Legal Tips for Interactive Multimedia Producers
How to insure a smooth ride on the information superhighway

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Five Hundred Channels!
Information Superhighway!
CDI, CD-ROM, 3DO!

Is this new technology real or is it merely media hype?

Perhaps as recent as a year ago much of the ballyhoo surrounding the new technology was hype but it has quickly become reality. *The Wall Street Journal* recently reported that the sale of CD-ROM drives for computers during the final quarter of 1993 exceeded expectations that were already optimistic. A brief visit to a local computer retailer or one of the discount electronic stores that sell computers will confirm that computers with CD-ROM drives or "multimedia computers" are here in great quantity and are selling. Sega and Nintendo are moving from their traditional game cartridges to CD-based systems that will improve the quality of the product. Phillips, 3DO and other hardware manufacturers are beginning to step up their marketing activities in the battle to become the preferred hardware system for interactive television.

"Mortal Combat," the much maligned computer game, reportedly grossed $200 million since its release last fall. If placed on last year's box office charts it would have been second in revenue behind the movie *Jurassic Park*. In other years it might have been number one. This is just the beginning.

The importance of the new technology was evidenced by the battle for Paramount Pictures. Viacom's Summer Redstone and QVC's owner Barry Diller created a 1990s version of the famous cowboy movie *High Noon*, complete with a Wall Street shootout featuring billions of dollars, high-powered lawyers and accountants, and a Baby Bell.

What does all this activity mean to the entertainment industry?

It means that today's definition of an entertainment property is obsolete. In the current "new age" terminology, it means a "paradigm shift." Memo to Hollywood: welcome to the information and computer age. The ability of a computer program to allow full-motion video, audio, text, graphics and photographs to be accessed and manipulated at the will and whim of a user has changed the entertainment industry profoundly, although at present many in Hollywood are in a state of denial over how truly profound this change is and are downplaying the impact of the new medium - interactive multimedia.

Producers, directors and writers must take heed: the typical plot need not be confined to the usual linear path of the beginning, middle and end. With this new medium a story can have several beginnings, numerous middles and several endings or no ending. Creators will no longer have absolute control over the direction of their stories. It is the viewer or end user who fashions the story using the database of plot elements.

Another profound change will occur as Hollywood's intellectual property, which has also been called intangible property, will become much more intangible. The familiar fixed forms of film, videocassette and even the new CD disc may no be necessary in the future. Films and programs will consist merely of digital data stored in a database, which can be accessed by consumers via their television sets or computers through phone lines or a satellite link - the infamous information superhighway.

The concept of truly intangible intellectual property in a digital form is frightening to those who produce entertainment products and seek to protect them. With the fixed form of CD or video cassette producers can see and inventory what they have and what they can control - most particularly, the distribution of their precious property. Piracy is more difficult as these fixed forms take up physical space and in quantity are difficult to conceal. Also, reproduction of analog recordings, even if done at high speed, takes time, requires expensive equipment and losses picture and sound quality as copies are made.

Unlike their analog ancestors, digital versions of a work can be copied very quickly to a disk by a consumer with basic computer skills with absolutely no degeneration of picture or sound quality. If this is not enough, once copied the property can be easily morphed, manipulated and otherwise altered to be virtually unrecognizable to the original creator or owner. This concept has made many in Hollywood very nervous as they direct their engineers and programmers to develop safeguards. Fortunately the superhighway is still a few years away and it is hoped that protection will be in place before these properties are on line.

Embracing the New Medium

In the March 1994 issue of the magazine Wired, John Perry Barlow, co-founder of the Electronic Frontier Foundation and lyricist for the Grateful Dead, posed the question as to whether intellectual property law has been rendered impotent by this new technology:

For all practical purposes, current copyright law offers legal protection to the bottle; not the wine. Digitization makes it possible to replace all information storage forms with one metabottle; complex and highly liquid patterns of ones and zeros . . . . Notions of property, value, ownership, and the nature of wealth itself are changing more fundamentally than at any time since the Sumerians first poked cuneiform into wet clay and called it stored grain. Only a very few people are aware of the enormity of this shift, and fewer of them are lawyers or public officials.

Many lawyers deny that intellectual property law is gasping for breath on its way to extinction, but most don't deny that changes in the laws will have to be made to keep up with the new technology. Others even confess that some of the fundamental concepts may need reexamination. There is, however, agreement that change is inevitable; the disagreement is the type and the extent.

How will these changes in technology and the reexamination of the concepts of intellectual property affect the entertainment lawyer?

Clearly the law must be adapted to embrace the new medium. Contracts will have to be modified and the number of rights that must be acquired will increase dramatically. The type of required rights will change and customs and practices will have to be developed. Also, the entertainment lawyer must become familiar with the culture of the computer industry. The quid pro quo is that the computer lawyer must become familiar with the customary practices of the entertainment industry. Either way it will be no simple task. As Hollywood counselors grasp terminology such as "graphical user interface," the Silicon Valley techno-lawyers must decipher the mysteries of Hollywood's "net profits" definitions.

Examine the following scenario: A producer meets her attorney at the latest "power" restaurant and explains that she has this great idea for an interactive CD called "What If?" It consists of a series of classic scenes from famous films with new footage added. The end user (a.k.a. the viewer) can manipulate the film clips to answer such questions as: what did Rhett Butler do after he told Scarlett he didn't give a damn and slammed the door in her face? What if Ingrid Bergman had not gotten on that plane and gone back to Rick's Café with Humphrey Bogart?

The concept is great! She is sure it will sell. The lawyer takes the cellular phone from his pocket and makes a few calls. After a few frustrating conversations the lawyer informs his client that the time and money involved in acquiring all the rights needed to produce the project make it cost-prohibitive. Another great idea is D.O.A. Why?

It's simple. The quantity of expensive rights necessary to complete the project make the budget too large to justify.

In planning the production the producer thought through her budget. She considered where and when to shoot, how much equipment would be needed and the amount of editing time required. What she failed to plan for were the cost of rights acquisition and the added cost for computer design and programming.

What's a Producer to Do?

A producer must determine what rights must be acquired and obtain licenses for these rights. This process, which is known "legal clearance," is much less expensive and most cost-effective when done before the production begins. In addition, the producer must factor in the added costs to design and write a computer program and design the necessary graphical interfaces necessary to make the project function smoothly in this new medium.

If David Letterman were an attorney who represented multimedia producers, he might present the following Top Ten list of things a multimedia producer should do in preparing a multimedia production.

1. **An oral contract is not worth the paper it's printed on, unless Kim Basinger is involved.**

The message here is: get it in writing. Unless producers create and produce every element on their own, any interactive multimedia property will require the license or purchase of the work product or the likeness of others. Depending on the type and scope of the project, producers will need agreements with writers, directors, other producers, composers, computer programmers, graphic artists and others.

The written contract must define the business relationship of the parties and transfer ownership of the intellectual work product. The recent case involving Basinger points out the need to have a clear written understanding of the business relationship between the parties. The last thing a producer needs is a judge or a jury deciding what the parties intended the agreement to be. Although an oral agreement was recognized in that case, its terms were culled from numerous written but unsigned drafts of an agreement that were passed back and forth between the parties and their lawyers. A second very important reason for getting an agreement in writing is that transfers of certain intellectual property rights - under copyright law, for example - are invalid unless made in writing.
In negotiating and drafting a contract for a multimedia production, new terms and concepts have been added to the discussion including:

- *Media.* Will this product be distributed on a single platform, such as CD-ROM, or can it be ported or translated so that it can be distributed on all media, such as CDI, 3DO, Sega, Nintendo, old-fashioned video cassette and the on-line systems like CompuServe and Prodigy?
- *Future Products*. Who has the right to produce derivative works or sequels?
- *Bugs*. Who is responsible for getting the kinks out of the program?
- *Technical Support*. Will a customer-support number be set up to answer questions about the product after its release?
- *Bundling*. This is a practice common in the computer industry where software is packaged and sold with the hardware whose manufacturer pays a minimal price for the software.

2. It is much better to own than it is to rent.

Anyone who has been tricked into watching a Saturday afternoon infomercial while channel surfing knows the number-one lesson of those real estate seminars: owning a property is far better than renting one. Wherever possible, acquire ownership of the elements in the production. Intellectual property rights, like other property rights, can be bought and sold. Common sense dictates that what you own you can completely control. If you have a musical composition created for the production that you own there is no one to pay royalties to nor is there a concern about a license that may expire or a need to worry about rights not acquired that you may want to exploit in the future.

Works can be acquired by assignment or as a work "made-for-hire" if created for a particular production. The basic premise is that if a producer "hires" an individual to create a work that is created under his direction and control, the producer becomes the copyright owner of the work. The requirements necessary to qualify for a work made-for-

hire are complex and still evolving (see the article on page 35). The preferred method is to remember tip number one: get it in writing.

3. **Create a license plan: look for rights that must be licensed.**

   There are two categories or rights: likeness rights and property rights. Property rights must be acquired for the use of copyrighted works such as books, plays, music, films and photographs. Likeness rights, also called publicity rights, are needed for the use of a person or the use of non-public information about a person. In some instances, as in film clips and photographs, both likeness and property rights must be licensed or cleared.

   Make a list of these items and mark off the ones that are essential to the creative integrity of the project. Be ruthless when making these decisions. The priority list will be a useful tool to help you eliminate items when you begin to negotiate the licenses and find that some rights may be difficult or too expensive to obtain. This process is much more effective if done early in the production process so you can eliminate items while it is least expensive to do so. Taking a film clip out in the development and script stage is certainly much cheaper than if it is done in final edit or after 5,000 CDs have been produced.

4. **Kick the tires: do your own "due diligence."**

   Before you buy a used car you kick the tires and you call up the owner to see whether he spent his days driving to the grocery store or training for the Indy 500. If a certain property is crucial for a project, do your own due diligence. If a licensor is not the original owner, make sure he owns the rights you intend to exploit. Order a copyright chain-of-title report and ask for the underlying agreements by which the licensor obtained his rights. He must have the ability to exploit the interactive-multimedia rights you intend to exploit. A copyright is made up of divisible rights that can be sold to many people in different ways. The individual you are acquiring rights from may only have certain specific rights, such as free television or video that will be of no use to you.

5. **Real people file real lawsuits.**

   Whenever the name or likeness of a real person is used, you encounter the possibility of defamation or an invasion of privacy. If you have a signed name-and-likeness release from that individual, which includes the right to fictionalize and dramatize, you have resolved the issue. If not, make certain the statement or portrayal of that person is true and verifiable by a reliable source. This will minimize potential defamation claims but not privacy claims.

   Privacy rights can be actionable even if the facts used are true. Privacy issues are separated into four categories: 1) public disclosure of embarrassing facts; 2) publicity that places a person in a false light in the public eye; 3) intrusion into someone's privacy or solitude; and 4) appropriation of a person's name or likeness.

6. **Murphy's Law applies to multimedia: always have alternatives.**

   Don't paint yourself into a rights corner. If your project depends on the use of a film clip from Gone With The Wind or a Lennon and McCartney composition, you may be amazed at the cost of a license. You may also get an out-and-out refusal to grant a license. A copyright holder has no obligation to grant you a license. As the studios who own these properties increase their awareness of multimedia, they may refuse to license certain classic and valuable works. Some property owners are deliberately holding back the licensing of their works in the new media until licensing terms and fees stabilize and technical safeguards are devised to minimize piracy and the unwanted manipulation of their work. Always have alternatives.

7. **It's a Wonderful Life: public domain is not always what it appears to be.**

   Just because someone tells you a work is in the public domain, or it is "old," don't assume that you are in the clear without verification. Works that are public domain in the U.S. may still retain protection in countries where your project may be distributed. Also, a work such as a film may be public domain, yet the underlying basis for that film, such as a book or story, may not. The music may be still protected. Republic Pictures was successful last Christmas in regaining some control of the licensing of Frank Capra's classic film It's a Wonderful Life, which had fallen into the public domain, because some of the music was still protected. Remember tip number 4: do your own due diligence.

8. **Imitation may be flattery, but it can be expensive.**

   Don't replicate a work you were not able to acquire or afford the rights. A parody can be done without a license but it must be legitimate. Conjuring up a film or composition to save a license fee does not fall within the definition of a parody. Be aware that the legal prohibition against sound-alikes and look-alikes is expanding. Imitation may be the greatest form of flattery, but this type of flattery can result in litigation.

9. **Look for the union label.**

   If you use union talent for your project, you will have to adhere to the standards set by the appropriate collective bargaining organizations (SAG, AFTRA, DGA, WGA, AFM). If you are reusing the performance or efforts of union talent in a film or television clip, you need to check with the appropriate unions as residual or reuse payments maybe required to be paid to the actors or composers. Most of the unions now have staff who are responsible for new technologies and who can be very helpful to a producer.

10. **Don't treat music as merely a part of the post-production process.**

    Music licensing can be a nightmare. In using music, you must acquire a license from the copyright owner of the composition or his representative for reproduction or "sync" rights, public performance rights, distribution rights and possibly adaptation rights. If you are using an existing master, a license must be obtained from the owner of the recording

and reuse payment may be due the musicians through the American Federation of Musicians.

Licensing music can become a very complex process. Don't let it go till the last minute.

This Top Ten list of tips is only a beginning.

As the computer lawyers continue to clash with the Hollywood lawyers and the boundaries of intellectual property law are tested, the standards and practices of the multimedia industry will evolve and emerge. The litigation has already begun: a music publisher recently sued the CompuServe on-line service for contributory copyright infringement of a composition transmitted through the computer network from one subscriber to another.

Just as a flurry of litigation ensued over the right to show movies on television and later to distribute them on videocassette, it is likely that disputes will occur to determine the right to distribute property on the various forms of new media - especially as these properties begin to make a profit. Legal history will repeat itself and a new round of interpretations of grant-of-rights language in contracts will commence: for example, is the widely used phrase "all media now known or hereinafter devised" sufficient to convey all future rights? Hopefully, these decisions will be consistent and practical.

In the interim these tips are intended to make a producer's journey down the information superhighway a smoother ride.