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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.¹

I. INTRODUCTION

With \$529 million CD-ROM revenues in the first half of 1995,² 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.³ 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.⁴ Most, and some of the best, creations are built from a network of others' art.⁵

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

1. FREDERICK P. BROOKS, JR., *The Tar Pit*, in THE MYTHICAL MAN-MONTH: ESSAYS ON SOFTWARE ENGINEERING 7, 7-8 (1975).

2. Sean Silverthorne, *Measuring Multimedia*, PC WEEK INSIDE, Dec. 18, 1995, at A12(1).

3. See AL KOHN & BOB KOHN, KOHN ON MUSIC LICENSING 4 (2d ed. 1996).

4. See Allen R. Grogan, *Acquiring Content for New Media Works: The Rights and Acquisition Process and Contract Drafting Considerations*, in MULTIMEDIA AND THE LAW 1996: PROTECTING YOUR CLIENTS' INTERESTS 257, 268-69 (PLI Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. G-428, 1996) [hereinafter MULTIMEDIA AND THE LAW 1996].

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.⁶ *The White Paper*⁷ 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.⁸

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,"⁹ 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.¹⁰ Its critical traits are a multiplicity of content forms; digital storage and delivery; computer technology; and a nonlinear, interactive style of use.¹¹ 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 creators¹² include two and three-dimensional artists, musicians, filmmakers, photographers, writers, performers, and designers.¹³ They may originate works specifically intended as multimedia content, or they may create works without contemplating any use outside the original media.¹⁴

6. AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1186 (3d ed. 1992).

7. INFORMATION INFRASTRUCTURE TASK FORCE, INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE: THE REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 41-42 (1995) [hereinafter WHITE PAPER].

8. *Id.*

9. Andy Johnson-Laird, *Multimedia and the Law*, in MULTIMEDIA AND THE LAW 7, 10 (PLI Patents, Copyrights, Trademarks, & Literary Property Course Handbook Series No. G-383, 1994) [hereinafter MULTIMEDIA AND THE LAW].

10. 1 THOMAS J. SMEDINGHOFF, MULTIMEDIA LEGAL HANDBOOK: A GUIDE FROM THE SOFTWARE PUBLISHERS ASSOCIATION § 1.2 (1996).

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.¹⁵ 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 she¹⁶ 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.”¹⁷

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.¹⁸ 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.¹⁹ 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.²⁰ The liability, however, of using creative content without obtaining all the proper clearances is enormous: the producer of an infringing product is

THE ARTS, MULTIMEDIA LAW FOR ARTISTS MCLE SEMINAR HANDBOOK 1, 2 (1994) [hereinafter MULTIMEDIA LAW FOR ARTISTS].

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,²¹ and attorneys' fees and costs.²² An infringing producer is also subject to injunctive relief impounding and destroying the infringing product²³ and requiring recall of all units previously sold.²⁴ In some instances, the infringing producer would also be subject to criminal sanctions.²⁵

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.²⁶ 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 Choice²⁷ 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.²⁸ Consumers will enjoy increased availability of higher

21. 17 U.S.C. § 504 (1994).

22. *Id.* § 505.

23. *Id.* § 503.

24. Clearing House, Ltd., *A Guide to Clearing Music in Audio/Visual Multimedia Products*, in MULTIMEDIA LAW FOR ARTISTS, *supra* note 14, at 2 [hereinafter Clearing House]; see *infra* note 112 and accompanying text.

25. 17 U.S.C. § 506 (1994).

26. "Some feel that acquiring intellectual property is so costly and problematic that multimedia developers should produce everything themselves." MICHAEL D. SCOTT, MULTIMEDIA LAW & PRACTICE, § 1.02 (1995) (quoting Kahin, *The IMA Intellectual Property Project*, in INTERACTIVE MULTIMEDIA NEWS, Aug.-Sept. 1992, at 4). This, however, leaves the problems associated with clearing the rights to works made for hire unsolved.

27. "Hobson's Choice" refers to an apparent choice that actually offers no real alternatives. See AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 859 (3d ed. 1992).

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.

31. DAVID SINACORE-GUINN, *COLLECTIVE ADMINISTRATION OF COPYRIGHTS AND NEIGHBORING RIGHTS: INTERNATIONAL PRACTICES, PROCEDURES, AND ORGANIZATIONS* § 1.0.1 (1993).

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.

censes, 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 administration³⁴ 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.³⁵

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.³⁶

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 distinguishes between blanket and compulsory licenses, presents the issues surrounding each type, and then discusses licensing in a multimedia context. Part VI proposes a multimedia licensing scheme aimed at building a mutually beneficial commerce between creators 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 technologies as these mature. Interactive television is in its infancy and has largely awaited the standardization of the high definition television (HDTV).³⁷ HDTV will be a boon to the entire multimedia industry because its high-definition display, suitable for both computer and television viewing, will support multimedia's graphic demands.³⁸ This product should soon be available in a standardized form,³⁹ but will be very expensive until the general public accepts it as a desirable standard.⁴⁰

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 consumer 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 characterized 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 apparent. *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 income 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 consumers. *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.⁴¹ An immersed VR user perceives the environment as "reality" and interacts with it from a first-person point of view.⁴² To achieve this result the user usually dons special gloves, head-gear, or sometimes a whole suit, connected to sensors and a computer.⁴³ Until recently, apart from a few research laboratories, this technology was hardly "real."⁴⁴ It was easy to distinguish between reality and virtual reality.⁴⁵ 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.⁴⁶ The "feelies" of Aldous Huxley's *Brave New World*⁴⁷ 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,⁴⁸ bringing with it not only excitement but a plethora of moral and legal questions our society has yet to address.⁴⁹

41. SCOTT, *supra* note 26, § 1.03[D].

42. *Id.*

43. Gregory MacNicol, *What's Wrong With Reality? A Realist Reflects on Virtual Reality: Is It a Virtual Boon Or a Boondoggle?*, COMPUTER GRAPHICS WORLD, Nov. 1990, at 102, 104.

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.

48. Grogan, *supra* note 4, at 257, 318-27.

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.⁵⁰ These come in two basic platforms, "set-top boxes" and "desktop systems."⁵¹ Set-top boxes sit on top of, and interact with, a television set.⁵² They are used primarily for video games and are further divided into stand-alone players and video game add-on hardware.⁵³ These formats are incompatible with each other and with desktop systems.⁵⁴

Desktop systems are generally personal computer based CD-ROM systems, primarily used for game technology, educational, and business applications.⁵⁵ The market for desktop systems is growing and diversifying.⁵⁶ 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.⁵⁷ A standard CD-ROM holds up to 650 megabytes of data, more than many hard drives and equivalent to 464 high-density floppy disks.⁵⁸ Technological improvements have led to another kind of disk, which will arrive in retail stores by late 1996.⁵⁹ 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.⁶⁰ 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.*

57. Erik Holsinger, *Multimedia 101*, COMPUTER CURRENTS, May 1996, at 26, 33.

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

61. See William A. Tanenbaum, *Current Multimedia Patent, Copyright, Work Made for Hire, and Rights Acquisition Issues*, in MULTIMEDIA AND THE LAW, *supra* note 9, at 97.

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 Inter-relatedness 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.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.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.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"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.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.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.⁷⁶ The producer adds these elements so that users believe they can realistically explore the rooms and grounds of various castles.

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.

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

72. See Johnson-Laird, *supra* note 9, at 17.

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.

74. SCOTT, *supra* note 26, § 1.02[c](1).

75. DE BREFFNY, *supra* note 73, at 14-15.

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"?⁷⁷ The developer will need a master license in the composition as well as a license in the rendition.⁷⁸ She must clear the right to the composition with CBS Records and the rights to the album rendition with Claddagh Records, Ltd.⁷⁹ 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 product⁸⁰ and, if necessary, to convert the song to a digital format.⁸¹ 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.⁸² 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.⁸³ 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.⁸⁴ 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.⁸⁵

77. THE CHIEFTAINS, *Boil the Breakfast Early*, on BOIL THE BREAKFAST EARLY (© CBS Records 1980, (p) Claddagh Records, Ltd. 1979).

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.

80. 17 U.S.C.A. §§ 106, 114 (West & Supp. 1996) (scope of exclusive rights).

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).

82. *Id.* § 106(4). For a general discussion of public performance rights societies, see William M. Dobishinki, *ASCAP/BMI Primer*, in THE MUSICIAN'S BUSINESS AND LEGAL GUIDE 176 (Mark Halloran ed., 1991).

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.⁸⁶ Clearinghouses set license fees based on their assumptions about the use, sales, and exposure of the images in a book.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.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.⁸⁹ The images for this book would cost \$15,100 to license.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

86. See O'Connell, *supra* note 14, at 3-4.

87. *Id.*

88. *Id.* at 3-4.

89. This price may be conservative. Images frequently are licensed for hundreds and even thousands of dollars. Neilson Interview, *supra* note 28.

90. See *supra* note 73 and accompanying text.

included.⁹¹ 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?"⁹²

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.⁹³ The owners' hesitation combined with an incipient attitude in the industry that it is acceptable to use copyright protected material without permission or payment⁹⁴ 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.⁹⁵ 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.L.J., 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.⁹⁶

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.⁹⁷ 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.⁹⁸ Further, developers tempted to use works without permission face the Copyright Act of 1976,⁹⁹ which explicitly voids the copyright in any portion of a derivative work “in which such material is used unlawfully.”¹⁰⁰

Meanwhile, a new breed of artists is emerging who intend to produce content specifically for multimedia.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.¹⁰² The fee structure to license preexisting works is also necessarily different than it is for content created pursuant to a work-for-hire agreement¹⁰³ or for a rights assignment. Although

96. *See infra*, Parts II.A.3, III.A-C.

97. “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.

98. 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.

99. The Copyright Act of 1976, 17 U.S.C.A. §§ 101-104, 105-106, 107-115, 117-118, 201-510, 601-803.

100. 17 U.S.C. § 103(a); *see* 1 NIMMER, *supra* note 63, § 3.06.

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*.)

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.

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 artists¹⁰⁴ 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.¹⁰⁵ 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."¹⁰⁶

The digital process converts an image or sound to binary code and stores it as information.¹⁰⁷ 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.¹⁰⁸ This means any work that can be captured, whether an original or a copy, can be digitized and stored as an original image.¹⁰⁹ It can then be sampled, cloned onto another image, or "morphed" with another image.¹¹⁰ 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).

109. Litwak, *supra* note 15, at 202.

110. Morphing creates a series of intermediate images all of which contain elements of the original images. Holsinger, *supra* note 57, at 35, illus.27; see Judith Merians, *An Overview of New Technology and the Entertainment Industry*, reprinted in EPAH, *supra* note 15, at 245.

pleted images.¹¹¹ 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.¹¹² 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.¹¹³

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.¹¹⁴ 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.¹¹⁵ 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.¹¹⁶ An infringement suit can result in judgments far exceeding the product's value,¹¹⁷ and damages may include attorneys' fees and costs.¹¹⁸ In addition, the rights owner may ask for injunctive relief, including seizure of unsold product and recall of all units sold.¹¹⁹

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.¹²⁰ 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.

116. 17 U.S.C. § 501(a). (1994).

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").

118. 17 U.S.C. § 505 (1994).

119. *Id.* §§ 502, 503, 509.

120. J. Dianne Brinson & Mark F. Radcliffe, *Intellectual Property Law Primer for Multimedia Developers*, COMMUNITY C.J., Oct.-Nov. 1995, at 20, 20.

software company, Berkeley Systems, had already made the flying toasters famous in their own screen saver.¹²¹ Berkeley sued Delrina for copyright and trademark infringement.¹²² Delrina was prohibited from further distributing their product and had to recall all unsold units.¹²³ Delrina lost hundreds of thousands of dollars in legal fees and damages.¹²⁴

A subsequent case, *The Jefferson Airplane v. Berkeley Systems, Inc.*,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 *Thirty Seconds Over Winterland*.¹²⁶ The album cover featured an illustration of two winged toasters flying in formation, much like the flying toasters module.¹²⁷ Unfortunately for the Jefferson Airplane, the copyright on their album cover was never properly registered and the court lacked subject matter jurisdiction.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.¹²⁹ Of course, Delrina would still have had to address infringement issues with the Jefferson Airplane.

Copyright protects most content.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

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. 886 F. Supp. 713 (N.D. Cal. 1994).

126. *Id.*

127. *Id.* at 714.

128. *Id.* at 717; *see* 17 U.S.C. § 501(b).

129. 17 U.S.C. §§ 201, 204.

130. Copyright in the United States protects "original works of authorship" that are "fixed in any tangible medium of expression." *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.

work conveys its copyright.¹³¹ Copyright is an ownership interest that vests initially in those creators or authors of a work who contribute “copyrightable expression” to the work.¹³² It may be a joint interest.¹³³ It also may be divided, transferred, licensed, granted, or assigned like any other piece of property.¹³⁴ 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.¹³⁵ Several individuals may jointly hold each of these rights.¹³⁶ 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.¹³⁷

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.¹³⁸ 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.¹³⁹ 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

131. 17 U.S.C.A. § 101; 17 U.S.C. § 202.

132. 17 U.S.C. §§ 102, 201.

133. *Id.* § 201.

134. *Id.* § 201(d).

135. *Id.* § 102; 17 U.S.C.A. §§ 101, 106.

136. 17 U.S.C. § 201.

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.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.¹⁴¹ Courts focus on who is in control.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.¹⁴³ Independent contractors very rarely qualify as employees and, with one narrow exception,¹⁴⁴ copyright vests in an independent contractor who cannot be defined as an employee.¹⁴⁵ The exception was carved out for certain types of specially commissioned works including "motion pictures or other audio-visual works."¹⁴⁶ "Multimedia software can be defined as an 'audio-visual work.'"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.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.¹⁴⁹

140. 17 U.S.C.A. § 101.

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].

142. *Reid*, 490 U.S. at 751-52.

143. *Id.*

144. See, 1 NIMMER, *supra* note 63, § 5.03[B][2][a].

145. 17 U.S.C.A. § 101.

146. *Id.*; 1 NIMMER, *supra* note 63, § 5.03[B][2][a].

147. Karen S. Frank, *Intellectual Property Issues in Multimedia*, in MULTIMEDIA AND THE LAW, *supra* note 9, at 163, 173.

148. *Id.* at 172.

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.¹⁵⁰ 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.¹⁵¹ The two began litigating in 1993 to determine whether Saenz' company, Reactor, Inc. employed Mr. Sparks or whether Sparks was an independent contractor.¹⁵² 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.¹⁵³ 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.¹⁵⁴

3. Preexisting works

Intellectual property, like real property, consists of a bundle of rights that can be parceled 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.¹⁵⁵ 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.*,¹⁵⁶ 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.*

155. 17 U.S.C. § 202; *Werckmeister v. Springer Lithographing Co.*, 63 F. 808, 811 (S.D.N.Y. 1894) ("The case of *Yuengling v. Schile*, 12 Fed. 97, [(1882)] implies throughout that the ownership . . . itself does not necessarily carry with it the right to copyright.").

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.”¹⁵⁷ 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.¹⁵⁸ Thus, three parties simultaneously held an interest in the painting. This very simple example is compounded geometrically when there is more than one copyright owner¹⁵⁹ or the owner begins to divide the bundle of sticks into individual rights, parceling out each right by geography and duration.¹⁶⁰

Most people wish to own marketable rights in order to benefit from the control and exploitation of those rights.¹⁶¹ 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.¹⁶² Movie distribution rights may be divided by specific product, i.e., theatrical prints, videocassettes, cable or pay television, and network television.¹⁶³ Those rights can then be sold worldwide, divided regionally, or even severed country by country¹⁶⁴ 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.¹⁶⁵

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.¹⁶⁶ 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.¹⁶⁷

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.¹⁶⁸ To accomplish this, the producer must first determine whether any rights need to be acquired and, if so, what rights they are¹⁶⁹ and who owns them.¹⁷⁰

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.¹⁷¹ 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 personality¹⁷² as well as the terms of the license to use the clip.

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].

168. Litwak, *supra* note 15, at 200-01; Mark Traphagen, *Legal Issues in Creating and Protecting New Media*, reprinted in EPAH, *supra* note 15, at 233, 234.

169. Traphagen, *supra* note 168, at 234-37.

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.¹⁷³ Moreover, the licensee should perform a search through the U.S. Copyright Office.¹⁷⁴ Such a search will provide the identities of the owners of record if the copyright was registered in the United States.¹⁷⁵ It will not, however, disclose foreign registrations or unregistered copyrights.¹⁷⁶ 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.¹⁷⁷

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.¹⁷⁸ Patent and trade secret law will most often apply to the underlying code or hardware.¹⁷⁹ 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.¹⁸⁰ For example, copyright does not protect titles.¹⁸¹ If, however, titles have secondary meaning, are "novel," or there has been merchandising associated with the name, they may be eligible for trademark protection.¹⁸²

Characters and recognizable set or property items may also be subject to trademark law and other protections.¹⁸³ Like titles,

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. RAYSMAN, *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.

180. Unfair competition laws vary from state to state. *E.g.*, CAL. BUS. & PROF. CODE §§ 17000-17200 (West 1987 & Supp. 1996).

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).

182. *See* the Lanham Act, 15 U.S.C. §§ 1051-1127 (1994).

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.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.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.¹⁸⁶ To surmount the obstacles, the producer usually must retain someone with specialized knowledge to research and clear the rights.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.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.¹⁸⁹ The producer needs an economically efficient way to solve this problem.

III. THE GULF: NEGOTIATING AND CONTROLLING MASS USES

A. Mass Uses

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

CAL. L. REV. 279 (1979); Stringfellow & Godin, *supra* note 85, at 3.

184. SCOTT, *supra* note 26, §§ 17.01, 17.03.

185. RAYSMAN, *supra* note 5, § 6.09.

186. Traphagen, *supra* note 168, at 236-37.

187. Daniel L. Brenner, *In Search of the Multimedia Grail*, reprinted in EPAH, *supra* note 15, at 227, 229; Litwak, *supra* note 15, at 200-01, 202-06, (discussing clearance and licensing issues and recommending both an attorney and a copyright search firm).

188. See Raysman & Brown, *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, *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).

189. 17 U.S.C. § 103(a) (1994).

190. See *supra* note 30 and accompanying text.

by special statutes, international treaties, and case law.¹⁹¹ 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.¹⁹² 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.¹⁹³ 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.¹⁹⁴

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.¹⁹⁵ Mass uses do not support individually negotiated licenses because the fixed costs of issuing the license exceed any fee the use could support.¹⁹⁶ For example, individual music publishers or artists could not possibly locate, contact, and negotiate individual licenses for every potential public performance of their work.¹⁹⁷ 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.¹⁹⁸

Source licensing, where potential users instigate licensing negotiations, minimizes the cost to rights holders.¹⁹⁹ 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.

192. 17 U.S.C. § 201.

193. SINACORE-GUINN, *supra* note 31, § 8.2.1; see *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979).

194. KOHN & KOHN, *supra* note 3, at 557-62.

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.

197. *Broadcast Music, Inc.*, 441 U.S. at 20; KOHN & KOHN, *supra* note 3, at 552.

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.²⁰⁰ 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.²⁰¹ The time and costs of administration alone would preclude them from either using or creating any further works.²⁰²

2. Detection and prosecution of infringement

The ability to effectively exploit a product depends on the ability to control its use.²⁰³ Where the creator is unable to control the use of the work, the creator loses the financial incentive to continue creating.²⁰⁴ 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.²⁰⁵ Thus, where a creator, individually, can neither economically license the work nor effectively prevent infringement, uncontrolled use without compensation is not an injury.²⁰⁶

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.²⁰⁷ Further, the abrogation of copyright protection contradicts the intent and the letter of the Constitution.²⁰⁸ The Constitution grants the right to exclusively exploit a work for a limited time after its creation.²⁰⁹

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.

202. SINACORE-GUINN, *supra* note 31, § 8.2.1(a).

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).

204. *Goldstein v. California*, 412 U.S. 546, 555 (1973).

205. SINACORE-GUINN, *supra* note 31, § 8.2.1(b).

206. *Id.*

207. See, e.g., *McGoon v. Northern Pac. Ry. Co.*, 204 F. 998, 1004 (1913).

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.”²¹⁰ 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”²¹¹ Congress immediately enacted copyright protection.²¹² The original protection was for books, maps, and charts.²¹³ This was statutorily expanded seven times in the 1800s,²¹⁴ prior to the introduction of the Copyright Act of 1909.²¹⁵ Congress amended the 1909 Act in 1912 to cover motion pictures and photoplays.²¹⁶ The current Copyright Act and other intellectual property statutes continue to effectuate the exclusive right to exploit one’s creations.²¹⁷

In cases such as the musician’s public performance right,²¹⁸ 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,

210. *Fisher v. United States*, 328 U.S. 463, 484 (1946) (Frankfurter, J., dissenting).

211. U.S. CONST. art. I, § 8, cl. 18 (capitalization omitted).

212. Act of May 31, 1790, ch. 15, 1 Stat. 124.

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).

215. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (amending and consolidating copyright protection into one Act, no longer codified but still in force for some works); see 17 U.S.C.A. §§ 101-215.

216. Act of Aug. 24, 1912, ch. 35, 37 Stat. 488; AMDUR, *supra* note 214, at 94.

217. U.S. copyright law is governed by title 17 of the United States Code. The Copyright Act of 1976 governs most issues. 17 U.S.C. §§ 101-104, 105-106, 107-115, 117-118, 201-510, 601-803 (1994). However, the Copyright Act of 1909 still governs controversies over works in existence prior to 1978. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075. A number of statutes and treaties must also be considered when addressing a copyright question. Beyond title 17, the administrative regulations of the U.S. Copyright Office are codified at title 37, C.F.R. Other current laws in force include: the Universal Copyright Convention (UCC), July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178; the Geneva Phonogram Convention; the Computer Software Copyright Act of 1980, 35 U.S.C. § 303 (1994); the Semiconductor Chip Protection Act of 1984, 17 U.S.C. §§ 901-914; the Satellite Home Viewer Act of 1988, Pub. L. 100-667, 102 Stat. 3949 (1988) (codified as amended in scattered sections of 17 U.S.C.A. & 47 U.S.C.); the Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1866, 828 U.N.T.S. 221 [hereinafter Berne]; the North American Free Trade Agreement Implementation Act, Pub. L. 103-182, 107 Stat. 2057 (1993); GATT, Uruguay Round Agreements Act, Pub. L. 103-465, 108 Stat. 4976; as well as the provisions of many bilateral treaties. Although the Uruguay Round was not formally ratified as a treaty, it is an outgrowth of the World Trade Organization (WTO), of which the United States is a member. *Id.* The WTO’s provisions, including all of its intellectual property provisions, have been enacted into federal law. *Id.*

218. 17 U.S.C.A. §§ 106, 114.

noninfringing work until closely examined.²¹⁹

This is not an unlikely scenario. Even without digital technology, there is often confusion about whether one work actually infringes 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* infringed 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 composition 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 Corporation²²⁶ 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 unforeseen by the 1981 agreement.²²⁹

The argument that uncontrolled use without payment does

219. Merians, *supra* note 110, at 244-46.

220. 858 F. Supp. 1292 (S.D.N.Y. 1994).

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. *Id.* at 1301-04.

224. *Repp v. Lloyd Webber*, 914 F. Supp. 80 (S.D.N.Y. 1996).

225. *Id.*

226. *Apple Corps. v. Apple Computer*, 1992 F.S.R. 431 (Ch. 1991).

227. *Id.*

228. *Id.*

229. *Id.*

not injure the creator gains credence, however, when the use is new, or newly important.²³⁰ This is especially true when it appears that owners formerly acquiesced in the use, but have since rescinded their acquiescence.²³¹ Here, the argument is that the law never intended to encompass the new, or newly important, use.²³² This argument was more potent under the 1909 Act.²³³ 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.²³⁴ Congress continues to revise the 1976 Act based on new concerns and developments²³⁵ thus ensuring its continuing relevance to emerging technologies.²³⁶

3. Effective political protection

Unfortunately, economics often places creators and users in an adversarial relationship.²³⁷ The user wishes to pay nothing, or as little as possible, while the creator wishes to earn as much as possible for the use.²³⁸ Many users will not pay unless they are caught and compelled by actual or threatened legal action.²³⁹

In a democratic society, where citizens have access to legislative authority, users command greater legislative power based solely on their greater numbers.²⁴⁰ 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 incomes²⁴¹, and lack the protection of political or-

230. SINACORE-GUINN, *supra* note 31, § 8.2.1(b).

231. *Id.*

232. *Id.*

233. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075.

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.²⁴² The best known voice for creators in the United States is the National Endowment for the Arts (NEA).²⁴³ The NEA, however, has spent recent years defending its own existence and fighting for its funding.²⁴⁴ Further, the NEA has focused on providing education and grant opportunities, not on the finer points of intellectual property law.²⁴⁵ 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.²⁴⁶

By contrast, multimedia is a product of both the computer and entertainment industries. As such, powerful political action committees represent its producers.²⁴⁷ Even where the producer is

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.

243. The National Foundation of the Arts and Humanities Act of 1965, Pub. L. 89-209, 79 Stat. 845 (codified at 20 U.S.C. §§ 951-963 (1967)) created the NEA. 20 U.S.C. § 954.

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.

245. NATIONAL ENDOWMENT FOR THE ARTS, GUIDE TO THE NATIONAL ENDOWMENT FOR THE ARTS 2 (Dec. 1991) (National Endowment for the Arts Statement of Mission). "[T]he NEA's goal is not to provide employment, but rather to make the arts more widely available to Americans, to preserve our culture and to encourage the creative development of our nation's finest artistic talent." René Linton, Comment, *The Artistic Voice: Is It in Danger of Being Silenced?*, 32 CAL. W. L. REV. 195, 198-99 (1995).

246. See generally, NEA, 1994 ANN. REP., 11 (1995). The NEA publishes a comprehensive list of individual awards on the World Wide Web. *Id.* at 12. Current listings by state are available at <<http://gopher.tmn.com:70/0/Artswire/Govarts/NEA/NEAINFO>>, visited Sept. 30, 1996 (on file with *Loyola of Los Angeles Law Review*).

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.²⁴⁸ Against this background, individual creators have few viable political options in a mass use situation.²⁴⁹

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.²⁵⁰ This route, however, is contrary to the Constitution and the history of intellectual property rights in this country.²⁵¹ Further, it heavily favors users over creators. Second, one may establish statutory controls and nonvoluntary licensing.²⁵² This may be the user's preference, but the courts disfavor nonvoluntary licensing.²⁵³ 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.²⁵⁴

political action committee (PAC). Others, like the Chamber of Commerce, operate as PACs, reflecting the concerns of their broader membership. Between the two kinds of associations, both the industry specific and general business needs of the multimedia producer will be addressed.

248. See, 15 U.S.C. §§ 631-634g (1994); 15 U.S.C.A. § 634 (West Supp. 1996) (setting out the purpose and establishing the Small Business Administration and the Office of Advocacy).

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.

253. JAY DRATLER, JR., LICENSING OF INTELLECTUAL PROPERTY § 3.03[2][b] (1995).

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 corporations.²⁶¹ They are seen by investors as an emerging technology and an interesting risk.²⁶²

Some well-funded developers have taken the stance that licensing is too disorderly, and it would be easier to create the work anew.²⁶³ 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.²⁶⁴ 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"); *Citi 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, *Inscap 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.

Dreamworks Interactive is a joint venture between Dreamworks/SKG and Microsoft. *All Things Considered: Microsoft and Dreamworks SKG Announce Joint Venture* (NPR radio broadcast, Mar. 22, 1995) (transcript on file with *Loyola of Los Angeles Law Review*). New Century Network (NCN) is an online news source funded by a group of nine media companies. J. Greg Phelan, *Hot off the Web: Interested in the News? You Can Find It on the Internet. Or, It Can Find You*, STAR-LEDGER, June 24, 1996 at 19, 21.

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.

264. Gates has purchased rights to several thousand images from the State Hermitage Museum in St. Petersburg, Russia; the National Gallery of London; the Philadelphia Museum of Art; the Bettmann Archive; and the Ansel Adams Publishing Rights Trust. *Corbis Corp.: Company, Started By Gates, Buys Digital Art Images*, WALL ST. J., Nov. 7, 1995, at B4; *Famed Images of West: Gates' Firm Expands Photo Library*, CHI. TRIB., Apr. 3, 1996, § 3, at 3; Corbis Corporation Background, <<http://www.corbis.com>>, visited July 1, 1996 (on file with *Loyola of Los Angeles Law Review*).

the entire UPI newphoto collection.²⁶⁵ Corbis is digitizing 25,000 images per week and its digital library will reach one million images by the end of 1996.²⁶⁶ 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.²⁶⁸ 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.²⁶⁹ If, after walking away, the producer approaches another creator, she acts as anticipated in a normal competitive market.²⁷⁰ She may, however, simply use the work without attribution or payment.²⁷¹

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.²⁷² It prescribes remedies where failure of this principle works an injus-

265. M. Sharon Baker, *Ansel Adams Deal Clicked Due to Corbis' Previous CD-ROM*, PUGET SOUND BUS. J., Apr. 5, 1996, at 6.

266. Robert Uhlig, *Innovations: Build Up Your Own Art Collection*, DAILY TELEGRAPH LONDON, Jan. 30, 1996, at 14.

267. Corbis Corporation Backgrounder, <<http://www.corbis.com>> [Press Releases: Backgrounder] (collected July 1, 1996). Corbis' images are marked with an invisible watermark that prevents and helps trace unlicensed high-resolution infringement, Part of Corbis' extensive commitment to protecting copyright. *Id.* at <<http://www/corbis.com/archive/arc-copy.html>>.

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.

269. Douglas A. Smith, *Collective Administration of Copyright: An Economic Analysis*, 8 RES. L. & ECON. 137, 142-48 & figs.1-2 (1986) (discussing competition policy and economics of copyright licensing).

270. *Id.* at 143-44 & fig.1.

271. *Id.*; Neilson Interview, *supra* note 28.

272. RESTATEMENT (SECOND) OF CONTRACTS § 12, cmt. c (1979).

tice.²⁷³ But the freedom of contract on which contract law is founded assumes that the parties can choose whether to agree.²⁷⁴ 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.²⁷⁵ In this case the creator must turn to a collective administration organization to preserve the utility of those rights.²⁷⁶

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."²⁷⁷ 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.²⁷⁸

A. Prototypes

The most commonly understood American model of collective administration is the Collective Licensing Organization (CLO) typified by ASCAP and BMI,²⁷⁹ the music performing rights societies.²⁸⁰ These two agencies administer blanket licenses²⁸¹ to radio and television stations and places of public performance

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.

277. SINACORE-GUINN, *supra* note 31, § 4.6.

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.

such as nightclubs, restaurants, stores, and theatres for unlimited nondramatic public performances of their entire repertoires for a prescribed period of time.²⁸² 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.²⁸³ In addition, these are the only two successfully competing music performance rights agencies.²⁸⁴

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.²⁸⁵ Cable retransmission rights allow cable television systems to broadcast network programming for customers who cannot receive television without cable.²⁸⁶ Cable systems pay a nominal royalty to the television station to rebroadcast the day's programming.²⁸⁷ Because broadcasting is a highly regulated industry, the CLO negotiates the contracts within strict statutory requirements.²⁸⁸ It then administers the collection and distribution of that nominal royalty.²⁸⁹ 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.²⁹⁰

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.²⁹¹ Fine arts display rights are much more common in European countries than they are in the United States.²⁹² The U.S. rights in this area are limited to a few situations addressed under the Visual Artists Rights Act (VARA).²⁹³

Reprographic reproduction rights include copy and storage rights for photocopies, microfiche, and electronic storage.²⁹⁴ Re-

282. See *United States v. American Soc'y of Composers, Authors & Publishers*, No. Civ. 13-95, 1985 WL 257, at *1 (S.D.N.Y. Feb. 7, 1985).

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.

290. See *id.* §§ 6.2.3, 15.1-15.1.2, 15.9.

291. *Id.* § 6.2.3(c).

292. *Id.*

293. Visual Artists Rights Act of 1990, Pub. L. No. 101-650, 104 Stat. 5128 (codified in scattered sections of 17 U.S.C.A.).

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.²⁹⁵ Major corporations and research institutions are the primary licensees in the reprographic rights area.²⁹⁶

CLOs are not the only form of collective administration. Agency Collective Organizations (ACOs) offer individual owners substantial control over their work.²⁹⁷ ACOs are appropriate for low volume use of defined works, and are used for administering dramatic, fine arts publishing, mechanical, synchronization, and transcription rights.²⁹⁸ At this minimal level of collectivization, there are other options for private administration of rights. In the United States, artists' agents and representatives typically perform this function, thus ACOs are uncommon.²⁹⁹

Collection and Distribution Administrations (CDAs) generally do not control rights. Instead, they administer remuneration rights under a statutory licensing scheme.³⁰⁰ In the United States, CDAs principally administer royalties under the Audio Home Recording Act,³⁰¹ which deals with digital audio tape (DAT) recorders and media.³⁰² DAT recorders and media were introduced only after protracted battles with recording companies and musicians' representatives.³⁰³ The Act lays out the manufacturers' obligation to pay royalties, payment methods, and distribution of royalty payments from the sale of digital audio recorders and tapes.³⁰⁴ The Act also permits digital and analog home taping of copyrighted material for noncommercial use, thus legalizing the widespread practice of taping CDs for personal use.³⁰⁵ Personal copying per-

295. *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.

301. The Audio Home Recording Act of 1992, Pub. L. No. 102-563, 106 Stat. 4237 (codified at 17 U.S.C. §§ 1001-1010 (1994)).

302. *Id.*

303. *See* H.R. REP. NO. 102-873, pts. I, II, (1992) *reprinted in* 1992 U.S.C.C.A.N., 3578, 3578-3608.

304. 17 U.S.C.A. §§ 1003-1007 (West & Supp. 1996).

305. *Id.* § 1008.

mitted under the Act includes both full works and self-edited compilations.³⁰⁶

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

Droit de suite grants fine artists the right to participate in the after-market for their original works by receiving royalties on continuing resales.³⁰⁹ *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.³¹⁰ Record companies withheld co-op advertising from stores that sold both new and used CDs to protest the practice.³¹¹ The Warehouse, 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.³¹² The suit eventually settled out of court and the practice continues.³¹³ Despite its lack of acceptance in the United States, *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.³¹⁴

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

306. *Id.*

307. SINACORE-GUINN, *supra* note 31, §§ 6.2.4(a), 6.2.4(c).

308. *Id.* §§ 3.10.1(h), 6.2.4(c).

309. *Id.* §§ 6.2.4(a), 15.1.

310. See Eileen Fitzpatrick, *Warehouse Tries Used-Tape Sales*, BILLBOARD, Jan. 28, 1995, at 1, 13.

311. *Id.*

312. Ed Christman, *Distributors Offer Used-CD Sellers Ad-Dollar Paybacks*, BILLBOARD, Feb. 26, 1994, at 6.

313. *Id.*; see Fitzpatrick, *supra* note 310, at 13.

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.

315. SINACORE-GUINN, *supra* note 31, § 4.7.4.

license, or a tax.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.³¹⁷ This type of collective more closely matches a socialized economy and is used in Nordic countries.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.³¹⁹

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.³²⁰ Both have too many providers; works that may be treated as fungible; and too many users to make individual, private licensing feasible.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.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.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.³²⁴ The cable operator needs all the rights of transmission for all the programs that the commercial stations include in their programming

316. *Id.*

317. *Id.*

318. *See id.*

319. *Id.* § 6.2.5. The creators in this case are either unknown or their rights have expired, extinguishing the primary purpose of other collectives.

320. *See* discussion *supra* Part III.B.

321. *See* *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-23 (1979).

322. *Id.*

323. 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.

324. *Id.* § 13.5.2.

and a license from the commercial stations for the right to use their "broadcast day."³²⁵

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.³²⁶ 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.³²⁷ In the United States, cable retransmission rights are covered by a compulsory license administered by the Copyright Office.³²⁸

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.³²⁹ The various individual collectives form the membership of the new collective organization, which then administers all collection, monitoring, and documentation under its various licenses.³³⁰

This model has several distinct advantages for multimedia. It allows for the affiliation of many different kinds of rights owners in the same collective.³³¹ Negotiation of rights occurs between collectives and not between the individual rights holders,³³² 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.

distance.³³³ 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.³³⁴ If a collective does not have an adequate repertoire, it will gain neither new affiliate owners nor new licensees.³³⁵ 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.³³⁶

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.³³⁷ The developer needs to license both the clip and the music.³³⁸ 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.³³⁹ 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.³⁴⁰

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 work³⁴¹ 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

341. 17 U.S.C.A. §§ 101-102, 201 (1996).

342. See 15 U.S.C. §§ 1-2 (1994).

343. U.S. Dep't of Justice & Federal Trade Comm'n, *Guidelines for the Licensing of Intellectual Property*, 4 Trade Reg. Rep. (CCH) ¶ 13,132, § 4.3, at 22-23 (Apr. 6, 1995) [hereinafter DOJ *Guidelines*].

344. *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 2 (1979).

345. 15 U.S.C. § 18 (1994).

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).

349. ASCAP and BMI have repeatedly fought antitrust challenges to their collective administration and blanket licensing of public performance rights in music. See, e.g., *Broadcast Music, Inc.*, 441 U.S. at 1; *Buffalo Broadcasting Co. v. American Soc'y of Composers, Authors and Publishers*, 744 F.2d 917 (2d Cir. 1984); *CBS, Inc. v. American Soc'y of Composers, Authors and Publishers*, 620 F.2d 930 (2d Cir. 1980); *United States v. American Soc'y of Composers, Authors & Publishers*, 1940-43 Trade Cas. (CCH) ¶ 56,104, at 405 (S.D.N.Y. 1941) [hereinafter *ASCAP I*], as modified by *United States v. American Soc'y of Composers, Authors & Publishers*, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950) [hereinafter *ASCAP II*].

350. *COMPACT v. Metropolitan Gov't*, 594 F. Supp. 1567, 1574 (M.D. Tenn. 1984); *Broadcast Music, Inc.*, 441 U.S. at 20-23.

new product, or entry into a new market."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."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.³⁵³ As joint ventures, their formation is subject to a "rule of reason" analysis.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;³⁵⁵ and (2) whether the collective administration organization unreasonably restricts competition and is narrowly tailored to achieve its purpose.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.³⁵⁷ Price fixing between direct competitors is known as a "horizontal price restraint" and constitutes a *per se* violation of antitrust laws³⁵⁸ except where such a price restraint is actually ancillary to procompetitive integrative efficien-

351. *COMPACT*, 594 F. Supp. at 1574.

352. *Id.*

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].

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).

355. ABA ANTITRUST, *supra* note 353, at 373.

356. *Id.* at 377.

357. 15 U.S.C. § 1 (1994).

358. *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-98 (1927); see *Broadcast Music, Inc.* 441 U.S. at 23.

cies.³⁵⁹ When content owners band together as a collective and set a common price for a license, they engage in a literal price restraint,³⁶⁰ but the Supreme Court has found that a blanket license could not “be wholly equated with a simple horizontal arrangement among competitors.”³⁶¹ The legality of such an action is, therefore, dependent on it being “subordinate and collateral”³⁶² to a legitimate, separate purpose or transaction.³⁶³

a. purpose

The Supreme Court recognizes that some activities must be accomplished jointly or not at all.³⁶⁴ 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”³⁶⁵ and to require a jointly operated entity to create and define a competitive market.³⁶⁶ The *Broadcast Music*³⁶⁷ 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.³⁶⁸ 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.³⁶⁹ 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 exist³⁷⁰ 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.

360. *Broadcast Music, Inc.*, 441 U.S. at 8-9.

361. *Id.* at 23.

362. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 224 (D.C. Cir. 1986) (Bork, J.).

363. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898) (Taft, C.J.), *aff'd*, 175 U.S. 211 (1899).

364. *NCAA*, 468 U.S. at 101.

365. *Broadcast Music, Inc.*, 441 U.S. at 22-23.

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."³⁷¹ 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.³⁷² 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.³⁷³

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.³⁷⁴ 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.³⁷⁵

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?³⁷⁶ 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.³⁷⁷ In *Continental T.V., Inc. v. GTE Sylvania Inc.*,³⁷⁸ the Court said that the effect must be examined "in light of the competitive situation in 'the product market as a whole.'"³⁷⁹ 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.³⁸⁰

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.

376. *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978); see DOJ *Guidelines*, *supra* note 343, §§ 3.1-3.2; ABA ANTITRUST, *supra* note 353, at 43; Addanki & Anderson, *supra* note 287, at 579-80.

377. ABA ANTITRUST, *supra* note 353, at 44-46 & n.259.

378. 433 U.S. 36 (1977).

379. *Id.* at 45 (quoting *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 382 (1967), *overruled on other grounds by*, *Continental T.V.*, 433 U.S. 36 (1977)).

380. ABA ANTITRUST, *supra* note 353, at 377; see, e.g., *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619 (W.D. Ky. 1985).

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.³⁸¹ If such a joint venture results in market power or anticompetitive effects sufficient to outweigh its procompetitive justifications, it will not survive a rule of reason analysis.³⁸²

Normally, a reasonableness analysis requires an in-depth examination of market power.³⁸³ There is an exception. When the challenged activity's effect on competition is "obvious on its face,"³⁸⁴ only a "quick look" is necessary.³⁸⁵ In *United States v. Ivaco, Inc.*,³⁸⁶ 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.³⁸⁷ 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.³⁸⁸

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*.³⁸⁹ After examining the collectives' blanket licenses within the competitive reality of music licensing, the Supreme Court disagreed.³⁹⁰ 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.'"³⁹¹

b. narrow tailoring

The Supreme Court considered the milieu in which the blan-

381. *United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 170 (1964); *United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989).

382. See ABA ANTITRUST, *supra* note 353, at 376-78.

383. *Id.* at 51-52.

384. *Id.* at 51.

385. *Id.* at 51-52 & n.281.

386. 704 F. Supp. 1409 (W.D. Mich. 1989).

387. *Id.* at 1426-27.

388. *Id.*

389. *Broadcast Music, Inc.*, 441 U.S. at 6.

390. *Id.* at 24-25.

391. *Broadcast Music, Inc.*, 441 U.S. at 20; accord *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985) (retail stationers' cooperative).

ket license arose; a world inhabited by thousands of users and thousands of composers with millions of compositions.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.”³⁹³ It recognized that CBS alone would require between 4,000 and 8,000 individual licenses each year³⁹⁴ and that the financial burden of individual sales transactions, monitoring, and enforcement would be prohibitive for the individual composer and the smaller user.³⁹⁵ It determined the blanket license was composed of the rights to use the individual pieces and the aggregating service that ASCAP and BMI provided.³⁹⁶ As such, the Court decided that blanket and individual licenses were different products³⁹⁷ 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.”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.³⁹⁹

For a restraint of trade to be reasonable, its legitimate purpose must outweigh its anticompetitive effects.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.⁴⁰¹ These elements created a different market in which individual composers could not effec-

392. *Broadcast Music, Inc.*, 441 U.S. at 20.

393. *Id.*

394. *Id.* at 21, n.35.

395. *Id.* at 20.

396. *Id.* at 21.

397. *Id.* at 20-21, 23.

398. *Id.* at 22.

399. *Id.* at 21-22.

400. *Id.* at 21; *Interface Group v. Massachusetts Port Auth.*, 816 F.2d 9, 10 (1st Cir. 1987).

401. *Broadcast Music, Inc.*, 441 U.S. at 21-22.

tively compete.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.⁴⁰³ The first element was the nature of the product.⁴⁰⁴ Because a musical piece can be simultaneously consumed by many users, the blanket license was unlikely to create a decrease in output.⁴⁰⁵ The second element concerned the basis on which the license remunerated composers.⁴⁰⁶ Royalties were paid, based on the popularity of the song, thereby encouraging composers to create marketable material.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.⁴⁰⁸ The Court noted that, historically, the market for public performing rights licenses has largely organized around a blanket license,⁴⁰⁹ that Congress created various blanket licenses by statute in the 1976 Copyright Act,⁴¹⁰ and that ASCAP and BMI have both operated under consent decrees,⁴¹¹ which have "scrutinized"⁴¹² the collective administration of a blanket license in great depth and constructed a framework within which ASCAP and BMI both operate.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.⁴¹⁴

Finally, the Court stressed the nonexclusive nature of the license.⁴¹⁵ Neither users nor composers were precluded from individually negotiating a public performance license.⁴¹⁶ The Court has

402. *Id.*

403. *Id.* at 20-23 & n.40.

404. *Id.* at 22.

405. *Id.* at 22 n.40.

406. *Id.* at 20-21.

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.* at 15-16.

411. *Id.* at 11-12.

412. *Id.* at 13.

413. *Id.* at 13-16.

414. *Id.* at 13.

415. *Id.* at 23-24.

416. *Id.*

emphasized this aspect in subsequent cases,⁴¹⁷ 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.”⁴¹⁸

V. LICENSES

Of the various ways to legally use copyright material, most developers will need to acquire licenses to use preexisting works.⁴¹⁹ 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.”⁴²⁰ A license is limited in scope and can be exclusive or nonexclusive, voluntary or statutory.⁴²¹

An exclusive license grants the licensee a monopoly within the arena of use.⁴²² 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.⁴²³ 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.⁴²⁴ Because an exclusive license impairs the owner’s ability to continue exploiting a market,⁴²⁵ exclusive licensing should be negotiated directly with the rights holder or his agent. In general, however, exclusive licensing is probably unnec-

417. See, e.g., *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982).

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).

420. BLACK’S LAW DICTIONARY 920 (6th ed. 1990).

421. 17 U.S.C. § 201(d) cmt. (1994).

422. *Id.*; *Dietel v. Chisholm*, 42 F.2d 172, 173 (1930).

423. O’Connell, *supra* note 14, at 7.

424. *Id.*

425. *Id.* at 6, 7.

essary and too expensive for most multimedia productions.

Licenses are limited in scope, and hence, constitute a lesser grant than an assignment.⁴²⁶ Licenses may be limited by duration, geography, market, or use.⁴²⁷ From a creator's point of view, the scope of the license is the most important provision in a licensing agreement.⁴²⁸ Creators will probably be reluctant to grant the right to sublicense the content, except as part of the whole product.⁴²⁹ They may want to limit the developer to a single computer platform.⁴³⁰ Most importantly, the agreement should include a clause that reserves "all other rights and media not expressly granted in this license agreement."⁴³¹ 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.⁴³²

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.⁴³³ 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.⁴³⁴ The individually negotiated license between the creator and the user is the purest form of creator-controlled exploitation envisioned by the Consti-

426. *Id.* at 6; *see infra* note 134 and accompanying text.

427. O'Connell, *supra* note 14, at 7-8.

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*.

tution.⁴³⁵ 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.⁴³⁶

B. Nonvoluntary Licensing

Some licenses, known as statutory, compulsory, or nonvoluntary licenses, are designated by law.⁴³⁷ 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.⁴³⁸ User groups usually favor statutory or compulsory licenses because these prevent rights holders from refusing to license their works.⁴³⁹ 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.⁴⁴⁰ Users in favor of a compulsory licensing scheme argue that private licensing is impracticable,⁴⁴¹ that it is necessary to have full and unrestricted access to all creative works,⁴⁴² and that compulsory licensing is necessary to assure market equity.⁴⁴³

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.⁴⁴⁴ The United States and the international majority regard intellectual property

435. See *infra* Part III.A.1-2.

436. SINACORE-GUINN, *supra* note 31, § 1.1.2.

437. DRATLER, *supra* note 253, § 3.03.

438. See *id.*

439. SINACORE-GUINN, *supra* note 31, §§ 8.1, 8.2; see also Brenner, *supra* note 187, at 230 (suggesting a period of "voluntary compulsory" license terms as a necessary prerequisite to the development of the multimedia industry).

440. SCOTT, *supra* note 26, § 22.08[C].

441. See Brenner, *supra* note 187, at 230.

442. SINACORE-GUINN, *supra* note 31, § 8.2.2.

443. *Id.* § 8.2.3. Some advocates of complete access even contend that compulsory licenses are unconstitutional because the rights granted to the author under such a system are not exclusive, contrary to the Constitution's exclusive grant. See 1 NIMMER, *supra* note 63, § 1.07. This argument fails to distinguish between words of authority and words of limitation. Article I, section 8 grants Congress the authority to enact "necessary and proper" laws, but it does not require Congress to enact only those laws that fully exploit federal power. See *Goldstein v. California*, 412 U.S. 546, 558 (1973); *DeepSouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 530-31 (1972); 1 NIMMER, *supra* note 63, § 1.07.

444. DRATLER, *supra* note 253, § 3.03[2](b).

rights as private ownership rights.⁴⁴⁵ Statutory licensing substantially or completely invades the owners' domain by stripping owners of the right and ability to control and exploit their work.⁴⁴⁶ 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.⁴⁴⁷ This tendency is not, however, absolute. The Copyright Act defines several compulsory licenses, among them: cable and satellite retransmission rights;⁴⁴⁸ public television transmission rights;⁴⁴⁹ mechanical reproduction rights in music;⁴⁵⁰ digital audio recording rights;⁴⁵¹ and jukebox performance rights.⁴⁵²

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.⁴⁵³ 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.⁴⁵⁴ 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).

448. 17 U.S.C.A. §§ 111(a)(4), (c), (d), 119 (West & Supp. 1996).

449. 17 U.S.C. § 118 (1994).

450. 17 U.S.C.A. § 115 (West & Supp. 1996).

451. *Id.* §§ 1001-1004 (West & Supp. 1996).

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.*

taining the greatest degree of control by the rights' owner.⁴⁵⁵

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.⁴⁵⁶ Collectives can issue blanket licenses because fees and royalties are based on something other than specific use.⁴⁵⁷ Blanket licenses are typically issued only for mass uses.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.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.⁴⁶⁰ It drastically reduces transaction costs to the user by establishing a clearinghouse.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.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.⁴⁶³ Blanket licensing thereby expands access to works and consequently increases competition in the market.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.⁴⁶⁵

455. See discussion *supra* Part IV.A, *infra* Part IV.C.

456. SINACORE-GUINN, *supra* note 31, §§ 8.5, 8.5.1.

457. *Id.*

458. *Id.* § 6.1.

459. *Id.* §§ 8.5.1(d), 8.5.2.

460. SCOTT, *supra* note 26, § 22.08[C].

461. See *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 20-23 (1979).

462. *Id.*

463. SINACORE-GUINN, *supra* note 26, § 8.7 (discussing access concerns).

464. *Broadcast Music, Inc.*, 441 U.S. at 22-23.

465. SINACORE-GUINN, *supra* note 31, §§ 8.5.1(d), 8.5.2.

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.⁴⁶⁶ Of these types, the socialized license most invades individual rights.⁴⁶⁷ 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.⁴⁶⁸ 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.⁴⁶⁹ 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.⁴⁷⁰ 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.⁴⁷¹ In the United States, statutory copyright licenses are administered by the Copyright Arbitration Panel of the Copyright Office,⁴⁷² not by private collectives, and so are not a true statutory blanket license.⁴⁷³ 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.⁴⁷⁴ However, they differ in that the user has no ability to negotiate in a unilateral system.⁴⁷⁵ In a unilateral system, the collective publishes or posts rates for use,

466. *Id.* §§ 8.5.2-8.6.

467. *Id.* § 8.6.

468. *Id.*

469. *Id.*

470. *Id.* § 8.5.4.

471. *Id.*

472. 17 U.S.C. § 119(c)(3)(D) (1994).

473. 17 U.S.C.A. § 119 (West Supp. 1996).

474. SINACORE-GUINN, *supra* note 31, §§ 8.5.2-8.5.3.

475. *Id.*

whereupon any user may make use of any work in its repertoire upon payment of, or a contract to pay, the posted rate.⁴⁷⁶ 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, untailed licensing terms and definitions.⁴⁷⁷ 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.⁴⁷⁸ These licenses can be negotiated per year, per program, per occasion, or for a particular performance.⁴⁷⁹ Although the U.S. government has placed some limitations on the types of licenses available for television performance rights,⁴⁸⁰ 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.⁴⁸¹ 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.⁴⁸² 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.”⁴⁸³

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.*

480. *See, e.g.,* United States v. American Soc’y of Composers, Authors & Publishers (*ASCAP I*), 1940-43 Trade Cas. (CCH) ¶ 56,104, at 405 (S.D.N.Y. 1941), (consent decree) as modified by United States v. American Soc’y of Composers, Authors & Publishers (*ASCAP II*), 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950).

481. *See* Broadcast Music, Inc. v. CBS, 441 U.S. 1, 20-23 (1979).

482. SINACORE-GUINN, *supra* note 31, § 8.5.2.

483. *Id.*

costs, reasonable and flexible license fees, a broad repertoire, and voluntary membership.⁴⁸⁴ 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."⁴⁸⁵ 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.⁴⁸⁶

Because multimedia production requires such a variety of content, a super collective, at a minimum, would require the cooperation of ASCAP, BMI, SESAC,⁴⁸⁷ the Harry Fox Agency, AMRA,⁴⁸⁸ the Copyright Clearance Center,⁴⁸⁹ the Motion Picture Producer's Association of America (MPAA), the Motion Picture Export Association (MPEA),⁴⁹⁰ Artists Rights Services, Inc. (ARS), and the Visual Artists and Gallery Association (VAGA).⁴⁹¹ 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.⁴⁹² 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

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.⁴⁹³ This technology, steganography, is proving difficult to defeat as a tracking and enforcement tool⁴⁹⁴ 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 project⁴⁹⁵ 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.⁴⁹⁶ 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**

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.

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