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Multimedia Computing: Copyright Law's "Last Stand"

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COPYRIGHT LAW'S "LAST STAND"*

INTRODUCTION

*"Technology . . . is a queer thing. It brings you great gifts with one hand, and it stabs you in the back with the other."*¹

On June 25, 1876, a small group of U.S. Cavalrymen desperately battled a force of American Indians at the Battle of Little Bighorn.² Lieutenant Colonel George Armstrong Custer, disregarding orders to wait for reinforcements, foolishly attacked a numerically superior force of Sioux Indians led by Chief Sitting Bull.³ The massacre of Custer's 265 men by the force of 2,500 Sioux Indians is known today as Custer's Last Stand.⁴ Custer and his forces were under-manned, ill equipped, and unprepared. The same may be said of current copyright law, especially in light of the technological developments over the last twenty years. Conceivably, the arrival of multimedia and interactive technology, and its effect on copyright law, may one day be known as the battleground for copyright law's "last stand."

In the last twenty years, there have been major advances in the fields of science and technology. However, the most practical and significant of these recent advances has been the development of the computer⁵ and its subsequent increase in power and decrease in size. Since the Copy-

* The author would like to thank Prof. Gary Shaw and Prof. Rena Sepowitz from Touro Law Center for assisting me in writing this article. The author would also like to thank Lenny Rivera and Eric Levy.

1. C.P. Snow, NY TIMES, March 15, 1971, reprinted in JAMES B. SIMPSON, SIMPSON'S CONTEMPORARY QUOTATIONS 144 (1988).

2. RAY ALLEN BILLINGTON, WESTWARD EXPANSION: A HISTORY OF THE AMERICAN FRONTIER 667 (3d ed. 1967).

3. *Id.*

4. *Id.* at 668.

5. See Robert J. McCully, *Computers and Copyright — Copyright Protection for Computer Operating Systems Programs — Apple Computers, Inc. v. Franklin Computer Corp.*, 33 KAN. L. REV. 167, 167 n.3 (1984). In the 1950's, there were approximately 1,000 computers in the United States. *Id.* By 1976, the number of computers in the United States increased to 220,000. *Id.* In 1982, it was estimated that there were over 2.8 million computers in existence. *Id.* Today, the number of personal computers worldwide is in excess of 173 million. *Earth Can't Keep Up, Research Group Says*, ST. LOUIS POST-DISPATCH, May 22, 1995, at 1A.

right Act was amended in 1976,⁶ the United States has seen more innovation and advancement in the computer technology field since man created the wheel.⁷ These rapid advancements in technology require a flexible and well-equipped set of legal guidelines to effectively govern both the expected and unexpected copyright issues that may arise. Unfortunately, current copyright laws are inadequately designed to resolve the complex issues that have arisen.⁸ The greatest challenge to the viability of the copyright laws today is in the area of multimedia and interactive computing. The effect that computers have had on copyright law, as a precursor to this challenge, has proven that copyright law is not well prepared to handle this challenge.⁹ Copyright law's inability to address recent technological advances is not a novel situation. As technology has evolved, "United States copyright protection has historically lagged behind technological developments. From the first Copyright Act in 1790¹⁰ up to the present Copyright Act,¹¹ Congress has amended the Act numerous times specifically to incorporate technological developments."¹² These changes in copyright law are not an indication of its

6. The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541, *amended by* Act of Dec. 12, 1980, Pub. L. No. 96-517, § 9-10, 94 Stat. 3015, 3028 (codified at 17 U.S.C. §§ 101-18 (1988 & Supp. IV 1992)).

7. The earliest known reference to the wheel is in ancient Mesopotamia between 3500 B.C. and 3000 B.C. *THE WORLD OF ANCIENT TIMES*, 19 (Charles Scribner's Sons 1966).

8. Suggestions have also been made that in addition to the computer field, the copyright laws are inadequate in other fields as well. *See, e.g.,* Colin Tapper, *Discovery in Modern Times: A Voyage Around the Common Law World*, 67 CHI.-KENT L. REV. 217 (1991); Peter S. Menell, *Tailoring Legal Protection for Computer Software*, 39 STAN. L. REV. 1329 (1987).

9. Since the advent of the computer, courts have grappled with various issues relating to the field of computers. *See, e.g.,* Lotus Dev. Corp. v. Borland Int'l, 49 F.3d 807 (3d Cir.) (concluding that a computer menu hierarchy is a method of operation and not copyrightable), *cert. granted*, 116 S. Ct. 39 (1995); *see infra* notes 192-204 and accompanying text; *See also* Whelan Assocs., Inc. v. Jaslow Dental Lab., Inc., 797 F.2d 1222 (3d Cir. 1986) (addressing the issue of whether a computer program's "look and feel" is copyrightable), *cert. denied*, 479 U.S. 1031 (1987); Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983) (stating that a computer program, whether in object code or source code, is protected from unauthorized copying), *cert. dismissed*, 464 U.S. 1033 (1984); Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 780 F. Supp. 1283 (N.D. Cal. 1991) (claiming that under the fair use doctrine, in the context of computer video games, a device which temporarily alters a video game does not create a derivative work), *aff'd*, 964 F.2d 965 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1582 (1993).

10. Act of May 31, 1790, Ch. 15, 1 Stat. 124.

11. *See supra* note 6.

weakness or ineffectiveness, but rather of its perseverance and flexibility.

A variety of copyright issues have been raised by multimedia technology that will need to be addressed in the immediate future. As stated by Kevin Harrang, a corporate attorney for Microsoft Corporation, "[t]he legal issues involved in creating and distributing multimedia products are diverse because this single activity simultaneously brings together issues of intellectual property protection from the . . . separate realms of literary works, audio and music, still and motion picture photography, and computer software."¹³ Although copyright law has effectively governed the protection of each of these "separate realms" individually, it has yet to regulate these realms in a way which brings together many of these individual works into a single production.

When considering the copyright issues that arise in the development of a multimedia production, it is imperative to keep in mind that the goal of copyright law is to provide for "the most efficient and productive balance between protection (incentive) and dissemination of information, to promote learning, culture and development."¹⁴ Society should ideally be the ultimate benefactor of copyright law, not just the copyright owners or the multimedia producers. This premise is supported by Article I, section 8, of the United States Constitution which grants Congress the authority "[t]o 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."¹⁵ Ideally, the solutions to multimedia copyright problems need to balance the rights of the copyright owners with the rights of multimedia producers in order to grant society the greatest access to these works.

This Comment describes how multimedia technology has impacted the field of copyright law. Part I of this Comment discusses the ambiguity in defining "multimedia"¹⁶ by briefly explaining the various applications of multimedia technology¹⁷ and discussing the digital nature of

12. Robert D. Sprague, *Multimedia: The Convergence of New Technologies and Traditional Copyright Issues*, 71 DENV. U. L. REV. 635, 643 (1994).

13. Kevin J. Harrang, *Licensing Issues in Creating and Publishing Multimedia Software Products*, in DRAFTING LICENSING AGREEMENTS 1994, at 361, 363 (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-394, 1994).

14. *Whelan Assocs., Inc. v. Jaslow Dental Lab.*, 797 F.2d 1222, 1235 (3d Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987).

15. U.S. CONST. art. I, § 8, cl. 8.

16. *See infra* notes 24-25 and accompanying text.

17. *See infra* notes 26-28 and accompanying text.

multimedia which makes this technology appealing.¹⁸ Part II presents an illustration of a multimedia production and addresses specific licensing issues pertaining to multimedia productions under copyright law.¹⁹ These issues are analyzed according to current law and practices. Part III analyzes the practical and legal ramifications presented by the multimedia dilemma and discusses possible solutions.²⁰

PART I: MULTIMEDIA DEVELOPMENT AND INTEGRATION

A. Introduction

In order to thoroughly analyze the copyright issues that pertain to a multimedia production, it is imperative that one have an understanding of the field of multimedia. This understanding is important for two reasons. First, multimedia is a new area of development and, as such, encompasses a degree of ambiguity and indefiniteness. Second, a multimedia production brings together different individual copyrighted works from different fields into one compilation. An understanding of the complexity of these works and their interaction will clarify the character of the legal issues that arise.

B. Multimedia Defined

The field of multimedia and interactive software is so vast and complex that even the dictionary definition of the term "multimedia" is unclear. The Dictionary of Computer Terms defines "multimedia" as a "[c]ombination of sound, graphics, animation, and video . . . [It] is a subset of hypermedia, which combines the elements of multimedia with hypertext to link the information."²¹ Hypermedia? Hypertext? This definition of multimedia is ambiguous and fails to delineate the scope of multimedia.

Andy Johnson-Laird, a forensic software analyst and consultant, best characterized the ambiguous definition of "multimedia" when he stated, "[e]veryone familiar with the term sorta, kinda knows what it means in

18. See *infra* notes 29-38 and accompanying text.

19. See *infra* notes 39-108 and accompanying text.

20. See *infra* notes 109-211 and accompanying text.

21. DICTIONARY OF COMPUTER TERMS 115 (1993).

general, but finds it very hard to define in specific.”²² For instance, multimedia has been defined as “a creative work consisting of multiple audio-visual materials. The multimedia production can be fixed in a tangible media — film, laser disk, CD-ROM,²³ or it can be a performance in progress — music, lights, fireworks and dramatic readings.”²⁴ This definition, along with many others,²⁵ is so broad and encompassing that it does little to clarify the meaning of the term “multimedia.”

C. Applications of Multimedia Technology

The broad and complex nature of multimedia productions creates a spectrum of practical applications. Two factors which separate multimedia from other rapidly developing fields are that multimedia computing has significant practical uses in nearly all aspects of today’s society and the technology is simplistic enough that nearly anyone with a computer can use it. As stated by Jill Sarnoff Riola, senior trademark and copyright counsel of Apple Computer, Inc.:

[Multimedia] is used to advertise, demonstrate, educate. It is used to fire up sales forces, explain marketing strategies and new products to distributors and dealers, and educate consumers. It is a sure-fire attention getter that has replaced the ubiquitous overhead projector and slide show.

Multimedia is found in staff meetings to present project ideas and budget strategies. It is used in the boardroom to sell one company on the assets and advantages of working with another company. It is used at sales conferences to introduce new products and marketing plans. It is packaged with personal computers to educate the consumer and to demonstrate the

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

23. CD-ROM is an acronym which stands for “Compact Disc, Read Only Memory.” Heather Meeker, *Multimedia and Copyright*, 20 RUTGERS COMPUTER & TECH. L.J. 375, 378 n.15 (1994).

24. Jill Sarnoff Riola, *Getting a Grip: A Practical Approach to Protection of Multimedia*, in DRAFTING LICENSING AGREEMENTS 1994, at 391, 393 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-394, 1994).

25. See, e.g., Harrang, *supra* note 13, at 363 (defining multimedia as a work that “combine[s] software, text, photographs, video, audio, [and] music . . .”); Michael D. Scott & James N. Talbott, *Content and Licensing Issues in Multimedia Agreements*, in ADVANCED SEMINAR ON COPYRIGHT LAW, at 337, 339 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-411, 1995) (commenting that multimedia is “amorphous” in nature and has different meanings to different persons); Sprague, *supra* note 12, at 635 (defining “multimedia” as a “convergence of technologies from which a vast number of specific products and services will emerge”).

possible uses of software programs Multimedia has become the corporate way of life.²⁶

It is foreseeable that multimedia technology will have a monumental impact on the way all businesses will operate. This impact will parallel the impact that computers had on businesses twenty years ago.²⁷ Eventually, multimedia technology will become as indispensable to business operations as the desktop computer. Another practical application of multimedia technology is in the field of education²⁸ — from teaching a pre-schooler how to read to teaching a college student the intricacies of quantum physics.

D. Digitization: The Key to Multimedia

The process of digitization²⁹ has allowed multimedia technology to become a reality. Digitization permits a multimedia producer to transfer information, regardless of its form, into digital data which can be incorporated into a multimedia production.³⁰ Due to the memory requirements of multimedia productions, a medium that can incorporate large amounts of information is required. Today, the most ideal medium for such a demand is the CD-ROM, which stores data in digital format.³¹

26. Riola, *supra* note 24, at 393-94.

27. For a discussion on the history of computers and their impact on business and society see Preston Gralla, *Chips Off the Old Block: A History*, PC WEEK, Jan. 19, 1988, at S13; Jim Seymour, *The Forecast: Less Razzle, More Dazzle*, PC WEEK, Feb. 28, 1994, at 63; Ron Wolfe, *Evolution of Computer Applications in Science and Engineering*, RESEARCH & DEVELOPMENT, Mar. 21, 1989, at 14.

28. Some people have suggested that the interactive nature of multimedia products spark interest in education and aid in the learning process, while others argue that multimedia diminishes the learning process by allowing video and audio representations to replace reading and comprehending the entries. See Steven Levy, *Technomania*, NEWSWEEK February 27, 1995, at 29 (arguing that "there's real danger in even a partial abandonment of narrative forms and rigorous modes of thought associated with logical arguments, where A leads to B. Multimedia's forte is not reason, but hot emotional impact-the same ingredients that make local TV news compelling yet less filling").

29. Digitization is the process where analog samples, such as audio sounds, are converted by an analog-to-digital converter into numerical values which a computer is able to read. Robert I. Hummel, *Quiet!, Listen!, That Sound: Is it Live or is it Digitized?*, PC-COMPUTING, Apr. 1994, at 210.

30. Jeffrey C. Selman, *Copyright Protection in a Digital World: Judicial, Legislative, Technological, and Contractual Solutions*, 7 J. PROPRIETARY RTS. 4, 7 (1995).

31. "The huge storage capacity of CD-ROM discs make it an ideal medium for multimedia, since video, animation, music and complex graphics use enormous amounts of memory." Riola, *supra* note 24, at 394. The storage capacity of a CD-ROM can "hold the text of a multi-volume encyclopedia with room leftover for the more storage-intensive audio, photographs, and video." Harrang, *supra* note 13, at 365.

The flexibility of multimedia and CD-ROM technology motivated software billionaire Bill Gates to purchase the entire Bettmann Archive³² with the intent to “convert[] the pictures, art works and texts of the past into the digital code of computers.”³³ Digitization is appealing because it “enabl[es] people who could never travel to the Library of Congress or the Hermitage to sample their intellectual treasures, and to preserve aging pictures and documents for prosperity.”³⁴ It is argued that the advantage of digital imaging is that it will “enable images to be distributed inexpensively to a far wider market. As more people have powerful home computers with access to the Internet³⁵ and the World Wide Web,”³⁶ it is likely that a “consumer market for digitized images could well emerge.”³⁷ As the consumer market for digitized images and works increases, the danger of manipulation of the digitized data will also increase.³⁸ This growing demand for digital images and manipulation of digital data stems from the growing number of sophisticated multimedia productions that are available to computer users.

32. The Bettmann Archive, founded by Otto L. Bettmann, is the world's largest photo collection, containing 16 million images. William Grimes, *From One Vision to 16 Million Images*, N.Y. TIMES, Oct. 11, 1995, at A1.

33. Steve Lohr, *Huge Photo Archive Bought By Software Billionaire Gates*, N.Y. TIMES, Oct. 11, 1995, at A1, D5.

34. *Id.* at A1.

35. The “Internet” is a “global network of computers linked by high-speed data lines and wireless systems. Established in 1969 as a military communications system, it now allows individuals to link with corporations, educational institutions and other groups.” Vic Sussman and Kenan Pollack, *Gold Rush in Cyberspace*, U.S. NEWS & WORLD REPORT, Nov. 13, 1995, at 72, 77.

36. The “World Wide Web” is an “information storage system linking resources around the world. Browsers allow highlighted words or icons . . . to display text, video, graphics and sound on a local computer screen, no matter where the resource is actually located.” *Id.*

37. Lohr, *supra* note 33, at D5.

38. An example of how digitized data can be manipulated is through morphing. Morphing is the process of transforming an image into a variant of that image. The problem relating to morphing is that “[p]resently, people in the computer industry work on the presumption that the transition point [in the process] occurs when the new image is no longer recognizable as the new image. But recognizable by whom? The creator of the original image? Or the person-in-the-street? Or the Judge and/or jury.” Johnson-Laird, *supra* note 22, at 18. The transition point in morphing is an issue that will have to be addressed by the legislature or the judiciary.

PART II: ASSEMBLING A MULTIMEDIA PRODUCTION

A. Introduction

Among the plethora of copyright issues that are raised by multimedia technology are a medley of licensing problems.³⁹ These licensing problems exist mainly because of two characteristics of multimedia technology. First, because a multimedia production incorporates numerous individually copyrighted works, there are an extremely large number of licenses that need to be negotiated. Although this is not a novel problem, it is complicated by the second attribute: the diverse nature of the copyrighted works that need to be licensed. If a systematic and equitable solution to the licensing problem can be created, then many of the other problems should become manageable.

Perhaps the simplest way to present the multitude of licensing problems associated with multimedia productions is through an example. By using an example, the significance of the novel aspects of multimedia become apparent. Throughout this part, a hypothetical multimedia production will be assembled on the topic of baseball.⁴⁰ Specific examples and the licensing practices of the various photographic,⁴¹ audio⁴² and video⁴³ components will be presented.

B. Multimedia Production Example

The easiest way to develop a multimedia production on a specific topic is to license existing works on that topic. Although the vast number of copyright and licensing problems would be nonexistent if a producer decided to create his own works, the most practical, efficient, and cost effective approach for a multimedia producer is to license the underlying component parts.⁴⁴ Further, even if a multimedia producer creates an original work it will likely incorporate, to some degree, previously copyrighted works. Because most standard publishing contracts transfer electronic rights to the publisher of the work,⁴⁵ it is necessary for the multimedia producer to negotiate with the publisher of the origi-

39. See *infra* notes 84-93 and accompanying text.

40. See *infra* notes 44-52 and accompanying text.

41. See *infra* notes 53-60 and accompanying text.

42. See *infra* notes 61-72 and accompanying text.

43. See *infra* notes 73-78 and accompanying text.

44. Harrang, *supra* note 13, at 370.

45. Harrang, *supra* note 13, at 372.

nal work to obtain a license.⁴⁶ More often than not, however, the publisher of the original work is less amenable to licensing the rights of the work, fearing conflict with their own commercial interests.⁴⁷

In assembling the baseball multimedia production, it would be prudent to license an existing work, a fine example would be the book *Baseball*⁴⁸ written by Ken Burns. Assuming that the publisher of this book will agree to license parts of the book for the baseball multimedia production, a series of problems are likely to arise prior to the drafting of a licensing agreement. One problem is that within the book are a variety of works which are unlicensable. For instance, "photographs licensed from photo agencies, diagrams or other images not originally created by the author, and even brief quotations and excerpts"⁴⁹ are unlicensable. It has been suggested that the best way to remedy this problem is by requiring the author to secure permission to use the unlicensable work.⁵⁰

There are other traditional copyright issues that need to be mentioned. The producer of the baseball multimedia production may need to modify the size, color, and shape of the original copyrighted works incorporated in the production while still trying to capture the essence of what the original author work was trying to convey. This modification of a copyrighted work generally results in the creation of a derivative work.⁵¹ Unless the multimedia producer obtains a license to utilize the derivative work in the production, the multimedia producer will have to raise the defense of fair use to avoid copyright infringement.⁵² A possible solution to this problem is to allow the multimedia producer to modify the work and to give the author final approval of the revisions.

C. Photographs: A Multimedia Component

Integrating photographs into the baseball production would tend to augment the aesthetic appeal of the work which, in return, will hopefully

46. Harrang, *supra* note 13, at 372.

47. Harrang, *supra* note 13, at 372.

48. KEN BURNS, *BASEBALL* (1994).

49. Harrang, *supra* note 13, at 372.

50. Harrang, *supra* note 13, at 372.

51. Sprague, *supra* note 12, at 666-67. A derivative work is defined as "a work based on one or more pre-existing works, such as a translation, musical arrangement, dramatization, fictionalization, motion picture version, sound recording, art reproduction, abridgment, condensation, or any other form in which a work may be recast, transformed, or adapted . . ." 17 U.S.C. § 101 (1976).

52. See *infra* notes 108-143 and accompanying text.

increase its economic value.⁵³ CD-ROM, because of its tremendous storage capacity, would likely be utilized as the medium for this project in order to effectively incorporate baseball images and photographs into the production.

Many of the photographs and images for the production can be acquired through various photo agencies.⁵⁴ From this stock of photos, baseball photos from as early as the 1880's to the present can be licensed. Although a photo agency is an ideal source for photos and images, obtaining the items from an agency is not an easy task. Currently, "there is still a strong distrust by many in the photography industry of electronic publishing, and negotiations can be complicated if the photo agency is unwilling to quote a price for the minimum rights necessary for the software publisher."⁵⁵ This distrust stems from the fact that the digitized form of the photos allows for appropriation of the work without a license. Further, once appropriated, this digital data may be manipulated and distributed without the approval of the copyright holder. One must also consider the fact that "stock photo agencies typically act merely as agents for their photographers, a fact that may further complicate negotiations if the photo agency has failed to anticipate such transactions in its agency contracts with its photographers."⁵⁶

Furthermore, it is a common practice for a photo agency to license only one edition of the work.⁵⁷ This is not a workable license from the multimedia producer's point of view because it is common practice to release updated versions of a work.⁵⁸ Moreover, the license granted by the agency may place size and color restrictions on the use of the photo-

53. For example, in order to capture the essence of the sport of baseball, the multimedia producer may want to incorporate into the work various photographs and images such as Babe Ruth calling his shot and Yogi Berra embracing Don Larsen after Larsen's perfect game in the 1956 World Series.

54. A photo agency is a library of various photos from different sources that are available for licensing. Meeker, *supra* note 23, at 392-93. For a discussion of the purchase of the Bettmann Photo Archive by software giant Bill Gates and his intention to incorporate the library into a digitized format for computer use, see *supra* notes 32-38 and accompanying text.

55. Harrang, *supra* note 13, at 376-77.

56. Harrang, *supra* note 13, at 377.

57. Harrang, *supra* note 13, at 377.

58. Harrang, *supra* note 13, at 377. Harrang argues that the restriction of the copyrighted work to only one version of the multimedia production "makes little sense" because, generally, software upgrades are released with changes to the software "functionality" only. Harrang, *supra* note 13, at 377.

graph.⁵⁹ These limitations may inhibit some multimedia producers from expanding their projects. If the owner of the copyright expresses an intent to place limitations on a license to use his work, it will lead to lengthy license negotiations which can slow the production process down and increase unanticipated costs.⁶⁰

D. Audio: A Multimedia Component

In order to obtain a license to incorporate sound clips⁶¹ into the baseball production,⁶² the multimedia producer will need to acquire a variety of separate licenses including a "mechanical" license⁶³ and a "master recording" license.⁶⁴ The "mechanical" license is usually acquired from the owner of the musical composition or from a clearinghouse such as BMI,⁶⁵ ASCAP⁶⁶ or the Harry Fox Agency.⁶⁷ The "master recording" license is acquired from the owner of the copyright in the sound record-

59. Michael D. Scott, *Frontier Issues: Pitfalls in Developing and Marketing Multimedia Products*, 13 CARDOZO ARTS & ENT. L.J. 413, 419 (1995).

60. Harrang, *supra* note 13, at 377.

61. The term "clips" refers to short, abbreviated portions of an audio or visual work such as a short segment from an old film, television show or piece of music. Barbara Zimmerman, *The Tangle of Multimedia Rights*, PUBLISHERS WEEKLY, Nov. 22, 1991 at 17. The term may also apply to still images of a work of art, photo or cartoon. *Id.* The term is often seen regarding multimedia works and computer software.

62. To add even more appeal to the baseball production, patriotic background music and audio clips should be included. For instance, Aaron Copland's "Appalachian Spring" could be played while the various menus and introductory screens are viewed or if the production includes a presentation on the great New York Yankee dynasty of the 1950's, then excerpts from the song "Mickey and the Duke" could be played during the presentation. Of course, no baseball production would be complete without a rendition of "Take Me Out to the Ballgame," or Lou Gehrig's famous words: "[t]oday I consider myself the luckiest man on the face of the earth," and other famous quotes and historic audio bits.

63. "Mechanical licenses' are required to manufacture and distribute the physical objects . . . in which the recording of a musical composition is embodied. This license is from the composer to use the underlying composition and does not grant rights to use a specific recording of the song." William A. Tanenbaum, *Current Multimedia Patent, Copyright, Work Made for Hire, and Rights Acquisitions Issues*, in MULTIMEDIA AND THE LAW 1994, at 95, 114 (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-383, 1994).

64. "Master recording' licenses are required to reproduce and distribute a specific performance (i.e., recording) of a musical composition by a specific artist." *Id.* at 114.

65. "BMI" is an acronym for "Broadcast Music, Incorporated."

66. "ASCAP" is an acronym for "American Society of Composers, Authors, and Publishers."

67. Tanenbaum, *supra* note 63, at 114. The Harry Fox Agency is a subsidiary of the National Music Publishers Association, a United States based organization.

ing.⁶⁸ Furthermore, if an audio track is to be synchronized with a certain image, photo or video clip in the production, a more expensive "synchronization" license⁶⁹ may be required.⁷⁰ Because there are so many different types of licenses, the multimedia producer may find that determining the specific types of licenses that will be needed is a difficult and confusing task.⁷¹

The difficulty regarding audio licenses for multimedia productions is that, most likely, the whole audio work will not be incorporated into the production. For most multimedia purposes, only a brief segment of the copyrighted audio work will need to be licensed. Although this is not a new problem,⁷² these "segment" type licenses will begin to be utilized in greater frequency. As a result, music and audio clearinghouses will have to establish new procedures for multimedia producers when seeking licenses for works that are only a small segment of the original work.

68. Tanenbaum, *supra* note 63, at 114.

69. "Synchronization" licenses are "required to synchronize the playing of musical compositions with visual images, a feature which distinguishes multimedia composition from audio CD's." Tanenbaum, *supra* note 63, at 114.

70. Generally, since most audio components in a multimedia production are synchronized with visual components, some clearinghouses, such as the Harry Fox Agency, have developed a single license for this use. Harrang, *supra* note 13, at 385. Although this standard multimedia license is progressive, negotiations are still necessary. Harrang, *supra* note 13, at 385 n.15.

71. See, e.g., Scott, *supra* note 59, at 414 (commenting that the two main differences between licensing a multimedia production and other works such as television and film are that multimedia requires an enormous number of licenses due to its format and that because multimedia is a new technology it has not developed a "track record" to value these licenses).

72. For discussions on the problem of utilizing digital samples of songs in other works see Michael L. Baroni, *The Sound Marks the Song: The Dilemmas of Digital Sound Sampling and Inadequate Remedies Under Trademark Law*, 6 HOFSTRA PROP. L.J. 187 (1993); Jeffrey R. Houle, *Digital Audio Sampling, Copyright Law and the American Music Industry: Piracy or Just Bad "Rap"?*, 37 LOY. L. REV. 879 (1992); Jason H. Marcus, *Don't Stop that Funky Beat: The Essentiality of Digital Sampling to Rap Music*, 13 HASTINGS COMM. & ENT. L.J. 767 (1991); Erick J. Bohlman, Comment, *Squeezing the Square Peg of Digital Sound Sampling Into the Round Hole of Copyright Law: Who Will Pay the Piper?*, 5 SOFTWARE L.J. 797 (1992); A. Dean Johnson, Comment, *Music Copyrights: The Need for an Appropriate Fair Use Analysis in Digital Sampling Infringement Suits*, 21 FLA. ST. U. L. REV. 135 (1993); Randy S. Kravis, Comment, *Does a Song By Any Other Name Still Sound As Sweet?: Digital Sampling and Its Copyright Implications*, 43 AM. U. L. REV. 231 (1993); Note, *A New Spin on Music Sampling: A Case for Fair Pay*, 105 HARV. L. REV. 726 (1992).

E. Video: A Multimedia Component

In addition to the audio and photo components, video clips from movies about baseball and television footage from actual games may be incorporated into the baseball multimedia production.⁷³ Although video clips require a large amount of memory, they will add aesthetic appeal and value to the production.

In order to incorporate video components into the multimedia production, the owner of the rights to these various products must first be identified and then contacted. However, the procedure for acquiring licenses for video clips may vary according to the type of clip obtained.⁷⁴ If the clip is historical footage, "[n]egotiations with a stock house or license from an institution is usually all that is required."⁷⁵ Using clips from a full-length film, however, requires more complex licensing.⁷⁶ Even if the film distributor authorizes usage of clips from the film, the distributor often does not have the right to use the music in the film clip or the likeness of a recognizable person in the clip.⁷⁷ Thus, additional authorization is necessary from the various copyright owners whose works are incorporated into the movie clip.

As with audio clips, the difficulty with video clips is giving value to the portion of the clip that is to be licensed. Further, the clip may contain aspects that are not licensable by the original copyright holder. If so, additional negotiations may be required, complicating the licensing process. Additionally, video clips will need to be synchronized with an accompanying audio component. This would require more extensive negotiations to acquire additional licenses including a synchronization license.⁷⁸

73. For instance, the production might include a presentation of great moments in baseball history, as such, a user of the production may want to see a replay of Bill Buckner's costly error in game six of the 1986 World Series.

74. William H. Neukom & Robert W. Gomulkiewicz, *Licensing Rights to Computer Software*, in TECHNOLOGY LICENSING AND LITIGATION 1993, at 775, 785 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-354, 1993).

75. *Id.*

76. For example, if the baseball production includes a section on the topic of women in baseball, the producer could incorporate a scene from the movie *A League of Their Own*. *A LEAGUE OF THEIR OWN* (Columbia Pictures 1991).

77. Neukom & Gomulkiewicz, *supra* note 74, at 785.

78. Scott, *supra* note 59, at 437-39. When negotiating licenses for audio and music components that will be included in a multimedia production or "synchronized" with a video clip, there are numerous organizations that may have to be acknowledged during the extensive negotiations. These organizations include musician unions and performing

F. Public Domain Works

It is possible that public domain works⁷⁹ may be incorporated into the multimedia project. There may be a variety of reasons why a work is considered to be in the public domain.⁸⁰ The fact that the work is in the public domain does not equate to permission to use the work.⁸¹ As a result, a multimedia producer will need to determine if a particular work that is considered in the public domain can be used without a license. That is, "the mere fact that something is generally considered to be 'in the public domain' does not obviate the need to determine whether it is protected by copyright"⁸² Furthermore, although a work may be in the "public domain," it may contain other works, such as graphics and music, which are the property of a third party.⁸³ Therefore, a multimedia producer should not be hasty to exploit works that he believes to be in the public domain when in fact they may not be. A multimedia producer should conduct a complete copyright search of all material that will be incorporated in the production to minimize the risk of infringement.

rights societies in the United States as well as foreign nations. Scott, *supra* note 59, at 437-39.

79. "Public Domain" is defined as "[p]ublic ownership status of writings, documents, or publications that are not protected by copyrights." BLACK'S LAW DICTIONARY 1229 (6th ed. 1990).

80. There are certain works that are generally considered to be in the public domain that can be utilized without concern. Scott & Talbott, *supra* note 25, at 349. These works include: "1. materials in which the copyright term has expired worldwide 2. materials created by the U.S. government and 3. materials on which the author has intentionally abandoned copyright protection." Scott & Talbott, *supra* note 25, at 349-50. There are other works that can only receive public domain status within the United States, such as:

1. materials first published in the United States before January 1, 1978, without proper copyright notice
2. materials first published in the United States before January 1, 1978, for which no registration and deposit was made in the Copyright Office
3. materials first published in the United States between January 1, 1978, and February 28, 1989, without a proper copyright notice which defect was not properly "cured" and
4. materials first published in the United States prior to January 1, 1964, for which the copyright was not renewed at the end of the first 28-year copyright term.

Scott & Talbott, *supra* note 25, at 350-51.

81. Scott & Talbott, *supra* note 25, at 351.

82. Scott & Talbott, *supra* note 25, at 351.

83. Riola, *supra* note 24, at 395.

G. General Licensing Practices

There are general licensing practices that the multimedia producer must be familiar with when negotiating the licenses for the various components of his production. An understanding of these general practices and their applicability to multimedia will help expedite the negotiation process. The licensing practices of each of the different fields within a multimedia production, text, audio, video and photography, are separate and distinct. For instance, "[l]icensing concepts and procedures familiar to the entertainment industry may be foreign to the computer industry, and vice versa."⁸⁴ The foundation for the extensive licensing issues that arise from a multimedia production⁸⁵ stems from the inability of the law to deal with multimedia productions which incorporate an enormous number of copyrighted works and the different licensing schemes that are currently available.

When a multimedia producer begins to develop his production, there are a number of different licensing classifications that he may encounter. For instance, a multimedia production requires software programs to run the production on a computer. Since these preexisting software programs are proprietary, it is necessary for the multimedia producer to obtain a license to use the software programs.⁸⁶ However, in some instances, a

84. Sprague, *supra* note 12, at 641.

85. The issue of licensing agreements and multimedia technology is evident in the analogous field of interactive on-line computing. Recently, CompuServe, Inc., an on-line server, settled a two-year-old suit with Frank Music Corp., in which Frank Music Corp. had alleged that CompuServe, Inc. violated copyright law when they permitted subscribers to upload and download copyrighted songs over a bulletin board. Matthew Goldstein, *Accord Ends On-Line Suit Over Music*, 214 N.Y. L.J. 1, 1 (Nov. 8, 1995). The parties agreed on a licensing scheme that required CompuServe, Inc. to pay royalties to Frank Music Corp. when copyrighted songs owned by Frank Music Corp. are used on CompuServe, Inc.'s on-line network. *Id.* Michael I. Rudell, a partner with Franklin, Weinrib, Rudell & Wassallo commented that "[l]icensing really does seem to be the wave of the future" in computer copyright law issues. *Id.* What is interesting about the settlement is that "it comes at a time when the Clinton Administration and Congress are debating how to rewrite copyright laws to address multimedia technology, which enables users to transmit and copy printed articles, works of art, music and photographs." *Id.* at 4.

86. Riola, *supra* note 24, at 400. The author states that "[s]oftware engines that drive the multimedia program usually need to be licensed as fully operational software: software applications that are included for demonstration purposes may be licensed either as fully operational or in crippled form." Riola, *supra* note 24, at 400. Crippled form means that the program does not work to its fullest capacity and, as a result, is limited in its functions. Riola, *supra* note 24, at 400.

license may not be necessary and a simple permission letter⁸⁷ will suffice.

Additionally, if a person's likeness or name is used in a multimedia production, state law may require written consent because the use is for a commercial purpose.⁸⁸ If the issue of consent becomes a problem associated with multimedia productions, the copyright laws will need to incorporate a clear statutory framework to regulate this situation. The statutory framework should require the multimedia producer to reasonably attempt to contact the person whose likeness he intends to use and advise the individual that he plans to use the person's name or likeness. Following this notification, where consent is not granted and the producer still utilizes the likeness, the burden should then shift to that person to take appropriate action.

There are a number of additional licensing methods that need to be considered when negotiating the licenses that will be used for the baseball multimedia production. For instance, the multimedia producer may have to contend with a "per copy" license which grants the producer the right to use only one copy of the copyrighted work.⁸⁹ The practical effect of this license is to limit the use of the copyrighted work and pre-

87. A "permission letter" is a "release form signed by the copyright owner that [specifies] the terms of the permitted use . . ." Riola, *supra* note 24, at 401. A permission letter may be adequate for use of "graphics[,] cartoons, charts, photographs, illustrations, music or movie or video clips." Riola, *supra* note 24, at 401.

88. Riola, *supra* note 24, at 401. *See, e.g.,* White v. Samsung Elecs. Am., Inc., 971 F.2d 1395 (9th Cir. 1992) (holding that a person's name or likeness may not be used without the permission of the individual portrayed), *cert. denied*, 113 S. Ct. 2443 (1993). Various states have adopted different approaches regarding the requirement of written consent. In New York, a plaintiff must show that "(1) the defendant used [plaintiff's] name, portrait or picture, (2) for purposes of trade or advertising, (3) without [plaintiff's] written consent" in order to successfully establish a claim for injunctive relief and damages for commercial misappropriation. *Stern v. Delphi Internet Servs. Corp.*, 165 Misc.2d 21, 23, 626 N.Y.S.2d 694, 696 (N.Y. Sup. Ct. 1995) (citing *Cohen v. Herbal Concepts, Inc.*, 63 N.Y.2d 379, 383, 472 N.E.2d 307, 309, 482 N.Y.S.2d 457, 459 (1984)). The state of Florida mandates that "[n]o person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the . . . photograph, or other likeness of any natural person without the express written or oral consent to such use . . ." *Genesis Publications, Inc. v. Goss*, 437 So. 2d 169, 170 n.2 (Fla. Dist. Ct. App. 1983) (citing FLA. STAT. ANN. § 540.08 (West 1977)). *But see* *House v. Sports Films & Talents, Inc.*, 351 N.W.2d 684 (Minn. Ct. App. 1984) where the state of Minnesota expressly rejects the claim of invasion of privacy; thus, the issue of written consent never arises. The Minnesota Supreme Court "has never recognized, either by legislative or court action, a cause for invasion of privacy even though many other states have done so." *Id.* at 685 (quoting *Hendry v. Conner*, 226 N.W.2d 921, 923 (Minn. 1975)).

89. Neukom & Gomulkiewicz, *supra* note 74, at 782.

vent the widespread use of the work over a larger computer network.⁹⁰ "Site" licenses, which convey unlimited use of the work over a specific geographic area such as within the confines of an office building or corporation, are a more attractive option for multimedia producers.⁹¹ Although they are not popular, these licenses are quite advantageous to multimedia producers because they place no limitations on the number of copies that can be made within the confines of the geographic location.⁹²

Another factor to consider is that the copyright holder may only authorize the use of the copyrighted work in a limited number of the multimedia production versions. This limits the multimedia producer because it is common practice in the software industry to release updated versions of a program.⁹³ This is an effective way for the copyright owner to limit the scope of the use of the copyrighted work. The multimedia producer should therefore ensure that the licensing agreement explicitly states rights for succeeding versions of the program.

H. Interpreting the Scope of Pre-existing Agreements

Another factor to consider is that many of the licensed works incorporated in a multimedia production will be subject to pre-existing licensing agreements. This factor must be taken into consideration because many pre-existing agreements do not incorporate terms that address multimedia production. The two issues which need to be resolved when considering pre-existing agreements are (1) whether the parties involved were aware of the possibility of multimedia technology when they negotiated the agreement⁹⁴ and (2) whether the language of the license is sufficient enough to encompass a multimedia production.⁹⁵ Although the second issue must be dealt with on a case-by-case analysis, the first issue can be readily analyzed.

90. Neukom & Gomulkiewicz, *supra* note 74, at 782.

91. Neukom & Gomulkiewicz, *supra* note 74, at 783.

92. Neukom & Gomulkiewicz, *supra* note 74, at 783.

93. For example, Microsoft Corporation has released updated versions of its popular Windows operating system such as Windows 3.0, 3.1, and Windows 95.

94. Scott & Talbott, *supra* note 25, at 341.

95. See Mark Radcliffe, *Identifying and Assembling the Rights: Selected Issues*, in MULTIMEDIA AND THE LAW 1994, at 183, 205 (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-383, 1994). In discussing the difficulty the courts have experienced in interpreting the scope of pre-existing agreements, the author suggests that multimedia producers should "include very broad language," such as "by any and all means, methods, processes, whether now or hereinafter granted," when drafting licensing agreements. *Id.*

On the first issue, the courts have developed two possible methods of interpreting pre-existing agreements. The first approach states that "the licensee may properly pursue any uses which may reasonably be said to fall within the medium as described in the license."⁹⁶ This approach was adopted by the Second Circuit in the case of *Bartsch v. Metro-Goldwyn-Mayer*.⁹⁷ In *Bartsch*, the motion picture rights of a play were assigned ten years prior to the existence of television.⁹⁸ These rights included the right "to project, transmit and otherwise reproduce the said [work] or any adaptation or version thereof visually or audibly by art of cinematography or any process analogous thereto, and to copyright, vend, license and exhibit such motion picture photoplays throughout the world"⁹⁹ Based on the provisions of the assignment of rights, the court addressed the issue of whether the assignment of the motion picture rights extended the licensee a right to telecast the play over television.¹⁰⁰

The Second Circuit held that the agreement included television rights even though television did not appear until the following decade.¹⁰¹ Crucial to the court's holding was the fact that "knowledgeable people in the entertainment and motion picture industries" were aware of the advent of television.¹⁰² This approach is beneficial to multimedia producers because the decision indicates that, when interpreting licensing agreements, the courts will look outside the plain language of the license agreement and consider factors such as party knowledge. Thus, since many pre-existing agreements do not include specific terms regarding multimedia technology, even if parties include broad language in their licensing agreement, without specifically indicating multimedia technology, it is likely the courts will interpret the agreement broadly. However, the safe practice of including multimedia technology in a licensing agreement will alleviate any question as to the parties intent.

One of the cases the Second Circuit distinguished in *Bartsch* was *Ettore v. Philco Television Broadcasting Corp.*¹⁰³ In *Ettore*, a prizefighter brought an action for damages against a television station for televising

96. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 10.10[B], at 10-92 (1992).

97. 391 F.2d 150, *cert. denied*, 393 U.S. 826 (1968).

98. *Id.* at 153.

99. *Id.* at 152.

100. *Id.* at 151.

101. *Id.* at 154.

102. *Id.*

103. 229 F.2d 481 (3d Cir.), *cert. denied*, 351 U.S. 926 (1956).

a boxing match without the prizefighter's consent.¹⁰⁴ The court addressed the issue of whether televising a motion picture constitutes a different use than showing the same motion picture in a theater so that the need to obtain consent is eliminated.¹⁰⁵ The court concluded that since television did not exist when the boxing match was first filmed, and that since it would be unfair to attribute knowledge of the advent of television to *Ettore*, the granting of motion picture rights did not extend to television.¹⁰⁶ The approach in *Ettore* recognizes that "a license of rights in a given medium includes only such uses as fall within the unambiguous core meaning of the term and exclude any uses that lie within the ambiguous penumbra."¹⁰⁷ This restrictive interpretation is not beneficial to multimedia producers. Because most licenses do not expressly address electronic or digital rights, they tend to be ambiguous in nature on this issue and, therefore, will not be construed to convey rights for electronic mediums, including multimedia applications.

PART III. SOLUTIONS TO THE LICENSING PREDICAMENT

A. Introduction

Solving the plethora of licensing and nonlicensing problems is a Herculean task beyond the scope of this Comment; however, developing a consistent and well organized licensing system would establish a strong foundation for standardization in the industry. As with any new developing industry, there is a need for uniformity and standardization. Uniformity and standardization establishes a structure and framework upon which multimedia producers can rely. This reliance has the effect of expediting and simplifying the negotiating process and reducing the overall cost of the production. Because multimedia is still in its developmental stages, the industry requires uniformity and standardization. This Part will examine possible methods of attaining standardization and uni-

104. *Id.* at 483.

105. *Id.* at 487.

106. *Id.* at 491 n.14. *Cf.* *Rey v. Lafferty*, 990 F.2d 1379 (1st Cir.) (holding that a license to broadcast over television did not encompass a license for videocassette sales). *cert. denied*, 114 S. Ct. 94 (1993).

107. 3 MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT* § 10.10[B], at 10-92 (1992).

formity by the judicial interpretation of existing law and through the development of a new statutory framework.

B. The Fair Use Defense Applied to Multimedia Productions

In some instances multimedia producers may decide to include a copyrighted work without acquiring a license and claim "fair use" as their defense to any copyright infringement actions brought against them.¹⁰⁸ In essence, fair use places a limitation on the exclusive rights of a copyright owner. In *Campbell v. Acuff-Rose Music Inc.*,¹⁰⁹ the Supreme Court recognized the importance of the fair use defense and stated that "[f]rom the infancy of copyright protection, some opportunity for fair use of copyrighted materials has been thought necessary to fulfill copyright's very purpose, '[t]o promote the Progress of Science and useful Arts'"¹¹⁰

Section 107 of the Copyright Act of 1976¹¹¹ codified the common law doctrine of fair use¹¹² by placing limits on the rights of owners of copy-

108. Fair use is defined as "a privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner by the copyright." HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 260 (1944).

109. 114 S. Ct. 1164 (1994). In *Cambell*, the Court held that the rap group 2 Live Crew's commercial parody of Roy Orbison's rock ballad, "Oh Pretty Woman" was fair use within the meaning of the Copyright Act of 1976. *Id.* at 1173.

110. *Id.* at 1169 (quoting U.S. CONST., art. I, § 8, cl. 8.).

111. 17 U.S.C. § 107 (1976). Section 107 provides:

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

Id.

112. See Lynn I. Miller, *Fair Use, Biographers, and Unpublished Works: Life After H.R. 4412*, 40 J. COPYRIGHT SOC'Y U.S.A. 349 (1993) (commenting on section 106 codifying the common law doctrine of fair use); Robert Kasunic, *Fair Use and the Educa-*

rights which are conferred by section 106.¹¹³ In addition to justifying fair use in a limited number of situations, section 107 may also be applied in situations that are not explicitly listed. The statute “employs the terms ‘including’ and ‘such as’ in the preamble paragraph to indicate the ‘illustrative and not limitative’ function of the examples given.”¹¹⁴

In order to determine whether a use is justified, the courts will look to the four factors listed in section 107.¹¹⁵ Although these factors give little direction to the scope of the fair use doctrine, the Congressional House Report includes several examples of its scope:

[Q]uotation of excerpts in a review or criticism for purposes of illustration or comment; quotation of short passages in a scholarly or technical work, for illustration or clarification of the author's observations; use in a parody of some of the content of the work parodied; summary of an address or article, with brief quotations, in a news report; reproduction by a library of a portion of a work to replace part of a damaged copy; reproduction by a teacher or student of a small part of a work to illustrate a lesson; reproduction of a work in legislative or judicial proceedings or reports; incidental and fortuitous reproduction, in a newsreel or broadcast, of a work located in the scene of an event being reported.¹¹⁶

Although use consistent with these examples is a strong indication of fair use, the classification system does not make a use per se fair or un-

tor's Right to Photocopy Copyrighted Material for Classroom Use, 19 J.C. & U.L. 271 (1992) (examining the “historical background of the fair-use doctrine and its codification in the [Copyright Act of 1976]”).

113. 17 U.S.C. § 106 (1976). Section 106 provides:

Subject to sections 107 through 120, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

- (1) to reproduce the copyrighted work in copies or phonorecords;
- (2) to prepare derivative works based upon the copyrighted work;
- (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;
- (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and
- (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

Id.

114. *Campbell*, 114 S. Ct. at 1170 (citing 17 U.S.C. § 101).

115. *See supra* note 111.

116. H.R. REP. NO. 1476, 94th Cong., 2d Sess. 65 (1976). *reprinted in* 1976 U.S.C.A.N. 5659, 5678. *See* PAUL GOLDSTEIN, COPYRIGHT, PATENT, TRADEMARK, AND RELATED STATE DOCTRINES 643-44 (3d ed. 1989).

fair. It is then necessary, therefore, to consider multimedia use in light of the four factors.

Concerning the first factor of section 107, which states "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes,"¹¹⁷ the Supreme Court in *Campbell* stated that "[t]he central purpose of this investigation is to see . . . whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message."¹¹⁸ On its face, this does not appear to be a dispositive factor for the multimedia producer because the multimedia use will most likely be for profit.

If the use does not fall within the examples described in section 107, the commercial nature of a multimedia production weighs heavily against classification as a fair use.¹¹⁹ However, the court in *Campbell* recognized that if "commerciality carried presumptive force against a finding of fairness, the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of § 107 . . . since these activities 'are generally conducted for profit in this country.'"¹²⁰ The Supreme Court has interpreted the commercial nature of unlicensed use as simply "tend[ing] to weigh against a finding of fair use."¹²¹ Furthermore, courts are more willing to find that an unlicensed use is fair when it produces a value that benefits the broader public interest.¹²² The fact that a multimedia production brings together numerous and diverse fields may help to mitigate the commercial purpose of the work. This fact, in conjunction with the courts' recognition that most uses of an unlicensed copyrighted work are commercial in nature, indicates that the courts will apply less weight to this factor.

117. 17 U.S.C. § 107(1) (1976).

118. *Campbell*, 114 S. Ct. at 1171 (citations omitted).

119. *Wright v. Warner Books, Inc.*, 953 F.2d 731, 736 (2d Cir. 1991). The court stated that if the work in question "falls into one of these categories [i.e., criticism, scholarship or research], assessment of the . . . fair use factor should be at an end." *Id.* (quoting *New Era Publications, Int'l v. Carol Publishing Group*, 904 F.2d 152, 156 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990)).

120. *Campbell*, 114 S. Ct. at 1174 (quoting *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 592 (1985) (Brennan, J., dissenting)). *See also* *American Geophysical Union v. Texaco*, 37 F.3d 881, 889 (2d Cir. 1994) (holding that the unauthorized copying of articles intended for research purposes violated copyright law because they were not used in a timely manner).

121. *Campbell*, 114 S. Ct. at 1174 (citing *Harper*, 471 U.S. at 562).

122. *Id.* at 1171.

The second factor in section 107 takes into account "the nature of the copyrighted work."¹²³ This factor cannot be readily qualified with respect to multimedia productions because the inquiry focuses on the copyrighted work's individually and not on the multimedia production as a whole.¹²⁴ Furthermore, the nature of the copyrighted works that could be included in a multimedia production are so diverse that it would be difficult to effectively analyze this factor. However, a critical element of the second factor is whether or not the copyrighted work is published or unpublished.¹²⁵ When the court is dealing with an unpublished work, "the 'scope of fair use is narrower' . . . because 'the author's right to control the first public appearance of his expression weighs against such use of the work before its release.'"¹²⁶ Because most of the copyrighted works that will be incorporated into the multimedia production have been published, the second factor may support the unlicensed use of a copyrighted work.

The third factor to consider in section 107 is the "amount and substantiality of the portion used in relation to the copyrighted work as a whole."¹²⁷ The ambiguity in case law for this factor presents an interesting issue for the courts.¹²⁸ This inquiry asks whether "'the quantity and value of the materials used' are reasonable in relation to the purpose of the copying."¹²⁹ Thus, there is both a qualitative and quantitative element to the inquiry.¹³⁰ The quantitative element considers the percentage of the copyrighted work that was used.¹³¹ The qualitative element asks whether the portion that was appropriated was "'essentially the heart' of the copyrighted work."¹³² In addition the test looks to how

123. 17 U.S.C. § 107(2) (1976).

124. Jonathan Evan Goldberg, *Now That the Future Has Arrived, Maybe the Law Should Take a Look: Multimedia Technology and Its Interaction With the Fair Use Doctrine*, 44 AM. U. L. REV. 919, 956 (1995).

125. *Wright v. Warner Books Inc.*, 953 F.2d 731, 737 (2d Cir. 1991).

126. *Id.* (quoting *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 564 (1985)).

127. 17 U.S.C. § 107(3) (1976).

128. The courts are not settled as to whether this factor should be examined in relation to the allegedly infringing work. *Compare* *New Era Publications, Int'l v. Carol Publishing Group*, 904 F.2d 152, 158 (2d Cir.) (holding that the third factor should not be considered in relation to the work accused of infringement), *cert. denied*, 498 U.S. 921 (1990) *with* *Harper & Row Publishers v. Nation Enters.*, 471 U.S. 539, 564 (1985) (holding that the Copyright Act of 1976 directs the court to examine the amount and the substantiality of the portion used in relation to the work as a whole).

129. *Campbell v. Acuff-Rose Music Inc.*, 114 S. Ct. 1164, 1175 (1994).

130. *Wright v. Warner Books Inc.*, 953 F.2d 731, 738 (2d Cir. 1991).

131. *Id.*

132. *Id.*

much of the copyrighted work was taken and the quality of the segment that was taken. The court in *American Geophysical Union v. Texaco*¹³³ stated that the third factor considers “whether the quantity of the material used was ‘reasonable in relation to the purpose of the copying.’”¹³⁴ Thus, under this broad inquiry, the use could be fair despite Judge Learned Hand’s comment that “no plagiarist can excuse the wrong by showing how much of his work he did not pirate.”¹³⁵

Considering the quantitative element of the inquiry, the use of audio/visual clips and textual excerpts will weigh in favor of fair use because most of the clips will be short segments that are fairly insignificant to the overall length of a multimedia production. However, use of photos will generally weigh against fair use because, in most instances, the entire photo will be used. Considering the qualitative element of the inquiry, the multimedia producer, in all likelihood, will be appropriating distinctive portions of the work that are “essentially the heart” and “central point” of the work.¹³⁶ As a result, the qualitative element will generally weigh against a finding of fair use. If the substance of the clip is not the “heart” of the copyrighted work, the third factor may support multimedia use of most audio/visual clips and textual excerpts because the length of these clips are significantly shorter in relation to the length of the entire copyrighted work. The use of photographs and longer textual excerpts, however, may not qualify under this inquiry.

The fourth and final factor is the “effect of the use upon the potential market for or value of the copyrighted work.”¹³⁷ In the past, this was considered “the single most important element.”¹³⁸ Recently, however, the Supreme Court emphasized that the four factors should be considered as a whole. In *Campbell*, the Supreme Court stated that “[a]ll [four factors] are to be explored, and the results weighed together, in light of the purposes of copyright [laws].”¹³⁹ The market for the copyrighted work, most likely, would not be adversely affected by use of the work in

133. 37 F.3d 881 (2d Cir. 1994).

134. *Id.* at 894 (quoting *Campbell v. Acuff-Rose Music Inc.*, 114 S. Ct. 1164, 94) 1175 (1994)).

135. *Sheldon v. Metro-Goldwyn Pictures Corp.*, 81 F.2d 49, 56 (2d Cir.), *cert. denied*, 298 U.S. 669 (1936).

136. *Wright*, 953 F.2d at 738. If the baseball production included segments of movies, recognizable scenes would be incorporated into the work in lieu of less recognizable scenes. For instance, if the movie “The Natural” was included, the scene in which Robert Redford hit a homerun into the stadium lights would be included instead of a lesser known scene.

137. 17 U.S.C. § 107(4) (1976).

138. *American Geophysical Union v. Texaco*, 37 F.3d 881, 894 (2d Cir. 1994).

139. *Campbell v. Acuff-Rose Music Inc.*, 114 S. Ct. 1164, 1171 (1994).

a multimedia production.¹⁴⁰ The purchaser of the multimedia production is not purchasing the multimedia production in lieu of the original work. The user will purchase the multimedia production because it is a compilation of a number of different copyrighted original works based on a single topic.

The policy of the fair use doctrine can best be summarized by *Lewis Galoob Toys v. Nintendo of America*,¹⁴¹ where the district court indicated that "[a] fair use will frequently suppress demand for a work, but as long as it does so without supplanting demand, the indirect detrimental effect on the market is not the subject of copyright protection."¹⁴² Although this statement supports expanding fair use to unlicensed multimedia use, the courts will not greatly expand the fair use doctrine without further direction from Congress.¹⁴³

C. Compulsory Licensing

Compulsory licensing is one of the most discussed solutions to the licensing dilemma of multimedia productions.¹⁴⁴ In theory, this system would require the owner of a copyrighted work to license his work to a multimedia producer despite any opposition to the license by the owner.¹⁴⁵ Despite the extensive discussion among legal scholars regarding the possibility of a compulsory licensing system, few address which copyrighted works would be subject to the compulsory licensing scheme. The existing compulsory licensing schemes authorized by the Copyright Act are narrow in scope.¹⁴⁶ Multimedia, however, would require an extensive number of copyrights to be subject to the compulsory

140. Because the multimedia production, in some instances, will only include small segments of the original work, an argument can be made that the market for the copyrighted work will be enhanced by this use. In essence, a multimedia user's interest may be sparked and the user may be motivated to purchase the whole copyrighted work. It may provide a market for a copyrighted work where, at one time, none existed.

141. 780 F. Supp. 1283 (N.D. Cal. 1991), *aff'd*, 964 F.2d 965 (9th Cir. 1992), *cert. denied*, 113 S. Ct. 1582 (1993).

142. *Id.* at 1294.

143. This proposition is supported by the statement of the Supreme Court in *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1983), where the Court noted that until Congress "take[s] a fresh look at this new technology . . . [the courts must not] apply laws that have not yet been written." *Id.* at 456.

144. See, e.g., Meeker, *supra* note 23, at 409-10 (exploring compulsory licensing by identifying problems and developing solutions to these problems in the realm of multimedia); Tanenbaum, *supra* note 63, at 106-07 (explaining the basics of multimedia works and the process for obtaining copyrights for multimedia materials).

145. Meeker *supra* note 23, at 410.

146. See *infra* notes 157-158 and accompanying text.

licensing system. For works such as audio and video clips, an equitable solution would be to require compulsory licensing of particular portions of the works. For instance, the statute could require compulsory licensing for thirty seconds of full length movies, fifteen seconds of songs, ten seconds of television or radio newscasts, etc. The weakness in this theory is that certain portions of the works will be inherently worth more than others.

Another possibility is to authorize compulsory licensing if the copyright owner decides to register his copyright in digital form. Currently, there is a project between the Library of Congress and the Copyright Office, entitled CORDS (Copyright Office Electronic Registration, Recordation and Deposit System), which will allow digital registration of copyrighted works.¹⁴⁷

Compulsory licensing can be construed as a payment of damages which are set by a governmental body as compensation for the infringement upon one's property.¹⁴⁸ Ideally, the "appropriate compensation" should reflect the figure the parties would have reached through private negotiations. Such a compulsory licensing system effectively eliminates the problems associated with the burdensome number of licenses that need to be negotiated in a multimedia production. Further, the system would expedite the licensing process and, in theory, would provide an accurate figure for the licensing fee.

A compulsory licensing system could serve many purposes that would be advantageous to the multimedia producer. First, a compulsory licensing system would create standardization in the licensing of such works, which, in turn, would reduce transaction costs and licensing fees.¹⁴⁹ Second, the system would lead to the efficient and unhindered dissemination of the copyrighted works to society which would further the underlying purposes of copyright law.¹⁵⁰ Third, compulsory licensing reduces the need for extensive copyright searches which would lead to faster development and production of multimedia productions.¹⁵¹ Finally, "compulsory licensing eliminates the monopolist's most powerful

147. See Guy Lamolinara, *Copyright in the Digital Age: CORDS Project to Make Registration, Verification Easier* [Copyright Office Electronic Registration, Recordation and Deposit System], L.C. INFO. BUL., June 12, 1995, at 267.

148. See *The Supreme Court, 1993 Term Leading Cases*, 108 HARV. L. REV. 139, 331 (1994) (stating that under a compulsory licensing scheme, "courts would grant the copyright holder a damage award that represented adequate compensation for the infringing use").

149. Meeker, *supra* note 23, at 409.

150. See *supra* notes 14-15 and accompanying text.

151. Meeker, *supra* note 23, at 409.

weapon — the refusal to deal — and makes material available for re-use.”¹⁵² Despite these advantages, compulsory licensing compromises a copyright holder’s freedom to control his own property, and thus operates counter to the purposes of copyright law.¹⁵³

In formulating a compulsory licensing scheme, the goal should be to design a system simple in nature, yet equitable to the parties involved. Such a system could be implemented in a number of ways. For instance, clearinghouses could form departments specifically to implement the compulsory license system while at the same time working in conjunction with a governmental agency possibly modeled after the Copyright Royalty Tribunal;¹⁵⁴ or the multimedia producer could be required to register the use of copyrighted work with a governmental agency which would then determine the fee for such use.¹⁵⁵ The licensing fee could be in the form of a flat rate, a royalty based on time or sales, or a combination of both.¹⁵⁶ Although the simplest form would be a flat rate per copyright, this solution would not be equitable to either party because of the diverse nature of the copyrighted works used and the fact that varying portions of the copyrighted works will be incorporated into the multimedia production.

Fortunately, the Copyright Act of 1976 provides guidance for determining the feasibility of compulsory licensing. Section 115 designates the conditions and fees for the compulsory licensing of certain musical compositions¹⁵⁷ and section 118 specifies conditions and limitations on the exclusive rights granted to certain copyright holders.¹⁵⁸

152. Meeker, *supra* note 23, at 410.

153. See *supra* notes 14-15 and accompanying text.

154. 17 U.S.C. § 118(b)(3) of the Copyright act authorizes, pursuant to chapter 8, the formation an arbitration royalty panel. See *infra* note 156. The purpose of the copyright arbitration royalty panel is to “maximize the availability of creative works, . . . to afford the copyright owner a fair return for his creative work, . . . to reflect the relative roles of the copyright owner and the copyright user . . . with respect to relative creative contribution, technological contribution, capital investment, cost, risk, . . . to minimize any disruptive impact on the structure of the industries involved.” 17 U.S.C. § 801 (1976).

155. See, e.g., 17 U.S.C. § 115 (1976).

156. *Id.*

157. 17 U.S.C. § 115 (1976) states in pertinent part:

(a) Availability and Scope of Compulsory License.—

(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. . . .

....

(c) Royalty Payable under Compulsory License.—

-
- (1) To be entitled to receive royalties under a compulsory license, the copyright owner must be identified in the registration or other public records of the Copyright Office. The owner is entitled to royalties for phonorecords made and distributed after being so identified, but is not entitled to recover for any phonorecords previously made and distributed.
 - (2) Except as provided by clause (1), the royalty under a compulsory license shall be payable for every phonorecord made and distributed in accordance with the license. For this purpose, a phonorecord is considered "distributed" if the person exercising the compulsory license has voluntarily and permanently parted with its possession. With respect to each work embodied in the phonorecord, the royalty shall be either two and three-fourths cents, or one-half of one cent per minute of playing time or fraction thereof, whichever amount is larger.
 - (3) A compulsory license under this section includes the right of the maker of a phonorecord of a nondramatic musical work under subsection (a)(1) to distribute or authorize distribution of such phonorecord by rental, lease, or lending (or by acts or practices in the nature of rental, lease, or lending). . . .

Id.

158. 17 U.S.C. § 118 (1976) states in relevant part:

- (a) The exclusive rights provided by section 106 shall, with respect to the works specified by subsection (b) and the activities specified by subsection (d), be subject to the conditions and limitations prescribed by this section.
- (b) Notwithstanding any provision of the antitrust laws, any owners of copyright in published nondramatic musical works and published pictorial, graphic, and sculptural works and any public broadcasting entities, respectively, may negotiate and agree upon the terms and rates of royalty payments and the proportionate division of fees paid among various copyright owners, and may designate common agents to negotiate, agree to, pay, or receive payments.
 - (1) Any owner of copyright in a work specified in this subsection or any public broadcasting entity may submit to the Librarian of Congress proposed licenses covering such activities with respect to such works. The Librarian of Congress shall proceed on the basis of the proposals submitted to it as well as any other relevant information. The Librarian of Congress shall permit any interested party to submit information relevant to such proceedings.
 - (2) License agreements voluntarily negotiated at any time between one or more copyright owners and one or more public broadcasting entities shall be given effect in lieu of any determination by the Librarian of Congress: . . .
 - (3) In the absence of license agreements negotiated under paragraph (2), the Librarian of Congress shall, pursuant to chapter 8, convene a copyright arbitration royalty panel to determine and publish in the Federal Register a schedule of rates and terms which, subject to paragraph (2), shall be binding on all owners of copyright in works specified by this subsection and public broadcasting entities, regardless of whether such copyright owners have submitted proposals to

As stated, the ideal compulsory licensing fee should be determined according to what figure the parties would have reached through private negotiations. This scenario, however, is not practical because there are too many factors involved in direct negotiation.¹⁵⁹ This is not unique to multimedia licensing negotiations. The personalized approach of negotiation was abandoned in the Copyright Act of 1976 in favor of fixed rates, which are, to a certain extent, flexible.¹⁶⁰

The fixed rate system seems very detached from the ideal scenario envisioned above and this weakness would be magnified if such a system were to be applied to multimedia productions. Personal negotiation for each individual work in the production does not take into consideration the diverse nature of the works in a multimedia production, and, in essence, treats them similarly. This is not an equitable solution for either party. The major distinction between existing compulsory licensing practices and the licensing practices involved in multimedia productions lies in the fact that the existing practices only need to be applied generally to one type of copyrighted work — musical compositions under section 115 and copyrighted works in public broadcasting under section 118. It is apparent that since multimedia productions deal with diverse components, they require different treatment under the law.

Furthermore, the existing framework of law deals only with one type of medium, whereas multimedia can be presented in a number of different media. This illustrates the complexity of applying compulsory licensing to multimedia and the inadequacy of the existing framework of the law as applied to multimedia productions. In formulating a compulsory licensing system, weaknesses in the existing statutory framework can provide insight to the structure that should be incorporated into the law.

As stated, section 115 prescribes the condition and fees for the compulsory licensing of musical compositions.¹⁶¹ Section 115 of the Copy-

the Librarian of Congress. In establishing such rates and terms the copyright arbitration royalty panel may consider the rates for comparable circumstances under voluntary license agreements negotiated as provided in paragraph (2). . . .

Id.

159. See *supra* notes 53-78 and accompanying text.

160. Section 115 multiplies its uniform rate by the number of records distributed by the compulsory licensees, thereby proportioning market appeal to the fee. Sections 111, 116, and 118 "leave some room for differentiation at the point at which fees are distributed to the copyright proprietors." Paul Goldstein, *Preempted State Doctrines, Involuntary Transfers and Compulsory Licenses: Testing the Limits of Copyrights*, 24 U.C.L.A. L. REV. 1107, 1129 (1977).

161. See *supra* note 157.

right Act of 1976 requires a fee upon distribution of the copyrighted work.¹⁶² It also provides that the fee be based on either 2.75 cents per work or 0.5 cents per minute of playing time, whichever is greater.¹⁶³ These two aspects of section 115 should also be incorporated into a multimedia compulsory licensing scheme. First, the scheme should require a fee only upon distribution. This would be equitable to both the multimedia producer and the copyright holder. The multimedia producer is incorporating the copyrighted work into the production for the purchaser of the work, the ultimate user. It follows that the fee should then be due when the user has access to the copyrighted work. Second, the length of the work, if it is an audio or video clip, should be a determinative factor in the licensing fee. This is also equitable to the multimedia producer and the copyright holder because the fee will be proportional to the length of the copyrighted work that was used.

Online services which provide multimedia productions have the ability to easily account for program distribution; therefore, technology may allow for the present system of payment-on-distribution to be extended to a system of payment-for-access. In a payment-for-access system, royalty payments would be due every time a work is accessed by an on-line user. As the popularity of on-line services escalates, there is a greater likelihood that multimedia productions will be offered primarily or exclusively through them. With more multimedia productions being offered through on-line services, a payment-for-access system would provide the on-line server with the ability to keep track of which copyrighted parts of a multimedia production have been accessed and subsequently downloaded by its subscribers.¹⁶⁴ Under a system such as this, payment-for-access appears to be a feasible and viable option for distribution of multimedia as well as other types of software.

This suggested approach results in two separate fees—one for the inclusion of the copyrighted work in the multimedia production and a second fee only if the copyrighted work is accessed by a user. In essence, the payment of the base fee represents the value added to the multimedia

162. 17 U.S.C. § 115(c)(1) (1976).

163. 17 U.S.C. § 115(c)(2) (1976). Section 115 is actually a modification of section 1(e) of the Copyright Act of 1909, in which a flat fee system was established. *See* Act of March 4, 1909, ch. 320 § 1(e).

164. Downloading is the "practice of capturing and storing data from an on-line data base, either for immediate use, i.e. to be printed, or for longterm or permanent use in other stored files or in other services made available to a third party." Peter Marx, *Electronic Information Publishing: Customer Agreements and Related Issues*, in ELECTRONIC INFORMATION PUBLISHING: OLD ISSUES IN A NEW INDUSTRY, AT 265, 312 (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G4-3753 1984).

production by each copyrighted work it incorporates¹⁶⁵ and the payment-for-access fees represent the actual value that the producer of the multimedia production receives if the user accesses the work. Such a system may reduce the inequities that may be presented by multimedia licenses.

Although section 118 applies to public broadcasting and not commercial enterprises,¹⁶⁶ adopting a similar framework would be advantageous to the multimedia producers. The compulsory licensing system under section 118 was designed to encourage licensing agreements while providing a mechanism that assures a reasonable result if an agreement cannot be reached.¹⁶⁷ Under section 118, the Copyright Royalty Tribunal determines and publishes "a schedule of rates and terms" for use by public broadcasters of published nondramatic musical works and pictorial, graphic and sculptural works.¹⁶⁸ These fixed rates do not preclude independent negotiations and agreements although they do provide a starting point of reference.¹⁶⁹ Further, to ensure that equitable license agreements are formed, section 118 mandates that independent licensing agreements be filed with the Copyright Office in order to be effective.¹⁷⁰

In light of the seemingly insurmountable amount of licensing agreements that need to be negotiated for a multimedia production, application of a structured system would accelerate the licensing process by providing a framework to follow. Such a system would help regulate the industry and guarantee that agreements are as equitable as possible. Further, by requiring that agreements be filed with the Copyright Office, parties will be subject to the scrutiny of the Office and are more likely negotiate in a fair and equitable manner.

165. Although any individual work may never be accessed by the purchaser, the mere presence of that copyrighted work would nonetheless add value to the entire multimedia production.

166. 17 U.S.C. § 118(g) (1976).

167. H.R. REP. NO. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5732.

168. 17 U.S.C. § 118 (b)(3) (1976). "[S]ection 118 . . . grants to public broadcasting a compulsory license . . . subject to payment of reasonable royalty fees to be set by the Copyright Royalty Tribunal established by [this] bill." H.R. REP. NO. 1476, 94th Cong., 2d Sess. (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5732.

169. 17 U.S.C. § 118 (b)(3). *See also* Daniel A. Saunders, *Copyright Law's Broken Rear Window: An Appraisal of Damage and Estimate of Repair*, 80 CALIF. L. REV. 179, 244 (1992) (stating that "[t]he fixed royalty itself could be compulsory or serve merely as a backup in the event that private negotiations fail").

170. 17 U.S.C. § 118(b)(2).

D. Problem of Valuation

There exists somewhat of a paradox in the relation between the value of each copyrighted work to the multimedia production as a whole. In most instances, a multimedia production is comprised of thousands of separate copyrighted works, most of which are fairly insignificant individually to the scope of the work. However, it is this precise fact that gives a multimedia production its attraction. In the baseball multimedia production scenario, there are aspects of baseball in the production in which many users would be interested.¹⁷¹ In contrast, there are those copyrighted works associated with the thousands of abstract, less popular points¹⁷² that conceivably will not be accessed nearly as often as the more popular parts of the production.

The value of any individual copyrighted work in a multimedia production that has 100 licensed works is inherently different than the value of the same copyrighted work in a production that has 10,000 licensed works. That is, the more copyrighted works there are in a multimedia production, the less value each work contributes individually to the overall scope of the production. This inverse proportional relationship is simply based on the premise that $1/100$ is greater than $1/10,000$. It is clear that, although the overall value of a multimedia production increases in relation to the number of copyrighted works incorporated, the independent value of each of these works is proportionately reduced. In other words, although each of the potentially enormous number of copyrighted works which could be incorporated in the multimedia production would add value, the overall independent value of each copyrighted work would likely decrease as the total number of works in the production increases. Complicating this formula is the fact that the value of the copyrighted work is also equally dependent upon the relationship of its length to the length of the production (i.e., a ten second clip has a different value to a work than a clip that is two minutes long).

These facts raise the issue of whether the licensing fee or payment-for-access fee should be related to the total number of works incorporated in the production. This creates a number of issues and problems that need to be addressed. First, should the fee be based on the total

171. Some examples would be great baseball teams like the New York Yankee dynasty of the 1950's, popular ballplayers such as Babe Ruth and Lou Gehrig, statistics and trivia, as well as other popular aspects of the game.

172. For instance, the baseball production may include segments on the manner in which a baseball is manufactured, the development and changes of the rules over the years, obscure records and facts, and various uniforms and logos.

number of licensed works as a whole or should the fee be based on the total number of works in each category, (i.e., photos, audio clips, and video clips)? Second, will the large number of copyrighted works in a multimedia production change the manner in which the producer hypothetically would bargain with each copyright owner?

It is impractical to license works on an individual basis; therefore, it may be appropriate to categorize the works and to base the value of the copyrighted work by its category. Under this plan, the initial work may be placed in a class based on its nature, either audio or visual. These classes may then be further divided into an assortment of subclasses. For instance, the audio class can be divided into music clips, movie audio clips, and news audio clips. These subcategories may then be divided into subclasses based on additional characteristics. For each subclass, a standard licensing fee would be established based on the ratio of the length of the full copyrighted work to the length of the segment that will be used in the multimedia production.

A category of visual imaging, for example, can be divided into subcategories based on whether the copyrighted work is a video or still photograph. If the copyrighted work is a photograph, then the licensing system should parallel the systems adopted by photo agencies.¹⁷³ The video category could be divided in a manner similar to the licensing fee calculated by the ratio of the length of the copyrighted work to the length of the segment used. Under both the audio and video categories, the licensor could decide whether to offer the copyrighted work based on a flat geographic rate,¹⁷⁴ by a "per copy" fee,¹⁷⁵ or if possible, by a per-access fee.

By reducing the licensing fee proportionally, in relation to the number of copyrighted works, a multimedia producer would be encouraged to incorporate as many copyrighted works as possible. This would change the manner in which the producer would bargain with each copyright owner, thereby resulting in a lower license cost per copyrighted work. Although this would add economic value and attraction to the multimedia production, a lower value will be paid to each copyright owner. This reduction in value paid to the copyright owner is an important factor to consider in developing any compulsory licensing system.

173. See *supra* note 54 and accompanying text.

174. Flat geographic rate is also known as site licensing. Under this system a "blanket license for unlimited use rights to a software product within a defined geographic site or other fixed boundary [would be set] for a fixed price." Neukom & Gornikiewicz *supra* note 74, at 783.

175. See *supra* notes 89-92 and accompanying text.

Ultimately a compulsory licensing system may be the most practical solution, but the problems regarding valuation make the system a last resort.¹⁷⁶ Although a compulsory licensing system is designed to solve the problem of the excessive licensing in multimedia productions, this system does not adequately value the individual copyrighted works. Because of the varying lengths, nature, and quality of the works, standard valuation of each copyrighted work is nearly impossible. From this important aspect, it appears that the diverse nature of the types of copyrighted works makes compulsory licensing an improbable solution, albeit a practical solution, to the licensing problem.

E. Judicial Flexibility in Interpreting Copyright Law

Based on the legislature's past record, it is clear that it is unable to keep pace with the rapid rate of technological advancement when developing statutory law.¹⁷⁷ This suggests that the judiciary should be given a certain degree of liberty in interpreting existing statutes with regard to these new advancing fields. Judicial expansion provides the degree of flexibility needed in fields where legal issues are complex and difficult to anticipate. Additionally, judicial expansion helps mitigate the dilemma of the law always being a step behind technology.

In addition to the fair use decisions previously discussed,¹⁷⁸ a number of recent case decisions provide insight into the judiciary's attitude regarding licensing agreements.¹⁷⁹ In *Apple Computer, Inc. v. Microsoft Corp.*,¹⁸⁰ the Ninth Circuit addressed the issue of whether certain aspects of Apple Computer's operating system, specifically its Graphic User Interfaces [hereinafter GUI],¹⁸¹ were within the 1985 license granted by Apple Computer to Microsoft Corporation.¹⁸² The dispute between Apple Computer and Microsoft Corporation stems from Apple Computer's registered copyrights for the GUI in their Lisa and Macin-

176. Meeker, *supra* note 23, at 410.

177. See *Computer Assocs. Int'l v. Altai, Inc.* 982 F.2d 693, 696 (2d Cir. 1992) (stating that "the growth of computer science has spawned a number of challenging legal questions, particularly in the field of copyright law"); Victor de Gyafas *Sega v. Accolade: A Step Forward in Reverse Engineering?*, 23 Sw. U. L. REV. 571, 573 (declaring "[w]e live in a technological age, and technology often advances faster than the law.")

178. See *supra* notes 108-143 and accompanying text.

179. See *infra* notes 180-204 and accompanying text.

180. 35 F.3d 1435 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1176 (1995).

181. The court defined GUIs as being "developed as a user-friendly way for ordinary mortals to communicate with the . . . computer . . ." *Id.* at 1438.

182. *Id.*

tosh operating systems.¹⁸³ Microsoft Corporation's Windows 1.0 operating system was designed with a GUI that was similar to the GUI of Apple's operating system, thereby sparking litigation between the two companies.

The two companies agreed to a licensing arrangement in which Apple Computer granted Microsoft "the right to use and sublicense derivative works generated by Windows 1.0 in present and future products."¹⁸⁴ Apple Computer brought an action alleging that succeeding versions of Microsoft's Windows program exceeded the scope of the licensing agreement. The court, over the progression of six published decisions,¹⁸⁵ determined that all visual displays in the later versions of Windows were in Windows 1.0 with some minor exceptions.¹⁸⁶ Apple appealed the lower court's broad interpretation of the license and the Ninth Circuit affirmed the ruling.¹⁸⁷

Although *Apple Computer, Inc.*, does not involve a multimedia production, it is significant to the licensing problems associated with multimedia productions because it provides an indication of the judiciary's attitude towards the interpretation of licensing agreements within the computer industry. The licensing agreement between Apple and Microsoft contained a provision which stated that "Microsoft acknowledged 'that the visual displays in [Windows 1.0] are derivative works of the visual displays generated by Apple's Lisa and Macintosh graphic user

183. *Id.*

184. *Id.*

185. *Id.* The licensing agreement has been the subject of seven published opinions since 1989 including the litigation involved in the present case. *Id.* at 1438 n.2. See *Apple Computer, Inc. v. Microsoft Corp.*, 821 F. Supp. 616 (N.D. Cal. 1993) (holding that unprotected elements of copyrighted computer program were virtually identical to corresponding elements of allegedly infringing works); *Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006 (N.D. Cal. 1992) (holding that "look and feel" of interface did not constitute protectable expression apart from the individual elements of the interface); *Apple Computer, Inc. v. Microsoft Corp.*, 779 F. Supp. 133 (N.D. Cal. 1991) (holding that even if elements of copyrighted works are found to be "unprotectable" they should not be eliminated from the substantial similarity of expression analysis used to determine copyright infringement); *Apple Computer, Inc. v. Microsoft Corp.*, 759 F. Supp. 1444 (N.D. Cal. 1991) (holding that agreement between copyright owner and manufacturer did not license visual displays); *Apple Computer, Inc. v. Microsoft Corp.*, 717 F. Supp. 1428 (N.D. Cal. 1989) (holding that visual displays, in Microsoft's later software programs, which were identical to earlier programs, were covered by the software license); *Apple Computer, Inc. v. Microsoft Corp.*, 709 F. Supp. 925 (N.D. Cal. 1989) (holding that the license did not cover enhancements to licensee's computer software program).

186. *Apple Computer, Inc.*, 35 F.3d at 1438.

187. *Id.* at 1438-39.

interface programs.”¹⁸⁸ The agreement also provided that “Apple granted Microsoft a nonexclusive, royalty-free, nontransferable license ‘to use these derivative works in present and future software programs and to license them’ to third parties”¹⁸⁹ Despite Apple’s contention that the term “visual displays” was ambiguous, the court looked to the plain language of the agreement and its prior drafts and construed the terms broadly.¹⁹⁰ As a result of this broad interpretation, the court determined that all of the visual displays in the Microsoft Windows programs were within the licensing agreement.¹⁹¹

The holding of the Ninth Circuit, which interpreted the agreement broadly, indicates that courts will construe licensing agreements in computer related fields as broadly as possible in order to avoid the complex legal analysis that is required when resolving licensing problems associated with computer programs. Drafters of multimedia licensing agreements must be extremely careful when drafting these agreements in order to avoid an interpretation, by the court, which goes beyond the intention of the parties.

The courts will also intensely scrutinize the subject matter of copyrighted works. Such was the situation in the First Circuit’s recent decision in *Lotus Development Corp. v. Borland International*¹⁹² Although not as well-known as the Apple/Microsoft litigation, the case between Lotus and Borland is just as passionate.¹⁹³ Lotus Development produced one of the earliest computer spreadsheet programs called Lotus 1-2-3.¹⁹⁴ Borland, in an attempt to compete with Lotus 1-2-3, developed a com-

188. *Id.* at 1440 n.8.

189. *Id.*

190. *Id.* at 1440.

191. *Id.* at 1441.

192. 49 F.3d 807 (1st Cir.), *cert. granted*, 116 S. Ct. 39 (1995).

193. There have been four published district court opinions involving Lotus and Borland since 1992. *See* *Lotus Dev. Corp. v. Borland Int’l*, 831 F. Supp. 223 (D. Mass. 1993) (concluding that the Lotus 1-2-3 menu tree design and structure is part of the protectable expression of the program); *Lotus Dev. Corp. v. Borland Int’l*, 831 F. Supp. 202 (D. Mass. 1993) (holding that the Lotus 1-2-3 menu tree was copyrightable and that the time period of two and one-half years between the release of the defendant’s alleged infringing work and the time of plaintiff’s filing of the action did not amount to an affirmative defense of laches); *Lotus Dev. Corp. v. Borland Int’l*, 799 F. Supp. 203 (D. Mass. 1992) (granting plaintiff partial summary judgment and denying defendant’s summary judgment motion; finding that, as a matter of law, defendant’s program infringed on plaintiff’s copyright, but concluding that jury trial was still necessary to determine whether the infringing work was a substantial part of plaintiff’s copyright); *Lotus Dev. Corp. v. Borland Int’l*, 788 F. Supp. 78 (D. Mass. 1992) (denying the parties’ cross-motions for summary judgment).

194. *Lotus Dev. Corp.*, 49 F.3d at 809.

puter spreadsheet program called Quattro that was similar in many respects to Lotus 1-2-3.¹⁹⁵ Because Lotus had basically standardized the format for spreadsheets, Borland's strategy was to develop a program that any Lotus user would be able to utilize without having to learn a new format.¹⁹⁶

On appeal was the issue of whether the "menu tree"¹⁹⁷ that Lotus implemented was copyrightable subject matter.¹⁹⁸ The district court held that the menu tree was copyrightable because "[a] very satisfactory spreadsheet menu tree can be constructed using different commands and a different command structure from those of Lotus 1-2-3."¹⁹⁹ The First Circuit, in considering the issue, held that the menu tree was a "method of operation"²⁰⁰ and thus not copyrightable under 17 U.S.C. 102(b).²⁰¹ The court indicated that the menu tree was "the means by which users control and operate Lotus 1-2-3" and thus was not copyrightable.²⁰²

Despite the holding of the court of appeals,²⁰³ the district court's argument in support of finding the menu tree copyrightable was solid and

195. *Id.* at 810.

196. *Id.*

197. *See Lotus Dev. Corp.*, 799 F. Supp at 206. The court explained a "menu tree" as follows:

In Lotus 1-2-3, menu commands are organized so that less than a dozen related menu commands are displayed at any given moment. This display communicates to the user the spreadsheet operations immediately available. Each menu of less than a dozen commands is linked to preceding/succeeding menus by the operation of (root/trunk) menu to form a "menu tree."

Id.

198. *Lotus Dev. Corp.*, 49 F.3d at 809. This case illustrates the continual exposure of new issues which are presented to the courts relating to the ever evolving computer industry. The court in *Lotus* noted that the issue in the case "is a matter of first impression . . ." *Id.* at 813.

199. *Id.* at 810.

200. The court stated "'method of operation,' as . . . used in § 102(b), refers to the means by which a person operates something, whether it be a car, a food processor, or a computer." *Id.* at 815.

201. *Id.* at 815. *See* 17 U.S.C. § 102(b).

202. *Lotus Dev. Corp.*, 49 F.3d at 815.

203. The court reasoned that the menu command hierarchy "does not merely explain and present Lotus 1-2-3's functional capabilities to the user; it also serves as the method by which the program is operated and controlled." *Id.* The court also considered the *Altai* test developed by Judge Pratt in *Computer Assoc. Int'l v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992). The court, however, ultimately concluded that its application to the facts at bar could "actually be misleading." *Lotus Dev. Corp.*, 49 F.3d at 815. The *Altai* test requires the application of three steps, "abstraction, filtration, and comparison." *Lotus Dev. Corp.*, 49 F.3d at 814. The court in *Lotus* stated that "abstraction . . . requires courts to 'dissect the allegedly copied program's structure and isolate each level of abstraction contained within it.'" *Id.* (quoting *Altai, Inc.*, 982 F.2d at 707). "Abstraction" enables the

consistent with the present copyright laws.²⁰⁴ In a case where the validity of a copyright is difficult to determine, the deciding factor may be public policy. By holding that the menu tree was not copyrightable, a similar format could be used by any programmer, thereby allowing standardization within the industry.

The courts appear to give substantial weight to the effect their decision will have on the public when upholding a copyright. Although in most situations, the copyrightability of a work in a multimedia production will not be in question, *Lotus* is still relevant in those situations where the copyrightability of a work may be in doubt. The eventual loser appears to be the creator of the copyrighted work, but it is highly unlikely that a judicial trend against upholding copyrights will have an adverse affect on the creation of copyrights.

CONCLUSION

Although expansion of fair use, establishment of a compulsory licensing system and judicial flexibility in interpreting existing statutes are each independently insufficient, the licensing problems associated with multimedia productions can be mitigated by combining each of the solutions presented. By extending the judicial doctrine of fair use to multimedia productions in situations where applicable, the need for licensing is diminished.²⁰⁵ By developing a compulsory licensing system that effectively values the copyright, a compulsory licensing system

court "to identify the appropriate framework within which to separate protectable expression from unprotected ideas." *Id.* "Filtration" allows the court to "examine 'the structural components at each level of abstraction to determine whether their particular inclusion at that level was 'idea' or was dictated by considerations of efficiency . . . required by factors external to the program itself; or taken from the public domain'" *Id.* (quoting *Altai, Inc.*, 982 F.2d at 707). Lastly, "comparison" requires the courts to "compare the protected elements of the infringed work . . . to the corresponding elements of the allegedly infringing work to determine whether there was sufficient copying . . . to constitute infringement." *Id.* (quoting *Altai, Inc.*, 982 F.2d at 710).

204. See Gary L. Reback, *Implications of Lotus v. Borland*, in *COMPUTER SOFTWARE AND THE INTERNET*, AT 143, 191-92 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. G-415, 1995). The Petitioner's Brief states:

The First Circuit's relatively brief opinion comes as a jarring departure from prevailing consensus The First Circuit quarrels with everybody: with the district court, with the Nimmer treatise, with Learned Hand, and with the Second, Ninth, and Tenth Circuits. And because the Fifth Circuit . . . explicitly adopts Judge Keeton's analysis, the First Circuit must disagree with that Circuit as well. The result is conflict both in outcome and approach.

Id. at 212.

205. See *supra* note 108-143 and accompanying text.

will be able to efficiently handle the large number of licenses that need to be negotiated.²⁰⁶ Finally, by adopting a flexible approach in interpreting the existing statutes, courts will be able to resolve the issues that the copyright laws do not address.²⁰⁷

The presentation of these solutions is by no means complete, but rather they offer a foundation or structure that may be implemented in order to solve the licensing problems within the structure of current copyright law. The awkwardness and complexity of the multimedia licensing problem ultimately originates from the fact that the drafters of the copyright laws could not have anticipated the development of a medium which would incorporate a tremendous amount of diverse copyrighted works.

Congress has been granted the constitutional authority to structure the copyright laws and has modified the law in the past to reflect changes in society and in technology.²⁰⁸ Congress inevitably may decide to amend the copyright laws in an effort to alleviate the constraints on copyright use in multimedia productions. However, until Congress does decide to change the nature of the copyright laws, any solution to the legal problems presented by multimedia productions must be implemented within the confines of the existing framework of the law. When these changes do arise, it is safe to say that technology and science will once again be generations ahead of the law. As Justice Holmes has said, "[i]t can not be helped, it is as it should be, that the law is always behind the times."²⁰⁹

206. See *supra* note 144-176 and accompanying text.

207. See *supra* note 177-204 and accompanying text.

208. See *supra* note 15 and accompanying text.

209. Justice Oliver Wendel Holmes, Address at Harvard Law School Association of New York, New York City (February 15, 1913).

