining whether the creator is an employee. These factors include: the duration of the relationship, who provides the tools and instrumentalities for the work, where the work is done, the degree of autonomy the employee has in determining work hours, the scope of employment, whether the employee has discretion to hire and pay assistants, whether payment depends on completion of the job, and who pays the taxes and benefits.\textsuperscript{141} Courts focus on who is in control.\textsuperscript{142} If, on balance, the producer is in control, then the creator is an employee, but if the creator is in control, then the creator is an independent contractor.\textsuperscript{143} Independent contractors very rarely qualify as employees and, with one narrow exception,\textsuperscript{144} copyright vests in an independent contractor who cannot be defined as an employee.\textsuperscript{145} The exception was carved out for certain types of specially commissioned works including "motion pictures or other audio-visual works."\textsuperscript{146} "Multimedia software can be defined as an 'audio-visual work.'"\textsuperscript{147} If, however, the independent contractor is working on something that does not fit into this narrow exception, the independent contractor, not the multimedia producer, owns the copyright.

When the specially commissioned work exception applies, the parties must follow some formalities to take advantage of the exception. Primarily, the parties must agree in writing that the result is to be a work made for hire.\textsuperscript{148} There has been some controversy over when the writing must be signed to be enforced. Courts will enforce a writing signed prior to commencement of the work; after that point, the producer should not count on the work made for hire exception.\textsuperscript{149}

\textsuperscript{140} 17 U.S.C.A. § 101.
\textsuperscript{141} The definition of employee is narrowly construed. See Community for Creative Non-Violence v. Reid, 490 U.S. 730, 751-53 (1989); 1 NIMMER, supra note 63, § 5.03[B][2][d].
\textsuperscript{142} Reid, 490 U.S. at 751-52.
\textsuperscript{143} Id.
\textsuperscript{144} See, 1 NIMMER, supra note 63, § 5.03[B][2][a].
\textsuperscript{145} 17 U.S.C.A. § 101.
\textsuperscript{146} Id.; 1 NIMMER, supra note 63, § 5.03[B][2][a].
\textsuperscript{147} Karen S. Frank, Intellectual Property Issues in Multimedia, in MULTIMEDIA AND THE LAW, supra note 9, at 163, 173.
\textsuperscript{148} Id. at 172.
\textsuperscript{149} E.g., Reid, 490 U.S. at 734. Courts have held that the exception did not apply to works made for hire when the agreement was signed after commencement of the work.
When the creation does not qualify as a work made for hire, the wise producer will get an immediate written assignment of copyright from the work's creator. The importance of defining the relationship early and getting a proper assignment cannot be overstated. It is amply demonstrated by the dispute between Joe Sparks and Michael Saenz. The two began litigating in 1993 to determine whether Saenz' company, Reactor, Inc. employed Mr. Sparks or whether Sparks was an independent contractor. If Sparks was an employee, he retains no legal interest in his work, but if he was an independent contractor, he is co-owner of Space-

ship Warlock, a successful game. As a co-owner, he would be entitled to half of the profits from the game as well as an owner’s right to exploit the product. In this case his share could be worth hundreds of thousands of dollars.

3. Preexisting works

Intellectual property, like real property, consists of a bundle of rights that can be parcelled out stick by stick. Unlike real property, however, which conveniently sits in one place, intellectual property is as mobile as its creators, and mere ownership or possession of the tangible object indicates no interest in the intellectual property rights attached to the object. Once ownership of the object and of the rights associated with that object become severed, the rights are readily fractionalized. The severability of rights has been recognized for over a century. In 1894, in Werckmeister v. Springer Lithographing Co., the court addressed “whether . . .

See Playboy Enters., Inc. v. Dumas, 53 F.3d 549, 559 (2d Cir. 1995) (holding that endorsements on the back of payment checks mentioning assignment but not work for hire failed to create a work for hire agreement), cert. denied, 116 S. Ct. 567 (1995). Compare Schiller & Schmidt, Inc. v. Nordisco Corp., 969 F.2d 410, 413 (7th Cir. 1992) (applying bright line rule of prior agreement) with Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc., 29 F.3d 1529 (11th Cir. 1994) (holding that a later writing can confirm status set out in prior oral agreement); see also 1 NIMMER, supra note 63 § 5.03[B][2][b] (discussing writing requirement).

150. An assignment is a grant of the title and all the intellectual property rights to the work and may be permanent. BLACK'S LAW DICTIONARY 119 (6th ed. 1990).
151. Brinson & Radcliffe, supra note 120, at 20.
152. Id.
153. Id.
154. Id.
156. 63 F. at 810.
the artist could sell [a] painting to one person, and the right to obtain the copyright to another" and held that "[t]he intellectual conceptions of an author are his absolute property." Consequently, the court allowed the sale. In Werckmeister the artist sold a painting to one party, retained the copyright, and sold an option to purchase the copyright to a third party. Thus, three parties simultaneously held an interest in the painting. This very simple example is compounded geometrically when there is more than one copyright owner or the owner begins to divide the bundle of sticks into individual rights, parceling out each right by geography and duration.

Most people wish to own marketable rights in order to benefit from the control and exploitation of those rights. As such, the more pieces into which the owner can divide rights, the more profitable the rights are to their owner. Film distribution rights, for example, are sold to companies with the infrastructure to assure market saturation in order to finance production of the film. Movie distribution rights may be divided by specific product, i.e., theatrical prints, videocassettes, cable or pay television, and network television. Those rights can then be sold worldwide, divided regionally, or even severed country by country so that rights to Asian videocassette distribution, for instance, can be divided between Hong Kong, South Korea, Taiwan, Japan, and the rest of Asia, with a different price attached to each license.

157. Id.
158. Id. at 809.
159. KOHN & KOHN, supra note 3, at 391.
160. 17 U.S.C. § 201(d)(2); see KOHN & KOHN, supra note 3, at 558-61 (discussing temporal and geographic division of music licenses); see also White-Smith Music Publishing Co. v. Apollo Co., 209 U.S. 1 (1908) ("The notion of property starts... from confirmed possession of a tangible object... But in copyright... [t]he right to exclude... restrains the spontaneity of men where but for it there would be nothing of any kind to hinder their doing as they saw fit.") Id. at 19. (Holmes, J., concurring).
161. Universal City Studios, Inc. v. Sony Corp. of America, 659 F.2d 963, 965 (9th Cir. 1981) (later reversed, the Ninth Circuit's opinion articulated this attitude and attempted to support it constitutionally), rev'd, 464 U.S. 417 (1984).
162. Lewis Horwitz, Borrowing on Distribution Contracts for the Production of a Motion Picture (1992), in LIONEL S. SOBEL, MATERIALS FOR A COURSE ON FEATURE FILM FINANCING 517, 519, 525-26 (1995) (on file with Loyola of Los Angeles Law Review); Lionel S. Sobel, Financing the Production of Theatrical Motion Pictures, 5 ENT. L. REP., May 1984, at 3, 4-5, 7 [hereinafter Sobel, Financing].
163. Sobel, Financing, supra note 162, at 5-7.
164. See Horwitz, supra note 162, at 532.
165. See id.
These licenses may also be temporally limited. The license to distribute in Japan may be for three years while the Taiwan distribution contract has a five-year term. Each intellectual property right may be so subdivided or fractionalized. Fractionalization, like the development of new media, creates a situation in which many content owners do not know what rights they own, which rights they must clear in order to license the content, or what it will cost them to clear those rights.

C. The Practical Process of Clearance

To ensure the commercial viability of the product, the multimedia producer must be certain to acquire the appropriate clearances and releases for all protected content being used in the product. To accomplish this, the producer must first determine whether any rights need to be acquired and, if so, what rights they are and who owns them.

Identifying the necessary rights and their ownership requires healthy doses of diligence, skepticism, and patience. The multimedia producer must question everything. It is unwise to assume the license includes all the rights a developer needs. For example, when a multimedia producer acquires a film clip license, that license will almost certainly not include the necessary licenses to any music on the clip. Yet the developer almost certainly intends to use the soundtrack with the clip, and hence, the music. Thus, the developer will need to clear the appropriate music licenses. If she cannot acquire the rights to the music in the clip, the producer may be unable to effectively use the clip. If she deletes and then reproduces the soundtrack, she risks violating the original participants' rights of publicity and personality as well as the terms of the license to use the clip.

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166. Clearing House, supra note 24, at 4-8.
167. See 3 NIMMER, supra note 63, § 10.10[B]. The question, "What rights were granted?" is complicated by the implied grant of collateral rights, that is, those rights necessary "to permit the full enjoyment of a right expressly ... granted." Id. § 10.10[C].
170. See 3 NIMMER, supra note 63, § 10.13[B]; KOHN & KOHN, supra note 3, at 396-400.
171. SCOTT, supra note 26, §§ 4.02, 22.03.
172. See Midler v. Ford Motor Co., 849 F.2d 460 (9th Cir. 1988); Litwak, supra note 15, at 214.
In addition, the licensee developer must not rely on the licensor’s representations about ownership. The license itself should contain warranties and indemnification clauses to protect the licensee from third-party ownership claims. Moreover, the licensee should perform a search through the U.S. Copyright Office. Such a search will provide the identities of the owners of record if the copyright was registered in the United States. It will not, however, disclose foreign registrations or unregistered copyrights. A developer should hire an attorney and use a professional search firm to unearth registrations, as a search firm may accomplish the search more expediently and thoroughly than the developer could.

Preexisting content may be protected by copyright, trademark, trade secret, patent, or unfair competition laws. The bulk of content will be protected by copyright or trademark law. Patent and trade secret law will most often apply to the underlying code or hardware. Unfair competition law may apply if the producer uses a commercially valuable item that costs money to produce but which is not eligible for other intellectual property protection. For example, copyright does not protect titles. If, however, titles have secondary meaning, are “novel,” or there has been merchandising associated with the name, they may be eligible for trademark protection.

Characters and recognizable set or property items may also be subject to trademark law and other protections. Like titles,

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173. Scott, supra note 26, § 22.03.
174. Id.
175. Traphagen, supra note 168, at 236-37.
176. Id.
177. Martin, supra note 94, at 128. This search and clearance process is not the same as the search and clearance process discussed below. This process determines whether there are any registered owners, while that process also looks at unregistered and neighboring rights as well as fractionalized ownership and unregistered transfers.
178. Rysman, supra note 5, §§ 1.02[1], 6.02.
179. For a discussion of patents in this context, see David Bender, Patents and Multimedia, in Multimedia and the Law 1996, supra note 4, at 87.
181. 1 Nimmer, supra note 63, § 2.16; see also National Lampoon, Inc. v. American Broadcasting Cos., 376 F. Supp. 733, 746-49 (S.D.N.Y. 1973) (discussing the necessary findings for passing off, unfair competition, and trademark infringement), aff’d, 497 F.2d 1343 (2d Cir. 1974).
183. Dennis Angel, Legal Protection for Titles in the Entertainment Industry, 52 S.
characters, props and other elements not protected by trademark law, may still be covered under the doctrine of unfair competition.\textsuperscript{184} This doctrine protects property with commercial value against unauthorized use if the use results in confusion advantageous to the user's product and harmful to the preexisting content.\textsuperscript{185}

Due to the number and complexity of rights involved, the developer, working alone, is unlikely to overcome the clearance hurdles in all but the simplest cases.\textsuperscript{186} To surmount the obstacles, the producer usually must retain someone with specialized knowledge to research and clear the rights.\textsuperscript{187} That person will often be an attorney. Research is time consuming, however, and attorneys are expensive. If the licenses are complicated by geography or fragmentation, or the creators are reluctant, the attorneys' fees may become prohibitive.\textsuperscript{188} This places the developer in a bind. Seeking licenses under these circumstances may seem economically unjustifiable; producers may feel they must choose between sacrificing the desired content and using the content without licensing it, thereby jeopardizing the validity of their license in the finished product.\textsuperscript{189} The producer needs an economically efficient way to solve this problem.

III. THE GULF: NEGOTIATING AND CONTROLLING MASS USES

\textbf{A. Mass Uses}

Copyright protection in the United States has evolved from limited common law protection under the Statute of Anne,\textsuperscript{190} to the full and detailed property rights of the current Act, as augmented

\begin{itemize}
  \item CAL. L. REV. 279 (1979); Stringfellow & Godin, \textit{supra} note 85, at 3.
  \item 184. \textit{SCOTT}, \textit{supra} note 26, §§ 17.01, 17.03.
  \item 185. \textit{RAYSMAN}, \textit{supra} note 5, § 6.09.
  \item 186. Traphagen, \textit{supra} note 168, at 236-37.
  \item 188. See Raysman & Brown, \textit{supra} note 92, at 3 (discussing the various rights that must be cleared, the number of people who must grant permission, the parties' concerns with licensing terms, and the difficulty of setting fees and enforcing rights); Litwak, \textit{supra} note 15, at 199-200, 205-06 (discussing the "exceedingly knotty" and "bewildering array" of issues the attorney must face in a "simple" project and recommending both an attorney and a copyright search firm).
  \item 189. 17 U.S.C. § 103(a) (1994).
  \item 190. See \textit{supra} note 30 and accompanying text.
\end{itemize}
by special statutes, international treaties, and case law. Protection for a work usually vests in its creator upon creation, and provides that creator the opportunity to exploit the work and benefit from its use. Some situations make the ability of creators to personally control their works impractical or impossible. The area of mass uses represents the most common case where individual control is impractical or impossible. Mass use describes a situation in which there are many potential users over a broad geographical expanse; there is little or no time between the decision to use the work and its use; and it will be extremely difficult to detect infringing uses. Radio stations and restaurants playing popular music exemplify a mass use. In mass use situations owners cannot license users economically, discover or enforce against infringement, or effectively protect their political rights in relationship to that use.

1. Economical licensing

Economical licensing occurs when the cost of negotiating and issuing the license is less than the potential income to be generated under the license. Mass uses do not support individually negotiated licenses because the fixed costs of issuing the license exceed any fee the use could support. For example, individual music publishers or artists could not possibly locate, contact, and negotiate individual licenses for every potential public performance of their work. Individual licensing requires rights holders to contact every potential user, in this case every radio and television station, club, restaurant, theatre, and performance hall that might publicly perform their music, both in the United States and abroad.

Source licensing, where potential users instigate licensing negotiations, minimizes the cost to rights holders. Even under a source licensing scheme, however, many well-intentioned users would still become infringers due to administrative errors and un-

191. See infra note 217 and accompanying text.
195. SINACORE-GUINN, supra note 31, § 8.2.1(a).
196. Broadcast Music, Inc., 441 U.S. at 20; Kohn & Kohn, supra note 3, at 552; Grogan, supra note 4, at 268-69.
198. See Broadcast Music, Inc., 441 U.S. at 4-5.
199. Source Licensing, supra note 95, at 257-74 (prepared statement of ASCAP).
anticipated, uncleared uses. In the case of public performance rights in music, the number of works, creators, and users is so great that it becomes impossible for either the owner or the user to license works individually at a cost the market will bear. The time and costs of administration alone would preclude them from either using or creating any further works.

2. Detection and prosecution of infringement

The ability to effectively exploit a product depends on the ability to control its use. Where the creator is unable to control the use of the work, the creator loses the financial incentive to continue creating. Mass uses, by their very nature, do not lend themselves to effective individual control.

Some believe that uncontrollable use should not be protected. They argue that the basis of protection is the exclusiveness of the exploitation, therefore, if exclusive exploitation is unattainable, there should be no protection. Thus, where a creator, individually, can neither economically license the work nor effectively prevent infringement, uncontrolled use without compensation is not an injury.

This thinly cloaked version of "might makes right" obscures the basis of the right, twisting the law to say that the right itself is based on the ability to enforce it. Enforcement of a right granted by law must be founded on the law granting that right. Further, the abrogation of copyright protection contradicts the intent and the letter of the Constitution. The Constitution grants the right to exclusively exploit a work for a limited time after its creation.

200. For example, "innocent" uncleared uses might include an unexpected encore in a live performance or distribution of material mistakenly believed to be in the public domain.
201. *Broadcast Music, Inc.*, 441 U.S. at 20; *Kohn & Kohn*, supra note 3, at 553.
203. *See* *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954) (suggesting that the best way to encourage individual effort is to allow personal gain).
206. *Id.*
208. *Mazer*, 347 U.S. at 219. "The copyright law . . . is intended definitely to grant valuable, enforceable rights to authors, publishers, etc., without burdensome requirements; 'to afford greater encouragement to the production of literary [or artistic] works of lasting benefit to the world.'" *Id.* (citations omitted).
209. U.S. CONST. art. I, § 8, cl. 8; *Goldstein*, 412 U.S. at 555.
It says nothing about enforcement, but "[t]he bite of law is in its enforcement." The Framers knew this and granted Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution the foregoing powers ..." Congress immediately enacted copyright protection. The original protection was for books, maps, and charts. This was statutorily expanded seven times in the 1800s, prior to the introduction of the Copyright Act of 1909. Congress amended the 1909 Act in 1912 to cover motion pictures and photoplays. The current Copyright Act and other intellectual property statutes continue to effectuate the exclusive right to exploit one's creations.

In cases such as the musician's public performance right, it is impracticable to monitor all possible infringements. This would require monitoring all public broadcasts and performances of a work. Monitoring increases in difficulty as digital technology becomes more sophisticated because a slightly altered work may either fail to trigger recognition, or may appear to be a different,  

211. U.S. CONST. art. I, § 8, cl. 18 (capitalization omitted).
213. Id. This protection has been amended and expanded to address current protection needs and encompass treaty obligations. See 1 NIMMER, supra note 63, at OV-1.
214. LEON H. AMDUR, COPYRIGHT LAW & PRACTICE 94 (1936).
noninfringing work until closely examined.219

This is not an unlikely scenario. Even without digital technol-
ogy, there is often confusion about whether one work actually in-
fringes another. For example, in *Repp v. Lloyd Webber*,220 Ray
Repp, a song composer, sued Andrew Lloyd Webber claiming that
a song in Webber’s *Phantom of the Opera* infringed Repp’s song
*Till You.*221 Lloyd Webber countersued alleging that *Till You* in-
fringed his earlier song *Close Every Door.*222 The court granted
summary judgment for Lloyd Webber finding no infringement of
*Till You,*223 and in a later decision, held that Repp had infringed
Lloyd Webber’s *Close Every Door.*224 The court then denied
Repp’s motion for summary judgment and remanded Lloyd
Webber’s *Phantom* composition to trial on the basis that Lloyd
Webber had stated a prima facie case of infringement to that com-
position as well.225

Further, what was once considered a completely separate and
noninfringing use may later be found to infringe. One example is
the extensive litigation between Apple Computer and Apple Cor-
poration226 over the Apple Computer’s use of the Apple trademark
for computer-based music programs.227 In 1981 the two companies
had signed an agreement limiting the use of their trademarks in
the United Kingdom. Apple Computer was limited to computer
products and could not use its apple for music products, of which it
had none, while Apple Corporation could use its apple trademarks
for record albums and other products related to music and the
Beatles.228 Over time the expansion of computer technology
blurred the line between what constituted a music product and
what was a computer product, creating litigation over uses unfore-
seen by the 1981 agreement.229

The argument that uncontrolled use without payment does

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219. Merians, supra note 110, at 244-46.
221. Id. at 1297.
222. Id.
223. Id. at 1304. Repp failed to prove that Lloyd Webber could have, or did, infringe
Repp’s song and also failed to contradict Lloyd Webber’s proof of independent creation.
225. Id.
227. Id.
228. Id.
229. Id.
not injure the creator gains credence, however, when the use is new, or newly important. This is especially true when it appears that owners formerly acquiesced in the use, but have since rescinded their acquiescence. Here, the argument is that the law never intended to encompass the new, or newly important, use. This argument was more potent under the 1909 Act. The 1909 Act failed to protect against many uses that emerged from technologies not yet envisioned, even by science fiction writers, when the Act was written. Congress continues to revise the 1976 Act based on new concerns and developments thus ensuring its continuing relevance to emerging technologies.

3. Effective political protection

Unfortunately, economics often places creators and users in an adversarial relationship. The user wishes to pay nothing, or as little as possible, while the creator wishes to earn as much as possible for the use. Many users will not pay unless they are caught and compelled by actual or threatened legal action.

In a democratic society, where citizens have access to legislative authority, users command greater legislative power based solely on their greater numbers. Users can advance their interests by exploiting their greater numbers politically, and where their interests are adverse to those of creators and other content owners, the content owners’ interests may go unheeded.

In addition, content providers frequently work alone, earn below average incomes, and lack the protection of political or-

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230. SINACORE-GUINN, supra note 31, § 8.2.1(b).
231. Id.
232. Id.
234. For example, it did not protect television and movies with sound, let alone computers. Further, sound recordings were not protected until the Sound Recordings Amendment Act of 1971, Pub. L. 92-140, 85 Stat. 391 (codified as amended in scattered sections of 17 U.S.C.A.).
235. See, e.g., statutes cited supra note 217.
236. See infra note 302 and accompanying text.
237. See, e.g., Collins, supra note 95, at D1.
238. Id.
239. SINACORE-GUINN, supra note 31, § 8.2.1(a).
240. Id. § 8.2.1(c).
241. See Industry Canada: Culture Counts, M2 Communications, M2 Presswire, July 21, 1995, available in LEXIS, NEWS Library, CURNWS File (indicating that while the cultural sector represents 2.7% of gross domestic product, cultural workers’ incomes were often substantially less than the Canadian average). In the United States a 1987 study
ganization. Furthermore, the artistic organizations that represent them generally serve limited and highly defined memberships, often with strict entrance requirements and quotas. The best known voice for creators in the United States is the National Endowment for the Arts (NEA). The NEA, however, has spent recent years defending its own existence and fighting for its funding. Further, the NEA has focused on providing education and grant opportunities, not on the finer points of intellectual property law. It is unreasonable to expect the NEA to safeguard the rights of all content providers, especially when its constituents include both content providers and users.

By contrast, multimedia is a product of both the computer and entertainment industries. As such, powerful political action committees represent its producers. Even where the producer is

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indicated that artists’ annual incomes were only six percent lower than those of nonartists, but conceded that the study did not include as artists anyone who listed another occupation on their census form, thereby effectively excluding a large category of artists. Even so, the study found that some categories of artists earned as much as one-third less than nonartists. The “Starving Artist” Is a Myth, Says New Study, PR Newswire, June 15, 1987, available in LEXIS, NEWS Library, CURNWS file.

242. For example, actors have three representative associations, the Screen Actors’ Guild (SAG), which covers actors in big screen entertainment and nontheatrical film; Association of Film, Television and Radio Actors (AFTRA), for actors in small screen productions and commercials; and Actor’s Equity for actors in live theatre. RAYSMAN, supra note 5, § 1.03[4].

There are few representative associations or organizations for writers and other creators. Screenwriters have the Writers’ Guild, and there are associations for computer graphic artists. Primarily, however, creators speak for themselves.


244. See George Vetter & Christopher C. Roche, The First Amendment and the Artist—Part I, 44 R.I. BAR J., Mar. 1996, at 7, 14, 17. The NEA’s 1990 budget was over $200 million. Id. at 14. By 1995 it had dwindled to $167.4 million. Id. The NEA presently faces direct threats to all funding from fallout over several specific career grants to individuals. Id. at 7, 14.


247. Powerful associations such as the Software Developer’s Association, IEEE, the National Broadcaster’s Association, and the Motion Picture Association of America have the clout to act politically for their members, whether or not they organize as a formal
part of a small, entrepreneurial enterprise, the enterprise may be represented by the same associations as its more powerful competitors. In addition, as a business, multimedia producers' interests are further represented by the Small Business Administration, the Chamber of Commerce, and many other active and well-funded political action groups. Against this background, individual creators have few viable political options in a mass use situation.

4. Resolving the tension

There are three possible resolutions to the tension between providing an effective and economical means for legally exploiting preexisting content and preserving the exclusivity of the creators' right to the greatest extent possible. First, one may determine that the use is not within the creator's exclusive right to exploit, and therefore do nothing. This route, however, is contrary to the Constitution and the history of intellectual property rights in this country. Further, it heavily favors users over creators. Second, one may establish statutory controls and nonvoluntary licensing. This may be the user's preference, but the courts disfavor nonvoluntary licensing. While this option is better than the first, it still strips creators of almost all control over their work. Third, one may provide some form of collective administration, usually in conjunction with one or more blanket licenses. Collective administration resolves many of the economic and enforcement issues that arise in a mass use and can be structured to preserve the bulk of the creators' individual rights.


249. See SINACORE-GUINN, supra note 31, § 1.22.

250. See discussion supra Part III.A.2.

251. 1 NIMMER, supra note 63, § 1.07.

252. See discussion infra Part V.A.


254. See discussion infra Part IV.
B. Multimedia as a Mass Use

Multimedia shares the characteristics of a mass use.\(^{255}\) There are many potential users and content providers distributed over a broad geographical expanse. Because the technology requires little initial capital, there is no way to track users who may be working with recognized organizations or out of their personal studio. Few multimedia producers have the time or budget to enter into protracted negotiations over any largely fungible work.\(^{256}\) If a creator is not immediately cooperative or the creator's rights are too fragmented, there are many other works that will suffice for most projects. Even in the best of circumstances, the use does not support the time the creator will have to spend to administer an individual license. The costs of individual clearance and negotiation exceed stringent multimedia project budgets.\(^{257}\) Finally, it is extremely difficult for creators to detect or prevent infringing uses in digital media.

C. Power Gulfs

From both an economic and a political perspective, content creators' bargaining power is severely limited. In most cases creators and other rights holders will be helpless to prevent digital infringement.\(^{258}\) They may not have the resources or tools to examine new products developed by producers to whom they have refused licenses, and even if they examine the products, they may be unable to immediately detect any infringing use.\(^{259}\)

Multimedia is part of the computer and entertainment industries. Although on tight budgets, multimedia producers are often well capitalized or have ready access to capital.\(^{260}\) Many are

\(^{255}\) See discussion supra Part III.A.

\(^{256}\) Just how fungible a work is will depend largely on why it is being used. A sunset, some classical looking statuary, textiles in a particular shade, or a few bars of the blues will all be relatively interchangeable, but if the producer wants Pavarotti then Bono just won't do.

\(^{257}\) Profitability constrains the budgets of even well capitalized endeavors, which also must work within the limits placed by the product's anticipated retail price and wholesale volume. SAMUELSON & NORDHAUS, supra note 92, at 60-61.

\(^{258}\) Brenner, supra note 187, at 229-30.

\(^{259}\) Merians, supra note 110, at 245.

\(^{260}\) For example, Dreamworks SKG started business with hundreds of millions of dollars of capital investment and a $1 billion line of credit with Chemical Bank. Andrew E. Serwer, Analyzing the Dream, FORTUNE, Apr. 17, 1995, at 71. Paul Allen, cofounder of Microsoft, put up $500 million, Microsoft kicked in $30 million, and Ziff Brothers Investments anticipated about a $27 million investment. Id. The Chemical Bank line of
backed by, or owned by, major entertainment or software cor-
porations. They are seen by investors as an emerging technology and an interesting risk.

Some well-funded developers have taken the stance that licensing is too disorderly, and it would be easier to create the work anew. Others with adequate capital purchase images, archives, libraries, and museum collections, including all the intellectual property rights to the works. Bill Gates is among the latter group. Through his company, Corbis Corp., Gates is amassing a vast collection of images to which Corbis owns the digital rights. In April, 1996 Corbis had a digital collection of 600,000 images in addition to the 16 million image Bettmann archive, which includes

credit is especially notable because Dreamworks is a new, untried company, and this immense credit was extended at a time when the Disney Company, with decades of success behind it, had only just negotiated this kind of credit with Citibank. Citibank to Serve as Disney Tour Guide, 10 INVESTMENT DEALERS’ DIGEST, INC., Apr. 3, 1995, § 14, available in LEXIS, NEWS Library, CURNWS File ("Citibank is arranging a $1 billion credit"); Cit in Thick of Disney, Union Pacific Deals, 10 INVESTMENT DEALERS’ DIGEST, INC., Aug. 7, 1995, § 32, available in LEXIS, NEWS Library, CURNWS File ("Citibank put together a $1 billion refinancing for the entertainment giant in the spring").

261. Microsoft and the other major computer manufacturers are quite competitive in this arena, as are some of the major film studios. For example, Time Warner has Warner Interactive, which itself has joint ventures with companies such as Kawasaki. Time Warner Interactive and Kawasaki Motors Corp. Team Up to Release “Kawasaki” Superbike Challenge™, PR Newswire, Mar. 21, 1995, available in LEXIS, NEWS Library, CURNWS File; see also Marilyn A. Gillen, Inscape to Absorb Two Warner Interactive Units, BILLBOARD, Oct. 28, 1995, at 12, 107; Time Warner Cable of New York City Signs Agreement With IPC Interactive, Inc., PR Newswire, July 11, 1996 available in LEXIS, NEWS Library, CURNWS File; Time Warner to Join Interactive Digital Solutions as Equity Partner; AT&T, Silicon Graphics and Time Warner Join Forces to Accelerate the Interactive Age, Bus. Wire, Apr. 25, 1995 available in LEXIS, NEWS Library, CURNWS File.


262. High technology investment is such a “hot” area that Investor's Business Daily runs a special column, “Computers and Technology,” four issues a week.

263. See infra note 13 and accompanying text.

MULTIMEDIA LICENSING

the entire UPI newsphoto collection. Corbis is digitizing 25,000 images per week and its digital library will reach one million images by the end of 1996. This type of amassment essentially monopolizes the intellectual property rights to the bulk of the world's most famous images in the hands of one producer and could exclude competition from the multimedia marketplace. However, Corbis is committed to "taking a leadership role in protecting intellectual property rights in the digital age," by "becoming the world's premier provider of high-quality digital content," and "provid[ing] easy access to the rich visual heritage of the world."267

Finally, whether the producer's business is large and powerful or a one-person outfit, the producer is the buyer of a largely fungible commodity. This widens the gulf between the producer and the creator because the producer, as a buyer, does not need any particular seller and can simply walk away from unpalatable terms. In this respect the content market closely resembles economists' models for perfect competition; no provider has any greater market power than any other. If, after walking away, the producer approaches another creator, she acts as anticipated in a normal competitive market. She may, however, simply use the work without attribution or payment.

Contract law does not account for the possibility that the object of an agreement can be acquired without reaching any agreement. It is, instead, based on the principle that parties have relatively equal bargaining power and the freedom to contract. It prescribes remedies where failure of this principle works an injus-

268. Since anything that can be created in, or converted to, digital form can become content, the vast amount of such content means that, for most purposes, there will be other images the producer can use if her first choice is unavailable.
270. Id. at 143-44 & fig.1.
271. Id.; Neilson Interview, supra note 28.
But the freedom of contract on which contract law is founded assumes that the parties can choose whether to agree. Where the individual creator has neither the power to prevent, nor the ability to detect infringing use of his work, he has no real choice but to acquiesce in its use. The content owner in this situation realistically has no freedom to negotiate a contract and no recourse for its breach. In this case the creator must turn to a collective administration organization to preserve the utility of those rights.

IV. COLLECTIVE ADMINISTRATION

A collective administration organization is an entity organized to "represent the economic and moral interests of creative rights owners" by administering "the economic and moral rights of a significant proportion of a nation's creators in their works." Essentially, the collective manages the day-to-day business of licensed uses. A collective may grant licenses, monitor uses, investigate and enforce against infringement, and collect and distribute license fees.

A. Prototypes

The most commonly understood American model of collective administration is the Collective Licensing Organization (CLO) typified by ASCAP and BMI, the music performing rights societies. These two agencies administer blanket licenses to radio and television stations and places of public performance.

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273. See, e.g., id. §§ 211-12 (contracts of adhesion); id. § 208 (unconscionability); id. §§ 152-54 (mistake).
274. Id. §§ 50-70 (failure of offer or acceptance); id. §§ 159-77 (fraud, duress); id. §§ 211-12 (contracts of adhesion).
275. The Federal Rules of Civil Procedure require that a plaintiff state a prima facie case, or a statement of factual allegations that, if believed, would result in legal consequences. FED. R. CIV. P. 8(1). Inability to detect the offensive conduct will preclude the plaintiff from stating a prima facie case, making legal and equitable remedies unavailable. In this situation, rights holders may even know that their work has been used, but still be unable to state a claim that will survive a motion for dismissal or summary judgment. FED. R. CIV. P. 12(b)(6), 56.
276. See discussion infra Part IV.
278. Id.
279. ASCAP and BMI are the acronyms and commonly known names of the American Society of Composers, Authors and Publishers and Broadcast Music, Inc.
280. SINACORE-GUINN, supra note 31, § 4.7.2.
281. Blanket licenses are discussed infra Parts V.C-D.
MULTIMEDIA LICENSING

such as nightclubs, restaurants, stores, and theatres for unlimited nondramatic public performances of their entire repertoires for a prescribed period of time. They monitor, collect, and distribute licensing fees to their members as well as enforce their members’ rights and lobby Congress for the protection of those rights. In addition, these are the only two successfully competing music performance rights agencies.

The CLO is appropriate, and utilized, for administering other rights as well. Cable retransmission, fine arts display, and reprographic reproduction rights are also administered by CLOs. Cable retransmission rights allow cable television systems to broadcast network programming for customers who cannot receive television without cable. Cable systems pay a nominal royalty to the television station to rebroadcast the day’s programming. Because broadcasting is a highly regulated industry, the CLO negotiates the contracts within strict statutory requirements. It then administers the collection and distribution of that nominal royalty. The CLO’s greatest benefit is that it relieves the individual stations from the need to devote significant resources to monitoring and managing these rights.

Fine arts display includes the right to display works in public places such as museums and galleries, in film and television sets, and in documentaries. Fine arts display rights are much more common in European countries than they are in the United States. The U.S. rights in this area are limited to a few situations addressed under the Visual Artists Rights Act (VARA).

Reprographic reproduction rights include copy and storage rights for photocopies, microfiche, and electronic storage. Re-

283. E.g., Source Licensing, supra note 95, at 257-74 (prepared statement of ASCAP).
284. SINACORE-GUINN, supra note 31, §§ 5.1-5.4, 818
285. Id.
286. See id. § 6.2.3(a).
287. Id.
288. See id. §§ 6.2.3, 8.5.4 (statutory blanket license).
289. Id. § 6.2.3.
291. Id. § 6.2.3(c).
292. Id.
294. SINACORE-GUINN, supra note 31, § 6.2.3(d).
prographic rights have three components: transgraphic copying, in which the object is photocopied onto paper; transoptic copying, where the work is copied to a film medium; and electrocopying, where the work is copied to an electronic medium, such as copying from one drive to another on a computer. The Copyright Clearance Center handles blanket licenses for corporate and research copying. See id.

295. See id. The Copyright Clearance Center handles blanket licenses for corporate and research copying. See id.

296. See id. The Copyright Clearance Center handles blanket licenses for corporate and research copying. See id.

297. SINACORE-GUINN, supra note 31, § 6.2.2.

298. See id.

299. See id. § 6.2.1.

300. Id. § 6.2.4.


302. Id.


305. Id. § 1008.
mitted under the Act includes both full works and self-edited compilations.\textsuperscript{306}

In other jurisdictions public lending rights and \textit{droit de suite} are important rights that can be administered by a CDA.\textsuperscript{307} Public lending rights enable the owner to receive a royalty from the lending of their work by a public library.\textsuperscript{308}

\textit{Droit de suite} grants fine artists the right to participate in the after-market for their original works by receiving royalties on continuing resales.\textsuperscript{309} \textit{Droit de suite} has not been as successful in the United States as it has in other jurisdictions. As recently as 1993, the record industry argued that resale of used CDs without royalty payments was a violation of artists' rights.\textsuperscript{310} Record companies withheld co-op advertising from stores that sold both new and used CDs to protest the practice.\textsuperscript{311} The Wherehouse, the largest retail chain involved, and the Independent Music Retailers Association shot back with a class action antitrust suit against the four major record labels.\textsuperscript{312} The suit eventually settled out of court and the practice continues.\textsuperscript{313} Despite its lack of acceptance in the United States, \textit{droit de suite} is important to the multimedia industry because intellectual property rights are increasingly international in scope, and because nations are increasingly bound by multilateral treaties that grant standard minimum levels of artists' rights.\textsuperscript{314}

Social Collectives (SCs) are the most invasive form of collective because they ignore the private property basis of creators' rights.\textsuperscript{315} Under this system, fees are generated under a statutory

\begin{footnotes}
\item[306] Id.
\item[307] SINACORE-GUINN, supra note 31, §§ 6.2.4(a), 6.2.4(c).
\item[308] Id. §§ 3.10.1(h), 6.2.4(c).
\item[309] Id. §§ 6.2.4(a), 15.1.
\item[310] See Eileen Fitzpatrick, Wherehouse Tries Used-Tape Sales, BILLBOARD, Jan. 28, 1995, at 1, 13.
\item[311] Id.
\item[313] Id.; see Fitzpatrick, supra note 310, at 13.
\item[314] GATT includes a section on intellectual property transfers that largely mirrors the Berne Convention. GATT, supra note 130, art. 69. Both GATT and Berne enforce compliance to their terms by threat of exclusion. GATT's enforcement powers significantly outweigh Berne's, however, because exclusion from GATT damages a nation's entire trading sector, with profound implications for the nations' gross national product and economy. Id. Conversely, exclusion from Berne affects relatively few individuals and its effect on a nation's economy is not generally distinguishable. Berne, supra note 217, art. 11 bis, 3(1), 14 ter; GATT, supra note 130, art. 69.
\item[315] SINACORE-GUINN, supra note 31, § 4.7.4.
\end{footnotes}
license, or a tax.\textsuperscript{316} Royalties received by SCs are placed in a common pool for collective benefits such as grants, awards, and subsidies, or they are used for the common societal good.\textsuperscript{317} This type of collective more closely matches a socialized economy and is used in Nordic countries.\textsuperscript{318} However, if a society wishes to promote the use of new works by charging a licensing fee for using folklore or works in the public domain, this is the only appropriate type of collective.\textsuperscript{319}

\textbf{B. Multimedia Needs}

As a mass use, multimedia licensing shares many of the characteristics and administrative needs of licensing the public performance, reproduction, and distribution of music.\textsuperscript{320} Both have too many providers; works that may be treated as fungible; and too many users to make individual, private licensing feasible.\textsuperscript{321} Both grapple with the creators' individual inability to enforce their rights, and with transactional costs of individual licensing that exceed the fees the uses can support.\textsuperscript{322}

A multimedia licensing collective must be able to effectively license many different kinds of works and administer either a totally new kind of license or a package of traditional licenses. Traditionally, collectives administer either the works of only one kind of creator, for example, photographers, or only one category of use, for example, dramatic, reprographic, or cable retransmission rights.\textsuperscript{323}

Cable retransmission, however, provides a working example of two different ways to administer a right that requires more than one kind of license from more than one owner or collective.\textsuperscript{324} The cable operator needs all the rights of transmission for all the programs that the commercial stations include in their programming

\begin{itemize}
  \item \textsuperscript{316} \textit{Id.}
  \item \textsuperscript{317} \textit{Id.}
  \item \textsuperscript{318} \textit{See id.}
  \item \textsuperscript{319} \textit{Id.} § 6.2.5. The creators in this case are either unknown or their rights have expired, extinguishing the primary purpose of other collectives.
  \item \textsuperscript{320} \textit{See discussion supra Part III.B.}
  \item \textsuperscript{321} \textit{See Broadcast Music, Inc. v. CBS, Inc., 441 U.S. 1, 19-23 (1979).}
  \item \textsuperscript{322} \textit{Id.}
  \item \textsuperscript{323} \textit{Sinacore-Guinn, supra note 31, at 818-20. As David Sinacore-Guinn discusses the administration of each type of rights, he provides a nation-by-nation list of the CROs administering those rights. Id. §§ 13.6.1-4, 14.9.1-2, 15.9, 16.10, 17.9.1-3, 18.7, 19.4.}
  \item \textsuperscript{324} \textit{Id.} § 13.5.2.
\end{itemize}
MULTIMEDIA LICENSING

and a license from the commercial stations for the right to use their "broadcast day." 

In one model, the various collectives cooperate first by negotiating among themselves how the total licensing revenue will be divided, then by building a team comprised of representatives from each member collective to negotiate their best deal with the cable operator. Unless the music performing rights societies elect to administer their rights independently, the collectives typically appoint one of the "larger and more well-established" members to actually administer the license. In the United States, cable retransmission rights are covered by a compulsory license administered by the Copyright Office. 

The second model is more instructive for multimedia. In Scandinavian countries the various collectives involved in the licensing of cable television retransmission rights joined together to form a new collective for the exclusive purpose of administering all the rights cable system operators needed to license for this particular use. The various individual collectives form the membership of the new collective organization, which then administers all collection, monitoring, and documentation under its various licenses.

This model has several distinct advantages for multimedia. It allows for the affiliation of many different kinds of rights owners in the same collective. Negotiation of rights occurs between collectives and not between the individual rights holders, thereby minimizing the danger of creating animosity between different types of rights owners by keeping all proceedings at a professional

325. See National Ass'n of Broadcasters v. Copyright Royalty Tribunal, 675 F.2d 367, 377-79 (D.C. Cir. 1982).
326. SINACORE-GUINN, supra note 31, § 13.5.2.
327. Id.
328. 17 U.S.C.A. § 111(c)-(d) (West & Supp. 1996). Cable retransmission rights were formerly administered by the Copyright Royalty Tribunal, but that office has been disbanded statutorily. Id. § 111(d)(4); National Ass'n of Broadcasters, 675 F.2d at 377-79. See also 17 U.S.C.A. § 119 (West & Supp. 1996) (satellite retransmission compulsory license).
329. SINACORE-GUINN, supra note 31, § 13.5.2.
330. Id.
331. Id.
332. Id. This is because the new collective's direct members are the various collectives already handling the creator's works and not the creators and other rights holders themselves.
Because the members are collectives, the new collective is "born" with the aggregate repertoires of its member collectives. Adequate repertoire is the most critical component in the initial success of a collective. If a collective does not have an adequate repertoire, it will gain neither new affiliate owners nor new licensees. This is especially important when technology creates a new use, such as multimedia, that needs multiple licensing or a new type of license incorporating elements from several kinds of available licenses.

It does not help the multimedia producer, any more than the cable system operator, to license the rights from one owner only to discover that there are other owners with prior claims to some portion of the rights the producer needs. Consider again the multimedia producer seeking to license a film clip. The developer needs to license both the clip and the music. In addition to a master license and licenses for synchronization and public performance, the developer will need to clear the public display rights for any art as well as publicity for any persons, characters, or prominently displayed trade or service marks that appear recognizably in the clip. If the film is based on another work still protected by copyright, the producer will need to ensure that the owner of the underlying work has not granted an exclusive license to the derivative rights elsewhere.

These verifications require information that the various member collectives already possess because they themselves license the material and must warrant its availability. They will have warranties from the creators as to the works' availability. If they do not have the information, they have a preexisting relationship with the rights holder and are better able to discover and remedy any problems.

333. Id. § 13.5.2.
334. See id. § 8.7.
335. See id.
336. See id. at 817-18.
337. See supra Part II.C.
338. See supra note 142 and accompanying text.
339. Clearing House, supra note 24, at 10-11; Scott & Talbot, supra note 171, at 2; Stringfellow & Godin, supra note 85, at 5.
340. See 1 NIMMER, supra note 63, § 1.07.
C. Antitrust Concerns

Copyright grants creators a legal monopoly on their work\(^{341}\) while federal antitrust laws are designed to prevent monopolies and anticompetitive restraints on trade.\(^{342}\) Intellectual property rights holders' monopoly in their work presents a limited exception to the antitrust laws.\(^{343}\) However, antitrust concerns are never far from the surface and attempts by creators to collectively administer their work has raised the question whether such a collective violates antitrust laws or principles.\(^{344}\)

Transfers of intellectual property are governed by section 7 of the Clayton Act,\(^{345}\) sections 1 and 2 of the Sherman Act,\(^{346}\) and section 5 of the Federal Trade Commission Act.\(^{347}\) While it is unlikely that the transfer of individual content items would create an antitrust concern, much less meet the $15 million threshold for a Justice Department or Federal Trade Commission filing,\(^{348}\) collective administration has and may continue to raise antitrust concerns.\(^{349}\)

A collective administration organization will be examined under antitrust laws as a joint venture.\(^{350}\) For antitrust purposes, a joint venture is "a separate enterprise characterized by an integration of operations between and subject to control by its parent firms which results in the creation of significant new enterprise capability in terms of new productive capacity, new technology, a

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346. Id. §§ 1-2.
347. Id. § 45; see DOJ Guidelines, supra note 343, § 5.7.
348. 1 WILLIAM C. HOLMES, INTELLECTUAL PROPERTY AND ANTITRUST LAW § 12.03, n.6 (1996).
new product, or entry into a new market."\textsuperscript{351} Joint ventures pose a conceptual difficulty for antitrust law because they "defy[] neat classification and precise definition and, by extension, well established rules for evaluating their competitive impact."\textsuperscript{352}

Collective administrations are seen as joint ventures because they integrate the content owners' intellectual property assets and consolidate licensing management in order for content owners to compete efficiently by achieving integrative efficiencies such as economies of scale, shared risks, facilitating entry to new markets, and the consequent synergies of pooling complementary resources.\textsuperscript{353} As joint ventures, their formation is subject to a "rule of reason" analysis.\textsuperscript{354}

To establish a collective administration organization that conforms to antitrust guidelines, one must consider two principles: (1) whether the collective administration organization’s effect on price and output are ancillary to a legitimate product or service not available in the absence of a cooperative organization, that is, whether the procompetitive integrative efficiencies outweigh any anticompetitive practices;\textsuperscript{355} and (2) whether the collective administration organization unreasonably restricts competition and is narrowly tailored to achieve its purpose.\textsuperscript{356}

1. Are the competitive restrictions ancillary to a legitimate purpose and the venture’s integrative efficiencies?

Section 1 of the Sherman Act bans conspiracies and restraints of trade between competitors.\textsuperscript{357} Price fixing between direct competitors is known as a "horizontal price restraint" and constitutes a \textit{per se} violation of antitrust laws\textsuperscript{358} except where such a price restraint is actually ancillary to procompetitive integrative efficiency.

\textsuperscript{351} COMPACT, 594 F. Supp. at 1574.
\textsuperscript{352} Id.
\textsuperscript{353} Broadcast Music, Inc., 441 U.S. at 20-23; COMPACT, 594 F. Supp. at 1574; ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 372-73 (3d ed. 1992) (discussing procompetitive integrative efficiencies) [hereinafter ABA ANTITRUST].
\textsuperscript{354} See NCAA v. Board of Regents, 468 U.S. 85, 103 (1984); Broadcast Music, Inc., 441 U.S. at 23-24; see also ABA ANTITRUST, supra note 353, 373-392 (discussing joint venture analysis in detail).
\textsuperscript{355} ABA ANTITRUST, supra note 353, at 373.
\textsuperscript{356} Id. at 377.
\textsuperscript{358} United States v. Trenton Potteries Co., 273 U.S. 392, 396-98 (1927); see Broadcast Music, Inc. 441 U.S. at 23.
When content owners band together as a collective and set a common price for a license, they engage in a literal price restraint, but the Supreme Court has found that a blanket license could not "be wholly equated with a simple horizontal arrangement among competitors." The legality of such an action is, therefore, dependent on it being "subordinate and collateral" to a legitimate, separate purpose or transaction.

a. purpose

The Supreme Court recognizes that some activities must be accomplished jointly or not at all. The purpose of a collective administration organization is to enable rights holders to market their property in a mass use situation where, individually, they are "inherently unable to compete fully effectively" and to require a jointly operated entity to create and define a competitive market. The Broadcast Music Court examined the collective administration and blanket licensing of the public performance right in music. In Broadcast Music over forty thousand composers, authors, and publishers agreed to allow ASCAP and BMI to license their works for a fee. ASCAP and BMI issued blanket licenses that required the licensee to license the entire repertoire and, except in certain circumstances, the collectives were not allowed to license individual works. On examination the Court found that the collectives' combination of licensing, monitoring, copyright enforcement, and the consequent integrative efficiencies resulted in a new product that could not otherwise exist and the license that the coopera-

359. See, e.g., NCAA, 468 U.S. at 100-03; Broadcast Music, Inc., 441 U.S. at 13-16; Chicago Bd. of Trade v. United States, 246 U.S. 231, 239-41 (1918). Integrative efficiencies include such things as economies of scale, improved efficiency from pooling common resources, enhanced ability to enter new markets, and the allocated benefit of shared risk. ABA ANTITRUST, supra note 353, at 372-73.
361. Id. at 23.
364. NCAA, 468 U.S. at 101.
366. NCAA, 468 U.S. at 101, 120.
367. 441 U.S. 1.
368. Id. at 5.
369. Id. at 5, 11.
370. Id. at 21-22, 23.
tives issued was "quite different than anything any individual owner could issue." Thus, the Court determined the blanket license was ancillary both to the purpose of the collective and to the integrative efficiencies the arrangement provided rights holders and licensees. Consequently, it held a per se analysis was inappropriate and reversed the Second Circuit holding that ASCAP and BMI were in violation of the antitrust laws.

Although its analysis overturned the court of appeals' per se ruling, the Supreme Court did not claim to have done a rule of reason analysis in Broadcast Music. It specifically left open the door that under a rule of reason analysis, especially under changed circumstances, the ASCAP and BMI blanket licenses might fail to pass muster. A rule of reason analysis requires a challenger to show that the challenged joint venture is an unreasonable restraint of trade. This showing requires examination of the joint ventures effect on competition.

2. What is the collective's effect on competition and has it narrowly tailored its activities to its purpose?

At the heart of antitrust is the question, will this practice adversely affect competition? In order to address the impact on competition, one must look at whether the joint venture has market power and what effect the joint venture has on the relevant market. In Continental T.V., Inc. v. GTE Sylvania Inc., the Court said that the effect must be examined "in light of the competitive situation in 'the product market as a whole.'" Thus, joint ventures that are narrowly tailored to achieve their procompetitive goals and to maintain competition among their members in other markets are generally viewed more favorably by the courts.

371. Id. at 23.
372. Id. at 21.
373. Id. at 18, 23-24.
374. Id. at 21 & n.34, 24.
375. ABA ANTITRUST, supra note 353, at 41.
377. ABA ANTITRUST, supra note 353, at 44-46 & n.259.
a. impact on competition

A joint venture can negatively impact competition when the joint venturers previously were actual or potential competitors in the relevant market. If such a joint venture results in market power or anticompetitive effects sufficient to outweigh its pro-competitive justifications, it will not survive a rule of reason analysis.

Normally, a reasonableness analysis requires an in-depth examination of market power. There is an exception. When the challenged activity's effect on competition is "obvious on its face," only a "quick look" is necessary. In *United States v. Ivaco, Inc.*, the court found that Ivaco's joint venture resulted in a preemptively monopolistic market share in the relevant market, completely integrated the parties' assets, and eliminated competition between the parties. The Ivaco joint venture created a negative impact on competition that could not be overcome by the defendants' procompetitive justification that the joint venture allowed entry to a new market.

In *Broadcast Music* the appellate court found BMI and ASCAP's blanket licensing practices to be the kind of restraint on competition found in *Ivaco* and, therefore, unlawful *per se*. After examining the collectives' blanket licenses within the competitive reality of music licensing, the Supreme Court disagreed. The Supreme Court found that collectives such as ASCAP and BMI seemed "designed to 'increase economic efficiency and render markets more, rather than less, competitive.'"

b. narrow tailoring

The Supreme Court considered the milieu in which the blan-
ket license arose; a world inhabited by thousands of users and thousands of composers with millions of compositions.\textsuperscript{392} It noted that “[m]ost users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, and the owners want a reliable method of collecting for the use of their copyrights.”\textsuperscript{393} It recognized that CBS alone would require between 4,000 and 8,000 individual licenses each year\textsuperscript{394} and that the financial burden of individual sales transactions, monitoring, and enforcement would be prohibitive for the individual composer and the smaller user.\textsuperscript{395} It determined the blanket license was composed of the rights to use the individual pieces and the aggregating service that ASCAP and BMI\textsuperscript{396} provided. As such, the Court decided that blanket and individual licenses were different products\textsuperscript{397} and concluded, “to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material.”\textsuperscript{398} The Court recognized that individual licensors could not offer the same product and benefit to the licensee under any circumstances because the aggregation of compositions lowered costs below what any licensor could offer.\textsuperscript{399}

For a restraint of trade to be reasonable, its legitimate purpose must outweigh its anticompetitive effects.\textsuperscript{400} The Court addressed whether ASCAP and BMI’s blanket license created a substantial adverse impact on competition. It determined that the aggregation aspect of the license met the users’ needs by providing immediate, unlimited access to the repertoire on an unplanned, flexible basis, while simultaneously providing composers with reliable protection against infringement, a substantial reduction in transaction costs, and reliable collection efforts.\textsuperscript{401} These elements created a different market in which individual composers could not effec-

\begin{itemize}
  \item \textsuperscript{392} Broadcast Music, Inc., 441 U.S. at 20.
  \item \textsuperscript{393} Id.
  \item \textsuperscript{394} Id. at 21, n.35.
  \item \textsuperscript{395} Id. at 20.
  \item \textsuperscript{396} Id. at 21.
  \item \textsuperscript{397} Id. at 20-21, 23.
  \item \textsuperscript{398} Id. at 22.
  \item \textsuperscript{399} Id. at 21-22.
  \item \textsuperscript{400} Id. at 21; Interface Group v. Massachusetts Port Auth., 816 F.2d 9, 10 (1st Cir. 1987).
  \item \textsuperscript{401} Broadcast Music, Inc., 441 U.S. at 21-22.
\end{itemize}
tively compete.\textsuperscript{402}

The Court also found that four elements increased competition between composers and two of these elements even affected composers from within the license framework.\textsuperscript{403} The first element was the nature of the product.\textsuperscript{404} Because a musical piece can be simultaneously consumed by many users, the blanket license was unlikely to create a decrease in output.\textsuperscript{405} The second element concerned the basis on which the license remunerated composers.\textsuperscript{406} Royalties were paid, based on the popularity of the song, thereby encouraging composers to create marketable material.\textsuperscript{407} The cumulative effect of these two factors suggests that competition will increase because composers will be best remunerated when they create many popular songs.

The third factor the Court weighed heavily was the prior history of litigation and blanket licensing.\textsuperscript{408} The Court noted that, historically, the market for public performing rights licenses has largely organized around a blanket license,\textsuperscript{409} that Congress created various blanket licenses by statute in the 1976 Copyright Act,\textsuperscript{410} and that ASCAP and BMI have both operated under consent decrees,\textsuperscript{411} which have "scrutinized"\textsuperscript{412} the collective administration of a blanket license in great depth and constructed a framework within which ASCAP and BMI both operate.\textsuperscript{413} While the Court recognized that such consent decrees were not binding upon either it or CBS, it chided the court of appeal for not considering them more fully.\textsuperscript{414}

Finally, the Court stressed the nonexclusive nature of the license.\textsuperscript{415} Neither users nor composers were precluded from individually negotiating a public performance license.\textsuperscript{416} The Court has
emphasized this aspect in subsequent cases, noting that the collective agreement placed no restrictions "on the right of any individual copyright owner to sell his own compositions separately to any buyer at any price."

V. LICENSES

Of the various ways to legally use copyright material, most developers will need to acquire licenses to use preexisting works. Works can be licensed on several bases. A license is "any transfer of [protected] rights short of assignment" or "authority granted by the owner of a [protected work] to another person empowering the latter to make or use the [work] for a limited period or in a limited territory." A license is limited in scope and can be exclusive or nonexclusive, voluntary or statutory.

An exclusive license grants the licensee a monopoly within the arena of use. After granting an exclusive license, the owner is no longer able to license the work to another person within the same industry or for a similar use. Clearly an exclusive license is an advantage to the multimedia producer who seeks to license the "Teenage Mutant Ninja Turtles" or some other highly recognizable characters or work. Because an exclusive license impairs the owner's ability to continue exploiting a market, exclusive licensing should be negotiated directly with the rights holder or his agent. In general, however, exclusive licensing is probably unnec-

418. Id. at 355.
419. See Brinson & Radcliffe, supra note 120, at 23-24. There are several ways to use copyright material legally. Scott, supra note 26, § 22.01 (licenses and releases); O'Connell, supra note 14, at 7 (sales or assignments and licenses). Some work may be used under the "fair use" doctrine, 17 U.S.C. § 107 (1994), but fair use is an affirmative defense found where the proverbial "fools rush in [and] angels fear to tread." Alexander Pope, Essay on Criticism, line 625 in Pope: Poetical Works 64, 81 (Herbert Davis ed., Oxford University Press 1966). It is a quaking bog full of traps and poison mists, not to be entered without a trustworthy guide and a solid walking stick. Chisum and Jacobs dedicate sixty-four pages to discussing affirmative defenses to copyright infringement and they consume 48 of the 64 pages on fair use. Donald Chisum & Michael Jacobs, Understanding Intellectual Property Law §§ 4F[3]-4F[4] (1992).
422. Id.; Dietel v. Chisholm, 42 F.2d 172, 173 (1930).
424. Id.
425. Id. at 6, 7.
necessary and too expensive for most multimedia productions. Licenses are limited in scope, and hence, constitute a lesser grant than an assignment. Licenses may be limited by duration, geography, market, or use. From a creator's point of view, the scope of the license is the most important provision in a licensing agreement. Creators will probably be reluctant to grant the right to sublicense the content, except as part of the whole product. They may want to limit the developer to a single computer platform. Most importantly, the agreement should include a clause that reserves "all other rights and media not expressly granted in this license agreement." The decision whether to include this reservation is critical for both the licensor and the licensee because case law has granted licensees the rights to media known but not contemplated at the time of the agreement.

A. Individual Licenses

The typical license is the individually negotiated license in which the owner grants the licensee the right to certain property for a particular use for a specified period of time in a defined territory. The right to manufacture a patented medicine in the United States, the right to produce a play in a theatre, the right to reproduce a book in paperback form, are all examples of individually negotiated licenses. Licenses are largely a matter of contract law rather than intellectual property law. The individually negotiated license between the creator and the user is the purest form of creator-controlled exploitation envisioned by the Consti-

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426. Id. at 6; see infra note 134 and accompanying text.
428. Id. at 7.
429. See id. at 8.
430. SCOTT, supra note 26, § 1.03. Most developers have not had the ability to successfully develop products for more than one platform whether it was set-top or desk-top, so it has been important that rights be licensed for the Macintosh only, for the PC only, or for some other platform only, thereby preserving the creator's ability to license the other markets as well. Id.
431. Id.
432. Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 155 (2d Cir.) ("If the words are broad enough to cover the new use, it seems fairer that the burden of framing and negotiating an exception should fall on the grantor" of the license).
433. See generally O'Connell, supra note 14, at 5-11 (discussing licensing multimedia content).
434. The Copyright Act of 1976 includes some provisions relating to compulsory and mechanical licenses, but these are not individual licenses and are discussed in Part V.B., infra.
In the case of a mass use, this form is impracticable, and one is left with a choice between a statutory or nonvoluntary license administered by the government and some type of blanket license administered by a private collective.

B. Nonvoluntary Licensing

Some licenses, known as statutory, compulsory, or nonvoluntary licenses, are designated by law. The fees for this kind of license are set by the government and usually cover arenas where the free market system is not working well. User groups usually favor statutory or compulsory licenses because these prevent rights holders from refusing to license their works. The mandatory nature of these licenses assures the greatest access to the widest repertoire of content, and dramatically slashes transaction costs by creating a statutory clearinghouse. Users in favor of a compulsory licensing scheme argue that private licensing is impracticable, that it is necessary to have full and unrestricted access to all creative works, and that compulsory licensing is necessary to assure market equity.

Advocates of compulsory licenses confront strong legal and policy arguments against the implementation of a nonvoluntary system. Congress views compulsory licenses as a last resort and imposes them only when market forces truly fail. The United States and the international majority regard intellectual property...
rights as private ownership rights. Statutory licensing substantially or completely invades the owners' domain by stripping owners of the right and ability to control and exploit their work. There must be substantial reasons to overcome such weighty public policy rationales and interfere with the creator's right to exploit his work. Consequently, there is a strong tendency to maintain these rights privately. This tendency is not, however, absolute. The Copyright Act defines several compulsory licenses, among them: cable and satellite retransmission rights; public television transmission rights; mechanical reproduction rights in music; digital audio recording rights; and jukebox performance rights.

There is another, more mundane, reason to maintain private licensing. Statutory license terms cannot be changed in the absence of a legislative act. In the United States, this translates to an act of Congress. Congress is not known for its efficiency. A bill to change the rate structure of a compulsory license may become bogged down with amendments or used as a bargaining chip for the passage of some more controversial measure, thereby delaying or even eliminating desired changes to the license statute. Further, the law is slow to react to changes in technology. Where licensing is subject to a statutory scheme, political caprice may deprive owners of income from variant uses, or deprive users of the ability to fully exploit emerging tools and products. A statutory scheme may also contribute to the expansion of government power in private enterprise.

Statutory licensing is not the only route to solving problems of practicability, access, and market equity. Collective administrations and blanket licensing can resolve these problems while main-

445. See, e.g., 17 U.S.C. § 201 (1994); Berne, supra note 217, arts. 11 bis, 3(1), 14 ter; Uniform Copyright Convention, arts. IV bis, V; GATT, supra note 130, art. 69. GATT provisions on intellectual property generally follow the principles laid out in Berne, but contain the full enforcement mechanisms of the treaty. Id.
446. See Smith, supra note 269, at 138.
447. See generally, SINACORE-GUINN, supra note 31, § 1.2.1 (discussing private rights protection).
452. Id. § 116 (West Supp. 1996).
453. See generally, SINACORE-GUINN, supra note 31, §§ 8.2-8.2.3 (discussing the arguments for and against nonvoluntary licensing).
454. Id.
tain the greatest degree of control by the rights’ owner.\textsuperscript{455}

\textbf{C. Blanket Licensing}

Blanket licenses are issued by collective administration organizations in the collective’s name, and allow the user access to the collective’s entire repertoire without prior notice.\textsuperscript{456} Collectives can issue blanket licenses because fees and royalties are based on something other than specific use.\textsuperscript{457} Blanket licenses are typically issued only for mass uses.\textsuperscript{458} The creators and other rights holder-members of the collective are compensated by a proportional sharing of income based on the collective’s sampling of uses and extrapolation of the correct percentage of all use that each work receives.\textsuperscript{459}

Collective administration of blanket licenses clearly cannot be defined as impracticable. It provides precisely the same function as a collective administration under a compulsory or other statutory license.\textsuperscript{460} It drastically reduces transaction costs to the user by establishing a clearinghouse.\textsuperscript{461} It provides efficient compensation and enforcement capacity to the rights holder and a known, defined rate structure, which assists current and future users to plan for use and improve market efficiency.\textsuperscript{462}

Further, a blanket license provides users complete access to the repertoire. Collective members generally may not prohibit the collective from licensing works in the repertoire to any specific user.\textsuperscript{463} Blanket licensing thereby expands access to works and consequently increases competition in the market.\textsuperscript{464} Of course, the collective cannot license any content not owned by its members. Thus, access is not universal, but the benefits to both rights holders and licensees make collectives a cost-effective means of transmitting preexisting content.\textsuperscript{465}

\begin{itemize}
\item \textsuperscript{455} See discussion supra Part IV.A, infra Part IV.C.
\item \textsuperscript{456} SINACORE-GUINN, supra note 31, §§ 8.5, 8.5.1.
\item \textsuperscript{457} Id.
\item \textsuperscript{458} Id. § 6.1.
\item \textsuperscript{459} Id. §§ 8.5.1(d), 8.5.2.
\item \textsuperscript{460} SCOTT, supra note 26, § 22.08[C].
\item \textsuperscript{461} See Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20-23 (1979).
\item \textsuperscript{462} Id.
\item \textsuperscript{463} SINACORE-GUINN, supra note 26, § 8.7 (discussing access concerns).
\item \textsuperscript{464} Broadcast Music, Inc., 441 U.S. at 22-23.
\item \textsuperscript{465} SINACORE-GUINN, supra note 31, §§ 8.5.1(d), 8.5.2.
\end{itemize}
1. Types of blanket license

Blanket licenses administered by private collectives come in four variations: the socialized license, the statutory blanket license, the unilateral or tariff blanket license, and the bilateral blanket license. Of these types, the socialized license most invades individual rights. It provides no remuneration to the individual rights holder, and in some cases the rights holder may be unaware a license has been granted because the nature of the license makes it impossible to track and account to the owner of the work. The socialized license is most appropriate when the State licenses works that would otherwise be in the public domain—something not done in the United States. As such, the socialized license is not an appropriate tool with which to develop a marketplace for multimedia content.

The statutory blanket license is only slightly less invasive. In some countries statutory licenses are administered privately, becoming a type of statutory blanket license. While the rates are set legislatively, it is appropriate to call this a blanket license because these collectives are powerful political forces and their lobbying activities result in the indirect negotiation of rates and operating rules on behalf of the members. In the United States, statutory copyright licenses are administered by the Copyright Arbitration Panel of the Copyright Office, not by private collectives, and so are not a true statutory blanket license. Because the statutory blanket license is alien to the American intellectual property system, it is not an appropriate prototype for an American multimedia blanket license.

The unilateral or tariff blanket license is similar to the bilateral blanket license in that both rate structures are negotiated between the collective and its members. However, they differ in that the user has no ability to negotiate in a unilateral system. In a unilateral system, the collective publishes or posts rates for use,
whereupon any user may make use of any work in its repertoire upon payment of, or a contract to pay, the posted rate. The unilateral system appears to have the advantage of a cooperative with absolute control of prices. In reality, prices are often controlled by governmental agencies, and the logistics of administration dictate broad, untailored licensing terms and definitions. Additionally, because licenses are not negotiated with the user, the collective may be less aware of, or able to detect and enforce against, infringement.

Bilateral blanket licenses are negotiated first between the collective and the affiliate member, and second between the collective and the user. These licenses can be negotiated per year, per program, per occasion, or for a particular performance. Although the U.S. government has placed some limitations on the types of licenses available for television performance rights, in theory a license could be negotiated either for a period of time or for a specific use, as long as individual licensing remained an option and the blanket license increased competition in the market. Fees for blanket licenses are based, not on the individual works that the licensee anticipates using—because the license allows unlimited access to the entire repertoire—but on an objective standard that reflects the value of the works to the affected industry. Typically, these include such “factors as seating capacity, number of performances being given, the form of usage, whether admission is charged, and the overall entertainment budget of the user, or... it may be set as a percentage of net revenues.”

VI. COLLECTIVE ADMINISTRATION OF MULTIMEDIA LICENSING: THE SUPERCOLLECTIVE

In order for any new collective administering multimedia licenses to function, it must be easy to use, have low transaction

476. Id. § 8.5.3.
477. Id.
478. Id. § 8.5.2.
479. Id.
482. SINACORE-GUINN, supra note 31, § 8.5.2.
483. Id.
costs, reasonable and flexible license fees, a broad repertoire, and voluntary membership. Rights holders want an efficient compensation system, a certain amount of control, and maximum revenue flow, while licensees want the process to be "convenient, affordable, and democratic." The combination of a CLO composed of other collectives and a bilateral blanket licensing structure would satisfy these demands. Such a "supercollective" would provide the multimedia industry with an instant, massive repertoire of available works at defined standard prices. This would minimize transaction costs and maximize return to the rights holders.

Because multimedia production requires such a variety of content, a super collective, at a minimum, would require the cooperation of ASCAP, BMI, SESAC, the Harry Fox Agency, AMRA, the Copyright Clearance Center, the Motion Picture Producer's Association of America (MPAA), the Motion Picture Export Association (MPEA), Artists Rights Services, Inc. (ARS), and the Visual Artists and Gallery Association (VAGA). In addition, Corbis Corp. and others that are amassing immense libraries of digital images would have to be involved in order to gain a "one-stop-shopping" license for multimedia. The combined repertoires of these collectives would create a vast resource for multimedia producers, one well worth licensing.

A new, standard license incorporating content into multimedia would need to be negotiated between the member collectives and ratified by their individual content owner members. Such a license could be based on the rights already granted to the member

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484. SCOTT, supra note 26, § 22.08.
485. Id.
486. See supra Parts IV.A, IV.C, V.C.
487. ASCAP, BMI, and SESAC administer the public performing rights in music. SINACORE-GUINN, supra note 31, §§ 17.9.1, 17.9.3; STEWART & SANDISON, supra note 33, at 978.
488. The Harry Fox Agency and AMRA administer the synchronization rights to music in the United States. SINACORE-GUINN, supra note 31, § 17.9.2.
489. The Copyright Clearance Center administers reprographic rights. Id. § 19.4; STEWART & SANDISON, supra note 33, at 978.
490. The MPAA and the MPEA administer the distribution rights to motion pictures. SINACORE-GUINN, supra note 31, § 13.6.1. They would need to be included because any multimedia production that included clips from motion pictures would be subject to the audiovisual distribution right. Id.
491. ARS and VAGA administer the display rights of fine, applied, and graphic artists. Id. § 15.9.
492. See supra Part III.B, notes 264-68 and accompanying text.
collectives. The individual collectives have already cleared these rights in association with the uses they presently license. Such a license would provide content users the assurance that they are not subject to liability for infringement of content licensed in good faith.

Persuading content owners to ratify such an agreement would be the most difficult part of the process. However, it should be sellable if presented as a means of extracting additional income from rights already granted.

Furthermore, it is now possible to provide digital protection in the form of a digital watermark or "fingerprint" embedded into the content that can only be detected if specifically sought. This technology, steganography, is proving difficult to defeat as a tracking and enforcement tool and may be broad enough to protect the majority of content licensed through the collective. Steganography could provide a valuable additional benefit for collective members and a persuasive factor for affiliation because it would greatly enhance the collective’s ability to enforce the content owners’ rights, thereby minimizing the downstream use dangers inherent in digital information.

Finally, an effective industry licensing structure must account for the enormous differences in financial resources and business sophistication between the start-up multimedia producer and the transnational corporation branching into multimedia. Accordingly, the collective should provide at least two different licensing structures: an annual license and a per-project license. The annual license fee could be based on a percentage of the net profit based on the number of units produced, a slightly higher percentage of profits based on the number of units sold, or a middle percentage based on the combination of units produced and wholesale price. This scheme would favor the larger producer by ensuring a somewhat lower total price per use. An annual license is, however, much less expensive for the collective to administer. The collective negotiates, collects, disburses, and accounts for the income on a regular schedule, whether annually or on some other basis. Consequently, the transaction costs by which the collective must reduce its revenues before distributing payments need not translate into lower fees to the content owner.

493. WHITE PAPER, supra note 7, at 188-89.
494. Id.
The other option, a per-project license, would be aimed at the small developer with tight cash flow and a restricted budget. While actual cost per use might actually be higher, the higher cost per use is reasonable because the costs associated with administering and enforcing a per-project license are higher. Further, to ensure availability to small and specialty producers, the license fee could be structured as a sliding scale, based on the number of units produced and suggested list price. The lowest cost would inure to the smallest projects. At the upper end of the scale, the price would equal or exceed that of an annual license. Such a sliding scale scheme would also provide content availability for the non-profit organization producing a multimedia product, not for sale, but for educational or fundraising purposes. Conversely, a major corporation planning to produce projects on an ongoing basis would be persuaded by this pricing scheme to participate in an annual license because the sliding scale fees would exceed the annual fees for their purposes.

Disbursement of funds to the artists could be facilitated by requiring the developer to include content credits in the documentation of the project and to forward to the collective a single copy of the product with documentation for sampling and archival purposes. The producer would also need to report sales of licensed products on a quarterly or semi-annual basis. The collective should sample the market to determine sales trends thereby providing a check on inaccurate reporting. Many relevant numbers may already be collected by industry watchdogs and might be used in conjunction with collective sampling. Such a system would provide fast, reliable information to the collective for the apportioning of shares to the individual rights holders as members of the supercollective affiliates.

VII. CONCLUSION

Only when there is a simple, convenient way for rights to be handled will there be widespread use of preexisting content in digital multimedia projects. When developers no longer have to reinvent the wheel with each project, multimedia will have the opportunity to expand and fill its place among the emerging

495. This could be implemented in an “About This Product” file such as those which carry the copyright information on a word processing program, or within the program itself.
technologies. Quality and complexity will improve because precious resources now spent on creation of new content or on the harrowing process of individually clearing rights to each work will be available for the development of the technology and the refinement of the art. The collective administration of blanket multimedia licenses will improve market efficiency, boost competition, and create opportunities at a time when creation of new capital is at a serious ebb.

Fara Daun*

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496. For example, Corbis Corp. has produced three critically acclaimed multimedia projects—A Passion for Art: Renoir, Cezanne, Matisse & Dr. Barnes; Critical Mass; and Volcanoes: Life on the Edge—and has gained a reputation for high quality work. Corbis' acquisition of the Ansel Adams rights was directly due to the quality of A Passion For Art. Baker, supra note 265, at 6. None of these projects would have been possible without access to Corbis' gargantuan library of high quality images.

* This Comment is dedicated to Jeremy Osher, without whom it could never have happened. The author wishes to thank Professors Ann Jones and Robert Rotstein for their careful reading, constructive comments, and encouragement; Denise Singleton and Laurie Hopkins for their thorough edits and support; Andy Baum, Oral Caglar, Karen Kupetz, and everyone on the Loyola of Los Angeles Law Review for their extraordinary efforts. The author would like to express special appreciation to her family for their unfailing love and absolute support.