

Contractual Uncertainty in Multimedia Products

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Although many multimedia technologies that exist today simply involve combinations of familiar forms of expression, we are beginning to see experimental forms of new media that could result in breakthroughs that change the way we experience media. We may begin to see works that include components different in kind from the literary, audio visual, or musical works with which we are currently familiar. This uncertainty critically affects the scope and delineation of contractual rights in multimedia deals being done today.

How Allocate the Unknown?

An example of new media is virtual reality. Virtual reality input devices are being used as means to manipulate objects in the virtual environment. Virtual reality technology is therefore slowly but surely beginning to connect the sense of touch to the sight and sound commonly experienced in today's mainstream media forms.

Because changes are occurring so rapidly, however, it is extremely difficult to predict what forms of new media will ultimately be successful in the marketplace. There is much work being done in many different areas, some of which will become successful and some not. For example, work is being done to incorporate the other senses, such as smell and taste, in the multimedia experience. Virtual reality books have been developed that integrate odors with occurrences in the book.

Because of all of the work that is being done and the limitless imaginations of those working in this area, it is not possible to envision all of the forms of media that will ultimately be developed.

As the new forms of media evolve, proprietary and ownership rights issues will become more important and subject to more disputes. The phrase "look and feel" may actually come to mean what it literally states if works begin to take on certain tactical sensations to the user! It would seem appropriate that the "feel" of a work might under appropriate circumstances contribute to the work's copyrightability. Because of the exponential rate of technological progress, contracts being negotiated and entered into now may be addressing and allocating ownership of rights in intellectual property that do not now exist and that very likely could not even be imagined by the parties to the contract. Thus, contracting parties must be cognizant of the issue that they are, unknowingly if not knowingly, allocating rights to reproduce and distribute forms of media that they can not currently foresee.

Learning from Analogous Situations.

One way to deal with the uncertainty of negotiating and interpreting multimedia contracts is to examine how courts have interpreted contracts that were entered into before the development of now common forms of media. The courts have used two basic approaches in interpreting contracts that grants rights with respect to a particular media (e.g., "motion picture rights"), when a dispute later arises about whether a later, new method of commercialization (e.g. VCRs) was encompassed within the grant.

Some courts have determined that absent evidence of contrary intent, "the licensee may properly pursue any uses which may reasonably be said to fall within the media as described in the license." An example of this approach is a case that determined that a licensee may pursue any uses reasonably within the medium described, even if not specifically enumerated. The court concluded that an assignment in 1930 of motion picture rights to a musical play included an assignment of the right to authorize broadcasting of the film on television. What makes the case relevant is that television was not commercially introduced until more than ten years after the

original license was entered into.

Other courts are more protective of the licensor. They presume that a license with respect to a particular medium (e.g. motion picture rights), includes only such uses as fall within the unambiguous core meaning of the term and excludes any uses which lie within the ambiguous fringes (for example, exhibition of motion picture film on television). This approach reserves for the licensor all rights that were not expressly and clearly licensed or sold to the licensee.

This approach is exemplified by a case that determined that a license covering the right to exhibit a film "by means of television" does not include the right to distribute video cassettes of the film even though prior cases had determined that video cassettes and video disks are a form of exhibition. Although the license expressly authorized the recording and reproduction of the movie "in any manner, medium, form, or language" the court concluded that the license did not authorize the distribution of such copies to the public by sale or rental. The licensee, Paramount Pictures, argued that the distribution of video cassettes for showing in private homes was a form of "exhibition by means of television." This argument was rejected, because the court determined the exhibition on television differs fundamentally from exhibition by means of a VCR in several respects. The court based its conclusion in part on the fact the technology in question did not exist at the time of the license grant. There are also cases on the books that provide that even if the contract does not expressly reserve rights to the grantor, the court may provide that protection. In one such case, the court stated that it was "troubled" that there apparently was no express reservation of rights in the contract. Nonetheless, the court stated that "fairness would seem to require that a court treat the absence of the new or unknown media, television in the instant case, as about the equivalent of a reservation against the use of the work product of the artist or performer by a known medium."

Lessons to be Learned from the Cases.

Unfortunately, the result of a particular controversy may turn on the jurisdiction in which the controversy arises. No matter what the jurisdiction in which the controversy arises, however, clear contractual language that establishes the intent of the parties with respect to new uses and new media will make the end result easier to determine.

If you are in a position of acquiring licensed rights, the safest way to insure that new media rights will belong to you is to acquire all rights to the work, with no rights of any kind reserved by the grantor. This is, of course, not always possible. When you are unable to acquire all rights to a work, but you desire to assure yourself that the subset of rights that you do acquire includes future developed media, it is critical that the contract specifically address the issue of future technologies, and that the relevant language includes phrases such as "all media whether now known or hereafter invented." In addition, the placement of this language, and what it modifies, is critical. If all media rights are desired for a particular subset of rights, it may not be enough to say that you have the right to make copies of the work in all media now known or hereafter invented. If the clause modifies only the licensee's rights of recording and reproduction but not its rights of exhibition and distribution, you may not have obtained what you hoped to obtain.

Similarly, when you are granting rights, the same analysis needs to be employed if you desire to limit the scope of the grant of the rights.