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ABSTRACT

Multimedia presentations offer educators and other communicators new avenues to reach audiences, but they combine a variety of legal hazards. Producers of multimedia can end up on the receiving end of lawsuits based on the many facets of copyright, privacy, and defamation law, as this guide illustrates. Copyright gives authors, composers, photographers, and others the right to protect creative efforts, and it serves to benefit the general public by encouraging creation of new works. Understanding public performance licensing and the copyrighting of music is essential for the multimedia producer. Other concerns relate to written works, works of art, and photographs. Copyright protection can extend to video footage of newsworthy events. Fair use is the doctrine that some unauthorized copying is permissible through a balancing of public interest, the rights of the copyright owner, and the nature of the use. The law of privacy presents another avenue for people to prevent the multimedia producer from using their likenesses or other attributes of their personalities. Yet another concern for the multimedia producer and user lies in the area of libel. Legal risks abound for the careless multimedia producer, but a few simple precautions will help avoid most liabilities. The creative urge is limited by the imagination of the multimedia producer and the rights of others. (SLD)

A Multitude of Risks in Multimedia

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A Multitude of Risks in Multimedia

Multimedia presentations offer the professional electronic communicator new avenues through which to reach audiences. The combination of visuals in the form of still pictures, film, videotape, cartoons or animation and audio tracks in formats which blend and meld each creative element, bring to life the producer's concepts, knowledge and persuasive messages.

Information users tout multimedia for its effectiveness in job training[1], sales and other information presentation and desktop video[2].

But multimedia also combines a wide variety of legal hazards and producers can wind up on the wrong ends of lawsuits based on the many facets of copyright, privacy and defamation law.

The unauthorized use of the creative works of others, changes made in copyrighted works, the use of people's likenesses without their permission and making people, products and institutions objects of ridicule open the door to expensive and prohibitive litigation. The multimedia producer, from broadcaster to educator, must be aware of the legal risks involved when being creative in

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[1] Mark Magel, "Selling Your Boss On the Need for Interactive Multimedia," AV Video, November 1992, pp. 78-83.

[2] Joe Cillo, "Apple: 'Media Integration' Is What we Do; More To Come," Computer Pictures, January 1991, Special Section 12.
Jim Strothman, "Commodore Amiga, Multimedia Vet, Aids in Presentations, Training," Computer Pictures, January 1991, Special Section 14.

this expanding medium.

The Many Dangers in Copyright

Copyright is simply the right given to authors, composers, photographers and others to protect their creative efforts. It exists, as the Supreme Court declared in Sony Corp. of America v. Universal City Studios, Inc., to benefit the general public by encouraging the creation of new works.

"The immediate effect of our copyright law is to secure a fair return for an 'author's' creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good."[3]

As such, the copyright holder has the right to bargain for the use of his or her works, deny permission when she is so inclined and to seek legal redress when his or her rights have been infringed.

Licenses for Public Performance

Perhaps the most widely recognized legal trap in multimedia today lies in the area of public performance licensing as multimedia producers show off the fruits of their creativity. Compulsory licensing, the process of paying a fee to use composers' works for public performance, covers the use of music in multimedia

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[3]Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 429, 104 S.Ct. 774 (1984).

presentations.[4]

Put most simply, persons who use other people's compositions in public performances must pay for that exploitation. The principle was laid out clearly in 1917 when the U.S. Supreme Court decided the case of Herbert v. Shanley.[5] Victor Herbert composed and held the copyright to the march, "From Maine to Oregon." The Shanley Co. owned the Vanderbilt Hotel. The hotel had an orchestra and it played Herbert's march and other songs for the entertainment of the hotel's guests during mealtimes.

The Supreme Court said that the performance was part of the hotel's entertainment offering for which it was being paid.

> It is true that the music is not the sole object, but neither is the food, which probably could be got cheaper elsewhere. The object is a repast in surroundings that to people having limited powers of conversation, or disliking rival noise, give a luxurious pleasure not to be had from eating a silent meal.[6]

Because the hotel was exploiting Herbert's music while engaged in business, it owed him compensation. The same has been applied to other businesses which make use of music, either incidentally or as their chief commodity.[7] Similarly, when a multimedia

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[4]Doug Wood, "Facing the Reality of Performing Rights," AV Video, September 1992, pp. 46-51.

[5]Herbert v. Shanley, 242 U.S. 591, 37 S.Ct. 232 (1917).

[6]Id, at 594.

[7]Copyright holders and licensing organizations have sued, with varying success, retail outlets, Sailor Music v. Gap Stores, Inc., 668 F.2d 84 (2d Cir.1981); restaurants, Merrill v. Bill Miller's

producer incorporates someone's music into a presentation, she is deriving a benefit from the composer's creative efforts and owes compensation to that composer or the subsequent holder of the copyright to the composition.

Because it is impractical to deal individually with the users of their music, composers formed organizations to help enforce their property rights in their music and more efficiently pass through the compensation which comes from licensing fees.[8] There are two major organizations in the United States which handle copyright and fees for composers -- ASCAP (American Society of Composers, Authors and Publishers) and BMI (Broadcast Music, Inc.). The two groups are nonprofit organizations operating as collectives which represent copyright holders.

ASCAP and BMI are zealous advocates of their members' rights, checking broadcasters, nightclubs, juke box operators and retail businesses which use professional sound systems to enhance their stores' appeal. The two groups, which represent 95 percent of recorded music, do not hesitate to sue when their members' rights are infringed, the Memphis Business Journal reported in January, 1992. "Failure to pay after being notified typically leads to a

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Bar-B-Q Enterprises, 688 F.Supp. 1172 (W.D.Tex.1988); and amusement places, Springsteen v. Plaza Roller Dome, Inc., 602 F.Supp. 1113 (M.D.N.C.1985).

[8]Victor Herbert, incidentally, was one of the founders of ASCAP.

$250,000 lawsuit -- plus the unpaid royalty."[9]

In 1992, the ASCAP and BMI extended their activities to include trade shows and their exhibitors. In some cases, individual exhibitors have found the plug pulled on the audio portions of their presentations.[10] In other instances, show operators have paid blanket licensing fees. But some show managers simply have decided to ban music rather than pay the fees, the Communications Daily reported in June.[11]

The implications for the multimedia producer are clear in that use of copyrighted music poses legal liability when users have not obtained permission. The liability applies only to valid copyrights. But while music in the public domain may be used freely, specific performances may have been copyrighted and are protected. Michael Jackson discovered that pitfall when the Cleveland Symphony sued him in April, 1992, over Jackson's use of a 67-second choral excerpt from Beethoven's "Symphony No. 9" for his "Will You Be There." Beethoven's music lay in the public domain, but the version recorded by the Cleveland Symphony was protected.

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[9]Scott Shepard, "Name That Tune," Memphis Business Journal, 6 January 1992, sec. 1, p. 3.

[10]Doug Wood, "Facing the Reality of Performing Rights," AV Video, September 1992, pp. 46-51.

[11]"Consumer Electronics," Communications Daily, 3 June 1992.

Some composers or copyright holders also place restrictions on the uses of their music and in some cases have denied their works to advertisers. The Beatles filed a $15 million lawsuit against Nike in 1987 for using their song "Revolution" in a television commercial.[1]

The Serious Consequences of Sampling

In addition to infringement suits brought over the taking of whole songs or significant portions, copyright suits are cropping up over "sampling," the process of taking a relatively small portion of a song and incorporating it into a new work.

In one of the first sampling infringement lawsuits decided in the federal courts, a judge from the Southern District of New York ruled that the unauthorized use of eight bars of the song "Alone Again (Naturally)" constituted copyright infringement.[2] The eight bars of the song were looped to form the musical foundation for rap star Biz Markie's vocalization in his song, "Alone Again."

The case was settled before reaching the appellate courts, but the decision signals that using portions of someone else's compositions without permission is risky business. Sampling, like

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[1]Bruce Pilato, "All You Need is Litigation," ABA Journal, July 1990, pp. 55-59, at 56.
Nike later paid $250,000 to use the song after Michael Jackson bought the rights to the library.

[2]Robert Sugarman and Joseph Salvo, "Sampling Case Makes Music Labels Sweat," The National Law Journal, 16 March 1992, p. 34.

other music infringement cases relies on the copyrightability of the original work, the ability to recognize the sampled material as the original work and proof that the sample was owned by someone else. Copyrightability rests on the originality and creativity of the work as produced by the composer.

Because a multimedia producer takes a sample for its distinctness and appeal of the music and the subsequent reuse of the still-recognizable music poses a great danger in a lawsuit. Multimedia producers should be aware that in these cases, their works may be the most damning evidence against them in an infringement case.

Other Copyright Concerns

Copyright infringement is not limited to music. Authors and cartoonists retain copyrights to their written and drawn works and are willing to sue over unauthorized exploitation. The Disney Co. is noted for its zealous protection of its characters. Authors do not have a literary counterpart to ASCAP and BMI and so may not discover infringement as readily, but they can and will sue.

A new group which has entered copyright litigation is made up of professional photographers. Photography has been long recognized as deserving of copyright protection with the key case of Burrow-Giles Lithographic Co. v. Sarony[4] over the unauthorized

[4]Burrow-Giles Lithography Co. v. Sarony, 111 U.S. 53, 4 S.Ct. 279 (1884).

copying of photographs of Oscar Wilde in 1884. The nature of copyright law is such that a photographer can take a picture of a subject, say a person, sell it to that person and yet retain the copyright to the picture. That is because the copyright is separate from the physical object.[15] The person who buys the photograph owns the physical photograph. But unless that person also purchases the copyright, the photographer retains the right to control who makes copies.

Olan Mills, Inc. brought suit against Linn Photo Co. in the Northern District of Iowa over reproduction of photographs. While the suit was unsuccessful on its merits[16], it nonetheless puts users

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[15]17 U.S.C. Sections 202, 204.

Section 202 - "Ownership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied."

Section 204 - "(a) A transfer of copyright ownership, other than by operation of law, is not valid unless an instrument of conveyance, or a note or memorandum of the transfer, is in writing and signed by the owner of the rights conveyed or such owner's duly authorized agent."

[16]Olin Mills sent an investigator to Linn Photo with four copyrighted photographs to have them enlarged. The investigator signed a "permission to copy" form which authorized the copying and included indemnification in the event Linn Photo was sued.

Olan Mills then sought a declaratory judgment that Linn could not reproduce copyrighted photos without consent. The suit failed because Olan Mills had given Linn Photo, through its agent/investigator, permission to copy the photographs and had no evidence of any copying of Olan Mills copyrighted photographs without consent.

"Investigator's Request for Copies is Copyright Owner's Authorization," BNA Patent, Trademark & Copyright Law Daily, 30 October 1991.

of photographs on notice of the possibility they can be sued for infringement.

In a case which proved successful for the photographer, the Second Circuit Court of Appeals ruled that the copying of a photograph by sculpting it was an infringement. The Second Circuit upheld the infringement finding of the U.S. District Court for the Southern District of New York in the case of Rogers v. Koons[1]. The case involved the reproduction of artist-photographer Art Rogers' work "Puppies," by sculptor Jeff Koons who turned the two-dimensional photograph, which was being sold as a museum notecard, into a three-dimensional sculpture.

The case is of special relevance to multimedia producers for two reasons: (1) the court found infringement even though the copying was in another medium, which could well be the case if a photograph were manipulated through computer effects; and (2) the court noted that Koons tore off the portion of the notecard bearing the copyright notice before making his copy, which raises the notion that similar actions, such as removing a copyright notice from a visual work when it is scanned, could prove troubling to a court and cast the multimedia producer in a poor light.

The result is, the scanning of a photograph in a magazine or a poster or a calendar into a multimedia presentation could well

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[1] Rogers v. Koons, 960 F.2d. 301 (2dCir.1992).

amount to copyright infringement.

In addition to still photographs, copyright protects film and video. George Holliday, the man who used his new video camera to record the Rodney King beating, filed a $100 million copyright against Los Angeles television station KTLA, its parent Tribune Co, Cable News Network, NBC, ABC and CBS.

In the fall of 1992, Holliday settled another copyright infringement suit against director Spike Lee and Warner Bros. over the use of a portion of the tape in the movie, "Malcolm X."

Copyright protection can even extend to video footage of newsworthy events as a video reporting service discovered in the case of Los Angeles News Service v. Tullo[8]. In that case, Audio Video Reporting Services copied and marketed news video of an airplane crash and train wreck made by Los Angeles News Service. The appellate court found that Los Angeles News Service's raw news video deserved copyright protection and thet Audio Video Reporting Services infringed that copyright by copying the video.

The court rejected Audio Video Reporting Services' claim of a Fair Use defense because Audio Video Reporting Services' use was commercial in nature, it sold the tapes to interested persons and

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[8]Los Angeles News Service v. Tullo, 973 F.2d 791, (9thCir.1992).

businesses.[19]

Multimedia producers may recognize the term Fair Use as a defense to copyright infringement but may not understand the limited protection it provides. Fair Use is the doctrine that some unauthorized copying is permissible through a balancing of three general interests: public interest, the rights of the copyright owner and the nature of the use.

In making Fair Use a statutory defense to copyright infringement Congress set out four considerations on which to judge individual cases. They are (1) the purpose and character of the use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used, and (4) the effect of the use on potential market.

In most court cases which have followed the incorporation of Fair Use in the copyright statute, the use of the copied material for profit weighs strongly against a finding of Fair Use.[20] In addition, the courts have also given considerable weight to the effect of the copying on the potential market for the copyrighted

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[19]Los Angeles News Service v. Tullo, 973 F.2d 791, 798, (9thCir.1992).

[20]Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 105 S.Ct. 2218 (1985).

"The crux of the profit/nonprofit distinction is not whether the sole use is monetary gain but whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." at 562.

work.[21]

A multimedia producer's claim of innocent infringement, or "I didn't know it was copyrighted," are irrelevant with regard to a finding of infringement although it may have a bearing on damages and the question of whether the infringement was willful or not.

Copyright law expressly rejects the defense of ignorance in infringement as cases have held that intent is not required to find infringement. As Justice Louis Brandeis said in the case of Buck v. Jewell-La Salle Realty Co., "Intention to infringe is not essential under the Act."[22] And Judge Learned Hand's opinion in Fred Fisher, Inc. v. Dillingham offered little comfort to the infringer when he wrote, "The author's copyright is an absolute right to prevent others from copying his original collocation of words or notes, and does not depend upon the infringer's good faith."[23]

Nor is the claim that the infringer "took only a little" an effective defense. The courts have stayed away from a bright line definition of how much taking is too much, preferring to judge each

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[21] Iowa State University Research Foundation, Inc. v. American Broadcasting Co., 621 F.2d 57 (2dCir.1980).
In this case, ABC used a 2 1/2 minute segment of a copyrighted film biography of wrestler Dan Gable during the network's Olympic coverage. The court found that the taking of the segment cut off a market for the film.

[22] Buck v. Jewell-La Salle Realty Co., 283 U.S. 191, 198, 51 S.Ct. 410 (1931).

[23] Fred Fisher, Inc. v. Dillingham, 298 Fed. 145, 148, (S.D.N.Y.1924).

case on its own merits. But even small takings present risks. Copyright cases have been brought over the use of four notes of a song[24]. And in the oft-quoted opinion of Judge Learned Hand in the case of Sheldon v. Metro-Goldwyn Pictures Corp.[25], "no plagiarist can excuse the wrong by showing how much of his work he did not pirate."[26]

Yet another copyright hazard arises over the editing or other alteration of a copyrighted work. Federal copyright law was amended in 1990 to give creators of visual art rights of attribution and integrity, that is to say, the right to prevent someone else from "distortion, mutilation, or other modification of that work which would be prejudicial to his or her honor."[27] The result is that a multimedia producer who significantly alters an image scanned into his or her computer may face a lawsuit from an enraged artist over the changes made.

Infringement of any stripe can be costly. A copyright plaintiff can sue for profits made on the multimedia presentation, as well as actual damages. Actual damages might be the revenues

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[24] Elsmere Music, Inc. v. National Broadcasting Co., 482 F.Supp. 741 (S.D.N.Y. 1980), aff'd, 623 F 2d 252 (2d Cir. 1980). The case was successfully defended on the grounds that the four notes were used in a parody which was a fair use of the copyrighted material.

[25] Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49 (2d Cir 1936), cert den'd, 298 U.S. 669, 56 S.Ct. 835 (1936).

[26] Id., at 56.

[27] 17 U.S.C., Section 106A.

that a copyright holder lost through the multimedia producer's exploitation of the work.

Copyright plaintiffs might choose statutory damages. Those damages, set by the copyright law range from $500 to $20,000. If the violation is willful, that is to say that the infringer knew she was infringing, the damages can be set by the courts at up to $100,000.[28] In addition there are criminal penalties of up to $250,000 in fines and or imprisonment for up to five years in some circumstances.[29]

Educators at state universities are fair game for copyright suits. It is true that state employees may enjoy some protection under state sovereign immunity or statutes limiting liability for tortious acts. But federal copyright law spells out quite clearly that no state employee has immunity.[30]

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[28]17 U.S.C. Section 504 (c)(1) ". . . the copyright owner may elect, at any time before final judgment is rendered, to recover instead of actual damages and profits, an award of statutory damages for all infringements . . . in a sum of not less than $500 or more than $20,000 as the court considers just."

17 U.S.C. Section 504 (c)(2) "In a case where the copyright owner sustains the burden of proving, and the court finds, that the infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than $100,000."

[29]18 U.S.C. Section 2319.

[30]17 U.S.C. Section 511 (a) "Any State, any instrumentality of a State, and any officer or employee of a State or instrumentality of a State, acting in her or her official capacity, shall not be immune, under the Eleventh Amendment of the Constitution of the United States or under any other doctrine of sovereign immunity,

The Right of Publicity: A "Copyright" in Faces

If copyright gives protection to the creative fruits or brainchildren of writers, composers, photographers, artists and other creative people, then the law of privacy presents another avenue for people to prevent the multimedia producer from using their likenesses or other attributes of their personalities.

Consider a multimedia sales presentation which incorporates a photograph of a person. The photograph might come from a magazine, other publication or be an original photograph taken on some city street, park or other public place. Unless the person photographed has given permission for his or her her likeness to be used, the result can be a suit for invasion of privacy under the tort of appropriation of likeness.

From the early case of Pasevich v. New England Life[1] in 1905 in which a Georgia man sued over the use of his photograph in a falsified testimonial for an insurance company, the courts and legislatures have recognized that people have a right to exploit their own features and to prevent others from doing so. Celebrities and unknowns have sued over the use of their likenesses in advertisements, television shows, movies and other for profit

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from suit in Federal court by any person, including any governmental or nongovernmental entity, for a violation of the exclusive rights of a copyright owner. . . "

[1] Pasevich v. New England Life, 122 Ga. 190, 50 S.E. 68 (1905).

publications.

The Ninth Circuit Court of Appeals ruled in favor of allowing TV game show hostess Vanna White to pursue her lawsuit against Samsung Electronics over an advertisement which featured a robot which resembled White in a setting similar to the program "Wheel of Fortune."

And the Ninth Circuit upheld a trial court judgement against Frito-Lay by actor-singer Tom Waits over the misappropriation of his distinctive singing voice.[32] The case, which was based on California state law, included damages beyond compensation for Waits' services. As an action based on privacy rights, Waits also was able to bring evidence that the use of a sound-alike singer for Frito-Lay products shocked, angered and humiliated him as well as making Waits appear to be a hypocrite because of his previously stated position he would not appear in commercials.

State statutes and common law provide legal means for persons who find themselves in someone else's promotional or sales material. Section 3344 of the California Civil Code spells out the risks in using someone's "name, voice, signature, photograph or likeness" for commercial purposes. The section reads, in part, that anyone who knowingly uses those features which belong to someone else "for purposes of advertising or selling, or soliciting

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[32] Waits v. Frito-Lay, Inc., 20 Med. L. Rptr. 1585 (9thCir.1992).

purchases of, products, merchandise, goods or services, without such person's prior consent . . . shall be liable for any damages sustained by the person or persons injured as a result thereof."

In addition, the person whose likeness has been taken can take the profits made from the use. For those situations in which the use does not generate damages or profits, the person suing can get minimum damages of $750 plus attorneys fees. With attorneys fees running from $100 to $300 an hour, any case can wind up costing thousands of dollars.

Elroy "Crazylegs" Hirsch successfully employed Wisconsin common law against appropriation of his nickname for a shaving product for women.[33]

Liability for the uses of other people's pictures extends past commercial use. The Restatement (Second) of Torts explains that invasion of privacy -- appropriation of likeness, extends past commercial appropriation. "It applies also when the defendant makes use of the plaintiff's name of likeness for his own purposes and benefit, even though the use is not a commercial one, and even though the benefit sought to be obtained is not a pecuniary one."[34]

The Fifth Circuit helped explain the application of the

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[33]Hirsch v. S.C. Johnson & Son, Inc., 280 N.W.2d 129 (1979).

[34]Restatement (Second) of Torts, Section 652C, Comment (b).

Restatement in Benavides v. Anheuser Busch[35] where a Medal of Honor winner sued over a film made of his exploits and shown by Anheuser Busch. The court said "To prove a cause of action for misappropriation, a plaintiff must show that his or her personal identity has been appropriated by the defendant for some advantage, usually of a commercial nature, to the defendant."[36]

But, as the language suggests, there can be situations where the taking of someone else's likeness or some other element of their personality can lead to a successful suit even where the production is not intended to make a profit or create some other economic benefit. A check of state statutes is in order though, some states make only the commercial use of someone else's name or likeness actionable.

The right of privacy and publicity arises when some use of a person's likeness of identity is used to suggest an endorsement or is used to promote a business or other enterprise. In Flores v. Mosler Safe Co.[37] the victim of a fire sued over an advertisement for fire-resistant safes. The advertisement included a news story about the fire which mentioned Joseph Flores several times. But the safe company never sought Flores' permission to use his name

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[35] Benavides v. Anheuser Busch, 873 F.2d 102, (5thCir.1989).

[36] Id., at 104, quoting Moore v. Big Picture Co., 828 F.2d 270, 275, (5thCir.1987).

[37] Flores v. Mosler Safe Co., 164 N.E.2d 853, (Ct.App.N.Y.1959).

in the ad. Flores sued the safe company based on New York state law and recovered for the use of his name. And in Moore v. Stonehill Communications[38] a model sued a book publisher over the inclusion of a photograph of her in an advertisement for a book.

A related privacy claim could arise under the tort of invasion of privacy -- false light in which a person is presented to the public in a false position or with false attributes. Cher sued Forum International for its promotion of an interview which appeared in the pages of that magazine. The interview originally was intended for publication in a different magazine but was sold to Forum and a second periodical. Forum advertised the interview as an exclusive with, among other statements, the sentence, "There are certain things that Cher won't tell People and would never tell Us. She tells Forum."[39] The advertisement also contained the sentence, "So join Cher and FORUM's hundreds of thousands of other adventurous readers today."[40]

In upholding the trial court's judgment for Cher, the Ninth Circuit pointed out the differences between use of a person's likeness in advertising and suggesting endorsement. "[T]he

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[38]Moore v. Stonehill Communications, 7 Med.L.Rptr 1438 (New York 1981).

[39]Cher v. Forum International, Ltd., 692 F.2d 634, 638, cert den'd, 462 U.S. 1120, 103 S.Ct. 3089 (1983).

[40]Id., at 639.

advertising copy was patently false. This kind of mendacity is not protected by the First Amendment and those defendants responsible for the placement and circulation of the challenged advertising copy must look elsewhere for their protection."[41]

The conclusion here is that a multimedia producer who incorporates a likeness of someone in a manner suggesting endorsement of a product, idea or service without having first secured an agreement to that effect, may find themselves facing privacy suits for both appropriation of likeness and for placing the subject in a false light.

Defamation

Yet another area of concern for the multimedia producer and user lies in the area of libel.

Libel arises when someone has been depicted in a manner which tends to diminish their standing The elements of libel are: (1) Identification (2) Publication (3) Defamation (4) Fault and (5) Injury.

As multimedia presentations rely on visual images, identification is relatively easy to establish as the person is recognizable. Publication occurs when someone other than the multimedia creator or the person depicted observes the work. Defamation is a product of interpretation of words and images,

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[41] Id., at 639.

whether the presentation tends to lower the esteem in which the person is held in the community or which exposes the person to "hatred, ridicule or contempt."[42]

A 1936 U.S. Court of Appeals case helped establish a right to sue for depictions which result in ridicule. In Burton v. Crowell Publishing Co.[43] a photographic advertisement for Camel cigarettes depicted a widely known steeplechaser in an unfortunate context in which a portion of the jockey's saddle appears to be a part of his anatomy. "So regarded, the photograph becomes grotesque, monstrous, and obscene. . ."[44]

The lesson here is that making a joke at another's expense may result in a costly lawsuit.

But that is not to say that multimedia producers and users are helpless and exposed to the mercies of libel lawyers. The landmark decision in New York Times v. Sullivan[45] provides constitutional protection for defendants in libel cases involving public officials and public figures. In addition, the Supreme Court has protected opinion in the form of humor. A reading of relevant texts and consultation with experts can help avoid litigation.

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[42]Restatement of Torts, Section 559.

[43]Burton v. Crowell Publishing Co., 82 F.2d 154 (2ndCir.1936).

[44]Id., at 154.

[45]New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710 (1964).

Further, the Supreme Court has declared that opinion is protected speech. And humor is treated as a form of opinion. Therefore, if a multimedia presentation pokes fun at someone in a context which cannot be understood to be anything but a jest, then the matter is protected as opinion speech under the First Amendment.

That does not throw open the doors to any mean-spirited productions aimed at shriveling the psyche of another. Causes of action for intentional infliction of emotional distress, though little used, still exist for the victims of cruelties.

Staying out of the Docket

Although legal risks abound for the careless multimedia producer, a few simple precautions will help avoid most legal liabilities. Perhaps the single most helpful advice is to "look before you leap." Checking to see if permission has been given in advance of the incorporation of the many elements of a multimedia production will avoid infringement. If no permission has been given, then the producer should take the time to get the necessary licenses and consents.

The process of licensing and other agreements should be amply documented and relying on telephonic agreements may prove an embarrassment when presenting evidence to judge and jury. The practice of seeking agreements after the fact is risky, especially when a copyright or other rights holder, is presented with a fait

accompli. The practice is not likely to win enthusiastic approval. It can also be a significant liability in a lawsuit. Such was the case with the infringement suit over the song "Alone Again (Naturally)" where the defendant produced and distributed his work before seeking permission.

Simply going ahead with a production without checking is to play legal Russian Roulette. The difference is, the more successful the work, the more likely someone is to recognize the taking and the surer a costly court date becomes.

In the final analysis, the creative urge must be tempered by the knowledge that the multimedia producer is limited, not only be his or her imagination, but the rights of others as well.