COPYRIGHT & CONTENT:

Staying Out Of Court And Making Money

BY CARYN MLADEN

This article provides some general principles of law related to multimedia development, but nothing in this article should be considered legal advice for your particular project. Always talk to an experienced intellectual property lawyer when starting any multimedia project and especially when legal issues arise.

I DON'T MEAN TO SCARE YOU. I REALLY DON'T.

Technology has made it simple to scan a photograph into your computer or use a pop song as background music for your kiosk. However, doing so can cost you millions of dollars, your company, your home and many years in your life. Copying usually means copyright infringement and, in multimedia production, it's cheating. Nobody cares whether or not you were trying to cheat. Nobody cares if other people in the industry also cheat.

But, as I said, I don't want to scare you. I want to give you some background information and some straightforward, simple techniques to help you stay on the right side of the law.

"I liked your article so much I photocopied it for all my friends"

People have been copying illegally for years; why should anyone care now? For many reasons, lawsuits based on copyright and content have become more popular lately. First, copying used to be laborious, expensive and imperfect. Digital technology now allows high-quality copying to be simple and inexpensive in any media.

Second, people have only started to recognize the value of their intellectual property in recent years, and some intellectual property became valuable *because* of the better technology. Students photocopying chapters of your textbook, for example,

are infringing copyright, but you won't make much money suing them. However, if a large company uses your photographs in a million-selling CD-ROM *without your permission*, you can sue for big bucks.

Generally it only makes sense to sue someone with money. Now that people are making money with multimedia, those making the money will get sued. Even so, the owners of copyrights have to enforce their own rights and suing all the time is costly and time consuming, even if they *could* monitor all the possible infringements. After all, producers want to spend their time in production, not in court.

The background: intellectual property

There's great confusion about the state of the law since intellectual property lawsuits came into vogue. Intellectual property is the legal term for trademarks, patents, copyrights and anything else that is completely intangible but provides a value to your company through its use. Trademarks are registered words, slogans or logos used to represent a particular business or product. They last for 10 years but can be renewed. A patent is a formally registered monopoly granted by the government to the creator of a new and novel process, technology or other innovation for a period of 17 years. A patent is not granted for content. The subject of a patent is a process or mechanism that may contain content. Content is governed by copyright law.

What is copyright?

Copyright is the legislated protection of a creative work, which can either be literary, dramatic, musical, artistic or a combination of these. Copyright is the protection of the right to reproduce and use a particular expression, and is held by the author unless assigned. It is *not* the protection of an idea; it is the protection of the way that idea is expressed. *West Side Story* may have the same general plot line as *Romeo and Juliet*, but it is expressed differently, so it has a separate copyright.

There are exceptions to the rule. The ones you are most likely to come across are listed in the sidebar. To obtain the right to use certain content you can use image banks, licensing groups, or catalogs and houses for clip art, music, film or video, including those listed on page 16. However, there is no universal method, pricing or standards for obtaining the license to use a work. It's all about supply and demand. Always secure rights before using any content, otherwise you are making it more expensive for yourself. The more you need particular content, the more the owner is likely to charge.

The issues to consider when buying or selling intellectual property are key to determining the price. If you're the seller, specify if the content can be used once, a certain number of times or for unlimited use. Specify whether the content can be sold to others for their own projects. Specify if the use is limited to in-house work or if the work will be sold retail. Specify if credit must be given. Specify everything you can think of. The general rule is to try to claim or keep as much for yourself as possible. For buyers, another general rule is the more rights you get, the more expensive the property.

Of course we know that sampling and copying without permission happen all the time. It happens so often that many people believe you can copy any content for any purpose as long as you only use a small portion. That's wrong. The so-called "two-second rule," "five-second rule" and "20 percent rule" should be called the ZERO rule. You cannot safely or legally sample or use any portion of anyone else's copyrighted work without permission. It doesn't matter if you aren't making money by using the content. It doesn't matter if the subject is a famous person. If someone else created the content and you use it, you've infringed copyright. Copying happens all the time and you might not get sued. However, if you get sued, you'll have to pay the price, which may amount to everything you own.

So I copied: will I get caught?

What if you modify the work to make it look or sound different? This is part of the gray area of law that has developed around copyright. To be a protectable element of a work, content must be "distinctive" in a legal sense. When images or sounds are digitally modified, it can be difficult to show that they are substantially similar to the original. However, better technology also allows for better evidence of copying. Image creators can mark their works with tracking numbers, heat stamps, laser signatures, holograms and other protective markings. All this electronic evidence is admissible in court and is very persuasive to a judge and jury.

When dealing with audio, recognize that each track is protected *independently*. Laying down several copied tracks may create music that sounds distinctive to any of the originals.

Top Ten Tips On Staying Safe While Making Multimedia

(and can't I get sued for using a Top Ten list?)

10. Create your own content. Don't copy other people's work.

9. Get proper licensing agreements with indemnities, non-disclosure agreements, non-competition agreements, consents, releases and waivers from content providers and everyone working on the project.

8. Get all rights before you start production and stop using any content the minute you realize you don't have the right to use it.

7. Never assume *your* use is a "fair use."

6. When contracting, make sure you know what the contract says and what you are granting or buying.

5. Don't copy other people's software. You don't want your products copied, so don't do it to anyone else. Besides, the Software Publishers Association and other watchdog groups are becoming more active in prosecuting software piracy.

4. Don't try to avoid copyright law by recreating content to resemble someone else's work. That's called "passing off," and it's just another phrase for a lawsuit.

3. Label your work as copyrighted property with "[YOUR NAME] © 1995. All rights reserved."

2. Register copyrights of your own works with the Copyright Office, Library of Congress, Washington, DC 20559.

1. Retain a good lawyer.

(By the way, anyone can get sued for anything, but I'm not infringing copyright by using a top ten list. There were top ten lists long before David Letterman used them. He just made them more popular. And no reasonable person would think that I am Letterman just because I have a top ten list!)

but is not distinctive in law. However, if there is no evidence to prove that copying took place, a court will apply a "reasonable person" test to determine whether a reasonable person thinks it sounds distinctive to the ear.

Practicing safe content generation

The safest way to generate content is to do everything yourself. You will not avoid all possibilities of a lawsuit by going in-house. You still have to avoid libel, infringement of privacy rights, misappropriation of personality and other demons in legalese. However, creating content in-house significantly decreases your chances of infringing copyright.

In practice, though, you often have to use outside content to get the job done. Get assurance *in writing* from every content provider that they are authorized to use and transfer use of the content *and* that they will indemnify you against any future claims. Every content provider includes your clients and those providing content for free. Without these assurances, you may be sued by the owner of the property even if you had no idea it belonged to them. It is *your* obligation to ensure you can use any content. It's better to be denied content from the beginning than to be slapped with a lawsuit after the product has been mass distributed.

Even if you want to comply with the law, technology can make it complex. A release for the use of a photograph only covers its use *as a photograph*, unless other uses are specified. By simply scanning the photograph into a storage medium, you have created a digital image that is not covered by the release. Get broad releases that cover any technology now known *or to be invented or discovered in the future*. This terminology has become standard in releases involving media, so expect to see it and don't be afraid to ask for it.

Who owns what — employees and contractors

In most cases, an employer owns an employee's work if the work was done as part of employment. Generally, an independent contractor owns the copyright to a work, but licenses out or sells outright particular rights to the person contracting. All rights not expressly granted — the "residual rights" — are retained by the author. Otherwise you can obtain a "work for hire" from an independent contractor, which means that the contractor gives up all intellectual property rights to the purchaser. To avoid problems in dealing with contractors or when acting as a contractor, be as clear as possible and state the responsibilities and rights in writing or specify that it is a work for hire.

Those dangerous general form releases

If you are being contracted, always read standard form releases and contracts very carefully. Never sign anything because "it's just a standard form and everyone signs it." Standard forms are least likely to apply to your case. The lawyer writing a standard form makes it all-encompassing to apply to every possible scenario and heavily favor the lawyer's client. The person dealing with you figures this incredibly broad standard form must be perfect for the situation because it came from a lawyer.

When it's your company involved, it's up to *you* to read the document. If something doesn't apply, strike it out and initial the spot. If there is anything you don't understand, get your own lawyer to explain it to you. Of course, if you make too many waves, you may get a reputation as being difficult. The amount of fuss you raise is a business decision based on your past dealings, your leverage position and your need for money.

The real costs of a lawsuit

If your rights have been infringed, you have to make a tough business decision in determining whether or not to sue. You have to consider the potential damage of becoming known as a company that does not protect its rights. On the other hand, there are huge costs involved in a lawsuit both directly and indirectly. Not only do you have to pay your lawyer, but you also have to pay your employees for all the time they may have to spend on the case (and not working). A lawsuit can mean months spent sitting in a court room instead of attending to business. It can mean gloom over the office. It may mean an injunction that prevents you from using your own intellectual property for the entire period of the case, which could easily drag on for years.

You may not win. *You* have the burden of proving your case, and it's a heavy burden. If *you* are sued and lose, the damages awarded can be enormous. Directors and officers of corporations and even employees can be held personally liable if it can be shown that they were grossly negligent about obtaining rights or knew about the infringing action. The result of this can be personal bankruptcy, irreparable harm to your reputation, and even jail.

Copyright Exceptions

1. Exhaustion

Generally copyright expires and falls into public domain after 50 years, plus the life of the author. The term is 50 years from the moment of creation for photographs and sound recordings. The term is the lesser of 75 years from the date of publication or 100 years from the date of creation for works for hire, anonymous works or works whose authors use a pseudonym.

2. Fair use

Using a *portion* of a work for educational, scholarly or critical purposes is exempted. Any time you are creating a product for sale or are copying a substantial part of a work, you are unlikely to fit within the fair use exception regardless of its educational purpose.

3. Freedom of the press

The press and news media can reprint or broadcast small portions of a work for critical purposes or if the work is newsworthy. They cannot reprint an entire story or broadcast a show without permission just because the public wants to see it.

4. Particular uses

Copyright does *not* protect titles, names, slogans, words or facts.

Contracts that work

Help avoid lawsuits by writing specific and clear contracts before starting production. Don't say merely that you will produce a CD-ROM about baseball by a specific date for a set fee. In addition, specify the content and interface requirements, the hardware compatibility, the standards required, what documentation and training will be required afterward and anything else applicable. When will you be paid? In what currency? Does that include expenses? What are considered expenses? What happens if there is a delay?

Generally, problems arise because of misunderstandings that can be avoided if you use plain language and define terms. This is especially important if you are dealing with people who are not technologically inclined and are embarrassed about not understanding technical terminology. Your client may misunder-