

Practical Tips for Licensing Content

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It is now over five years since the emergence in about 1992 of a market for multimedia products and services in Australia. Five years have also passed since the establishment of the Australian Interactive Multimedia Industry Association (AIMIA). Five years is a reasonable number of years in the development of a market. So it's very timely that the Australian Copyright Council published in December 1997 its discussion paper titled "*Licensing Content for Multimedia*" **.

The paper is a useful source for information. It was researched by Jacqueline Barrett and Gail Fulton and written by Gail Fulton. In its 53 pages it also contains a handy bibliography and some handy tables and graphs.

A key part of the research for the paper involved a survey of producers, independent creators and performers active in multimedia. Over 1,000 questionnaires were distributed. Responses were received from 61 producers and 25 individual creators. While the number of respondents is low, the results of this research reflect anecdotal observations including my own experience in numerous multimedia licensing transactions.

Given its publisher, the focus of the paper is on traditional copyright concerns, especially the acquisition and treatment of rights clauses in agreements.

The survey found that the copyright concerns of producers are, in order of importance: working out who controls rights, working out who is authorised to clear rights, lack of payment standards, working out which rights are needed, underestimating cost of content, delays, dealing with multiple rights holders, and even "refusals to license for multimedia".

Not surprisingly, the survey indicates that some producers regularly seek legal advice, some obtain precedent agreements from lawyers for repeated reuse without advice, while a further category of producers indicate that they seek no legal advice at all.

The paper is a useful source for the payment rates or approaches taken by content owners including the State Library of NSW, ABC, Australasian Mechanical Copyright Owners Society (AMCOS), and Copyright Agency Limited (CAL).

Observations are made regarding the relatively low level of interaction by multimedia producers with copyright collection societies.

The paper notes that a number of organisations have developed their own standard multimedia agreements.

Organisation-specific agreement standardisation is very useful, but industry-wide agreement standardisation is a Holy Grail in the digital media market.

Standards proliferate in licensing in all intellectual property industries. To build relationships, design deals and get agreements signed in the cut and thrust of commerce regularly requires the application of know-how and dedicated documents. Typically, people with legal know-how fashion them out of a range of documents which are short form, long form, letter format, biased towards one party (eg the producer) or biased towards others (eg creators). It takes know-how to select the right so-called standard.

In recent years, the area of confidentiality agreements has been one of the most prevalent areas for lack of proper selection. Instead of applying subtlety in negotiations, people regularly thrust hefty documents upon each other for signature thereby damaging trust - a vital ingredient for longer-term relationships.

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for specific projects. Nor could it produce practical licensing tips for producers such as:

- acquire only what you need
- select properties with the best chance of success
- acquire properties for which you and others can add value
- pay no more than you have to
- adopt sophisticated remuneration provisions

In the paper's Introduction, Gail Fulton has observed that: "It is a discussion document rather than a practical guide". So what would constitute a practical guide?

It can be said with certainty that finite copyright issues would be in the minority. The bulk of multimedia legal issues (and related commercial and management considerations) relate to analysis of deals and business relationships, contract drafting, market assessment, project and business risk assessment and management, product marketing, business processes and technology.

There are important differences between multimedia and other intellectual property product types or businesses. Web and disc-based media development is directly affected by the powerful mix of digitisation, globalisation, fractionalisation of markets, commoditisation, and increased rates of change. Therefore, the economics, technology, business processes and law of the multimedia marketplace are on a treadmill.

Back in 1994, industry players world-wide believed that the consumer CD-ROM title market was going to be huge, very quickly. The mantra sung for producers was "Content is King". This royalty analogy led to few royalties.

A generation or two further in the history of multimedia, that is in 1995, for most the mantra morphed into: "You need content plus services". Those players had moved into the service sector, primarily building Web sites for small and large businesses. However, producers and content developers and suppliers with limited know-how in business processes and professional services (i.e. those in the vast majority), were not able to fashion services to charm real customers to sign cheques.

Those who remain active in the market have survived on the basis of effective strategy, economies of scale and scope and excellent business management skills.

There are many stories of lost opportunities in the Australian multimedia business during the five years since 1992. They relate to the active, inactive and liquidated - artists, projects, companies, and state and federal governments. Still, the market has grown exponentially in terms of the number of digital media solutions, players, titles and level of investment.

Given its history, perhaps the first principle for the multimedia market should be: "Hype never reflects reality". If so then in 1998 we should all be very wary when called to labour feverishly for the new deity of "electronic commerce".

The contemporary formula for success for many successful suppliers in multimedia is: content + design + management consultancy. Design is a must since multimedia requires a rigorous integration between form, function and content. Management consultancy is necessary due to the level of smarts required to actually address customer needs - whether that be entertainment, information, training, education, transaction re-engineering, or consumer sales off the Web.

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Legal issues relevant to content and design involve much more than copyright or even privacy, security, defamation or censorship laws. When selecting a lawyer, a participant in multimedia is best advised to look for one with experience and expertise in structuring both deals and relationships for intellectual property.

Structuring deals requires legal knowledge and a sense for what might be perceived to be a "fair deal", including how to value and treat background and foreground intellectual property (e.g. the background source material and software brought to the project and the foreground digital media to be produced).

Structuring relationships calls for intimate knowledge of the individuals and organisations involved, relevant law, conventions for licensing in intellectual property industries, and market trends.

For selection of a lawyer other critical criteria should be know-how regarding - drafting methodology and design, deal points, business planning and strategy,

business and product financing, product management and intellectual property auditing. The breadth of these factors might be surprising. However, clients expect, need and deserve more than answers to finite legal issues.

When launching out with your dollars invested in a CD-ROM, DVD-ROM, Web site or other multimedia product or business, the fundamentals to get right include:

- gather market intelligence
- understand the context - drivers of change
- plan - target your position on value chains
- work with focused colleagues with assigned and monitored specific tasks
- secure cash flow and finance

Valuation of intellectual property in the digital media context is a fascinating and complex subject. There is rarely an instantly discoverable quick solution. Typically various types of clauses can be marshalled to improve positions i.e. maximise returns and reduce risks. It is also helpful to ask your lawyer to formulate valuation principles prior to negotiations.

Lawyers with expertise should be able to assist participants address such practical topics. After all, the business of law is a know-how business. It's a combination of theory and practice, the "know" part being the theory and the "how" part being the practice. As a useful booklet "Licensing Content for Multimedia" helps the "know" part in an industry that needs information in bucket loads. Licensing content for multimedia remains a sophisticated business activity requiring lots of the "how", only some of which can be standardised.

Credits

** "Licensing Content for Multimedia" is available from the Australian Copyright Council
Tel (02) 9318 1788 Fax (02) 9698 3536

This paper was first published in the June 1998 issue of the *Bulletin*, newsletter of the Australian Business Publishers Association.

Noric Dilanchian (BA LLB) founded Dilanchian Lawyers & Consultants in 2000. Noric is a lawyer in Sydney with almost two decades of experience in helping clients identify, develop, manage, protect and effectively commercialise their intellectual property.

Dilanchian maintains a library of templates and precedents for licensing in numerous for numerous industries, sectors, markets and technologies.

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