

1995

## Domestic and International Copyright Issues Implicated in the Compilation of a Multimedia Product

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### Recommended Citation

Jane C. Ginsburg, *Domestic and International Copyright Issues Implicated in the Compilation of a Multimedia Product*, 25 SETON HALL L. REV. 1397 (1995).

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# DOMESTIC AND INTERNATIONAL COPYRIGHT ISSUES IMPLICATED IN THE COMPILATION OF A MULTIMEDIA PRODUCT<sup>†</sup>

Jane C. Ginsburg\*

## INTRODUCTION

Suppose an entrepreneur wishes to create an interactive multimedia product on the theme of the Exploration of Space. The multimedia work would assemble components created specially for the product, and others drawn from preexisting works. The latter might include: Leonardo da Vinci drawings of aeronautical machines, archival photographs of early airplanes, excerpts from 19th and 20th century science-fiction novels, text and photos of newspaper accounts of space flights, NASA space maps, television news clips, excerpts of motion pictures and television series, and musical compositions and recordings. Elements specially created for the product might comprise the computer program users would employ to "navigate" through the information, animation of the still images, new text, images, and music.

Before undertaking to create and commercialize such a product, its producer needs to consider a variety of copyright questions. Some concern the compilation of the product; others the distribution of the product in CD-ROM copies, or over a network. In this discussion, I will confine myself to the problems surrounding the creation of the multimedia product. These spawn different analyses depending on whether the compiled elements are newly created for the multimedia product (I), or whether they are drawn from preexisting works (II). Within the category of preexisting works, some will be in the public domain, or subject to exemptions from copyright protection (IIA), while others will require the permission of their authors or other copyright holders before our entrepreneur may incorporate them into the multimedia product (IIB). Finally, because the elements of the product and its audience stretch beyond U.S. borders, it will be important to take into

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<sup>†</sup> This Article was delivered at a symposium entitled *Travelling the Information Superhighway, Communications Law and Regulation in the Twenty-First Century* on November 17, 1994, at the Seton Hall University School of Law.

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account international as well as domestic copyright norms governing all of the questions here envisioned.

I. ASSEMBLING THE MULTIMEDIA PRODUCT: INCORPORATION OF NEWLY CREATED COMPONENTS

Copyright clearance of works newly created for the multimedia product will be relatively simple, compared to the steps that our entrepreneur will have to take to avoid copyright liability with respect to the incorporation of preexisting protected works. If the entrepreneur complies with the requisites of U.S. copyright law's "works made for hire" doctrine,<sup>1</sup> she should be able to avail herself of initial copyright ownership of the new ingredients (A). However, the entrepreneur should also be aware that the laws of some foreign countries in which she may wish to exploit the work do not confer similarly broad copyright ownership rights on employers and commissioning parties. If the law of these countries were to apply to determine copyright ownership of multimedia works distributed within their borders, our entrepreneur might find herself a stranger to the copyright in works created for the product (B).

A. *Initial Copyright Ownership: Works Made for Hire*

Under U.S. copyright law, the "author" and copyright owner of a "work made for hire" is not the actual creator of the work, but is the employer of an employee who created the work in the course of her employment.<sup>2</sup> The party commissioning the creation of certain works may also be the "author" of a work made for hire, but only if the work falls within certain specified and limited categories set forth in the Copyright Act, *and* if a writing signed by the creator states that the work will be a "work made for hire."<sup>3</sup> This agreement should be written and signed before the commissioned party begins creating the work.<sup>4</sup>

Applying the work for hire doctrine to our entrepreneur, we see that the copyright in elements created by regular employees, for example, in a navigation program created by an in-house computer programmer, belongs directly to the employer entrepreneur.

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<sup>1</sup> See 17 U.S.C. § 101 (1988) (definition of works made for hire); 17 U.S.C. § 201(b) (1988) (ownership of copyright in works made for hire).

<sup>2</sup> 17 U.S.C. § 101 (1988).

<sup>3</sup> *Id.*

<sup>4</sup> See, e.g., *Schiller & Schmidt, Inc. v. Nordisco Corp.*, 969 F.2d 410, 413 (7th Cir. 1992) (Posner, J.). *But see Playboy Enterprises, Inc. v. Dumas*, 53 F. 3d 549 (2d Cir. 1995).

neur.<sup>5</sup> If the entrepreneur has engaged a free-lance writer or artist to create other segments — for example, new text material or new animation of still images — these contributions may be works for hire, provided that the entrepreneur complies with the statutory requirement of securing a written work for hire agreement from the creator. The multimedia product falls within the categories of commissioned works subject to being works made for hire: the product could be considered either an “audiovisual work,” a “compilation,” or both.<sup>6</sup> The statute defines a compilation as:

a worked formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.<sup>7</sup>

**Audiovisual works are:**

works that consist of a series of related images which are intrinsically intended to be shown by the use of machines or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied.<sup>8</sup>

The multimedia product would be an audiovisual work because the various screen displays would constitute a “series of related images,” and because the images require the mediation of electronic equipment to make them perceptible. The multimedia product would also be a compilation because it gathers, organizes and presents preexisting materials (as well as new materials) in a way that should satisfy copyright’s, low, originality standard.

If the elements specially created for the multimedia product are deemed contributions to a work made for hire, then the em-

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<sup>5</sup> If the creator is not a regular full-time employee, but rather is commissioned to create the work, it is nonetheless possible that she may be considered an “employee” under the Copyright Act. The Supreme Court has declined to limit the “employee” category to “regular, salaried employees,” opting instead for application of the criteria set forth in § 228 of the Restatement (Second) of Agency to determine the existence of an employment relationship. *See* Community for Creative Non-Violence v. Reid, 490 U.S. 730, 740-41 (1989). Considerations that the Court addressed in rejecting CCNV’s pretensions to employer status included the artistic autonomy and discretion exercised by the creator, and the payment (or not) by the commissioned party of payroll taxes, social security taxes, employee benefits, or other insurance on behalf of the creator. *Id.* at 751, 751-52. The latter considerations have weighed especially heavily in post-CCNV courts’ determination of the existence of an employment relationship. *See, e.g.,* Aymes v. Bonelli, 980 F.2d 857, 861 (2d Cir. 1992); Marco v. Accent Publishing Co., 969 F.2d 1547, 1550 (3d Cir. 1992).

<sup>6</sup> See categories set out in 17 U.S.C. § 101 (1988).

<sup>7</sup> 17 U.S.C. § 101 (1988).

<sup>8</sup> *Id.*

ployer or commissioning party is the initial copyright owner under U.S. law, and enjoys all exploitation rights in the work. However, the entrepreneur may be less secure in her copyright ownership abroad. If she intends to exploit the work outside the U.S., she will need to take foreign copyright ownership rules into account.

*B. Foreign-law Issues of Copyright Ownership*

The copyright laws of many countries, particularly those of the civil law tradition, do not contain a blanket employer-ownership rule. Rather, in many countries, whatever her employment status, the actual creator of the work is the "author" and initial copyright holder.<sup>9</sup> However, many countries' laws do contain partial exceptions to the author-ownership principle. The exception of most significance to our entrepreneur provides that the participants in the creation of an audiovisual work are presumed to have transferred exploitation rights to the producer of the audiovisual work.<sup>10</sup> Nonetheless, the presumption of transfer is less advantageous than the work made for hire doctrine, notably because it may require the producer to account to the creative participants for revenues with respect to each mode of exploitation of the audiovisual work.<sup>11</sup> By contrast, under a works made for hire regime, it suffices to pay the creator's salary, or to make a lump-sum payment to the commissioned party.

While the entrepreneur cannot guarantee the exclusive application of U.S. law to determine copyright ownership when the work is exploited abroad, she can endeavor to protect herself by contract in at least two ways. First, in the case of a work for hire, even though it is not necessary under U.S. law to secure an explicit transfer of all the creative participants' copyright interests (if any), such a transfer may protect the entrepreneur in the event that a foreign country does not recognize her initial copyright ownership. Second, the contracts with the creative participants should specify that U.S. law will govern the contracts. In that way, it may be possible to avoid foreign-law provisions that require substantial and complicated accounting to creative contributors to audiovisual works.

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<sup>9</sup> See, e.g., CODE DE LA PROPRIÉTÉ INTELLECTUELLE [C. PROP. INTELL.] art. L. 111-1.3 (Fr.) (the existence of an employment relationship in no way detracts from the principle that the creator of the work is its copyright owner).

<sup>10</sup> See generally JACQUELINE SEIGNETTE, CHALLENGES TO THE CREATOR DOCTRINE 117-59 (1994) (discussing German and Dutch law presumptions of transfer of copyright in audiovisual works). See also C. PROP. INTELL. art. L. 132-24 (Fr.).

<sup>11</sup> See, e.g., C. PROP. INTELL. art. L. 132-25 (Fr.).

## II. INCORPORATION OF PRIOR WORKS

The bulk of the elements featured in our imagined multimedia product would be taken from preexisting works. The problems these elements can present range from none to daunting. To the extent that the targeted material is in the public domain, no copyright permission is needed. The only problem is identifying whether or not the element in question has in fact fallen out of copyright (if it was ever in it). In the middle ground are elements still protected by copyright, but subject to free use exemptions. Here, the problem is determining whether the exemptions properly apply. The problems become most challenging when the works at issue are currently within copyright, and no exception applies. In these cases, the obligation to obtain permission may be certain; but the identity of the person entitled to grant permission may be considerably less so. Finally, foreign law may complicate the analysis not only with respect to economic rights, and particularly the duration of these rights, but with respect to "moral rights," that is, the right of the author, independently of the disposition of the exploitation rights in the work, to receive authorship credit, and to ensure the integrity of her work.<sup>12</sup>

### A. *Copyright-free Components*

#### 1. Public Domain

Under U.S. law, a work will be in the public domain if it is a "work of the United States Government."<sup>13</sup> A "work of the United States Government" is a "work prepared by an officer or employee of the United States Government as part of that person's official duties."<sup>14</sup> As a result, NASA photos, maps, and films, for example, are copyright-free, and our entrepreneur may incorporate them without seeking permission.

Whatever the origin of the work, domestic or foreign, the work will also be in the public domain in the United States if its term of copyright has expired, or if it did not obtain federal copyright protection at all due to failure to comply with the formalities in force at the time of its initial publication. However, the recently passed legislation to implement the United States' obligations under the Uruguay Round of the GATT accords, requires the

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<sup>12</sup> See, e.g., Berne Convention for the Protection of Literary and Artistic Works, Sept. 6, 1886, art. 6 bis, 102 Stat. 2853, 943 U.N.T.S. 178 (1978) (non economic rights of attribution and integrity).

<sup>13</sup> 17 U.S.C. § 105 (1988).

<sup>14</sup> 17 U.S.C. § 101 (1988).

United States to "restore" the copyrights in certain foreign works.<sup>15</sup> As a result, there will be fewer works in the public domain today than before the Uruguay Round Amendments Act's effective date of January 1, 1996.

The duration of copyright in works created as of 1978 is the life of the author, plus fifty years.<sup>16</sup> For pre-1978 works, published when the 1909 Act was still in force, there were two twenty-eight-year terms of copyright; if the author failed to register the work with the Copyright Office, and to renew the copyright registration at the end of the first twenty-eight-year term, the work fell into the public domain at the expiration of twenty-eight years. If the author did renew the work, it was protected for another twenty-eight years, which the 1976 Copyright Act extended by another nineteen years, to make a total of seventy-five years from publication.<sup>17</sup> In 1992, Congress amended the Copyright Act to provide that pre-1978 works then in their first term of copyright would be automatically renewed.<sup>18</sup> As a result, the copyright in works published between 1964 and 1977 (inclusive) will expire seventy-five years from initial publication.

But until March 1989, the work enjoyed a copyright (of twenty-eight, fifty-six, seventy-five, or life-plus-fifty years) only if it was published with a proper notice of copyright (the letter C in a circle, name of the author or copyright owner, date of first publication). (The U.S. abandoned the mandatory notice requirement upon joining the leading multilateral copyright convention, the Berne Convention for the Protection of Literary and Artistic Works, effective March 1989.) Failure to affix proper notice cast a pre-1978 work immediately into the public domain upon publication. For works first published between 1978 and March 1989, omission of the notice was no longer instantly fatal; Congress allowed the author five years to cure the omission. If the author failed to cure the omission within five years, then the work fell into the public domain.<sup>19</sup>

Let us apply these rules to the works our entrepreneur wishes

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<sup>15</sup> See Pub. L. No. 103-465 (1994).

<sup>16</sup> Or for anonymous, pseudonymous, or works made for hire, 75 years from publication. 17 U.S.C. § 302 (1988). Pending legislation would extend the term of protection to life plus 70 years (or 95 years from publication). H.R. 989, 104th Cong., 1st Sess. (1995).

<sup>17</sup> 17 U.S.C. §304 (1988). H.R. 989 would extend the term in subsisting copyright in 1909 Act works to 95 years from publication.

<sup>18</sup> Copyright Amendment Act of 1992, Pub. L. No. 102-307, §102(g)(2), 106 Stat. 264 (1992).

<sup>19</sup> See 17 U.S.C. §§ 401, 405 (1988).

to incorporate into the multimedia product. The Leonardo da Vinci drawings would be in the public domain, as would any science fiction novel or newspaper account published more than seventy-five years ago. For more recent works, our entrepreneur needs to: (1) ascertain the date of initial publication; (2) determine if the work was published with a copyright notice; and (3) if the work was first published before 1964, find out if the work was registered for copyright and if the registration was renewed. If the work was published without notice, or if the copyright was not renewed, then the work is in the public domain, *unless* it is covered by the new legislation implementing the agreement on Trade-Related aspects of Intellectual Property (TRIPs) negotiated as part of the Uruguay Round amendments to the GATT.

This legislation "restores" the copyright in works from countries *other than the United States* that are members of the World Trade Organization or of the Berne Convention. As of January 1, 1995, qualifying foreign works that never obtained copyright in the United States due to failure to affix notice, or whose copyright was cut off at twenty-eight years due to failure to register and renew, now enjoy copyright for seventy-five years, if the work was first published before 1978, or for works first published as of 1978, for the life of the author plus fifty years.<sup>20</sup> This means that our entrepreneur had best assume that any foreign work from a Berne Convention or WTO country is still protected in the United States if it was published less than seventy-five years ago.

Foreign law rules are important in this context as well, for they may yield a copyright period even longer than that in force in the United States. As a result, even if the work's U.S. copyright has expired, the work may still be protected abroad. This is most likely to be true in the European Union: a recent Directive, effective July 1, 1995, harmonizes the duration of copyright in the 15 countries of the EU at the life of the author, plus *seventy* years,<sup>21</sup> twenty years longer than the term of copyright provided under the 1976 U.S. Copyright Act. The transitional provisions of the Directive specify that even if a work had fallen into the public domain in some EU countries, if it is still protected in at least one EU country, then, as of July 1, 1995, the copyright in the work will be given effect in all EU countries. Thus, for example, the pre-Directive duration of copyright in Germany was life plus seventy years, while in the

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<sup>20</sup> 17 U.S.C. § 104A (1994).

<sup>21</sup> Council Directive 93/98/EEC of 29 October 1993, harmonizing the term of protection of copyright and certain related rights, O.J.E.C. (L 290) 9, 11, 12.

Netherlands it was life plus fifty. A work now in the public domain in the Netherlands may still be protected in Germany. On July 1, 1995, when the Directive enters into force, the work will exit the public domain and be protected once again in the Netherlands.

Even if the preexisting work is still protected by copyright, its partial incorporation may, under certain circumstances, benefit from an exemption from copyright infringement, such as the fair use doctrine under U.S. law, or similar foreign-law exceptions.

## 2. Exceptions to Copyright Protection

### a. *Fair Use*

The fair use doctrine<sup>22</sup> furnishes the principal U.S.-law exception to the author's exclusive right to reproduce her work. Section 107 of the 1976 Copyright Act obliges courts to take into account the following considerations: (1) the nature of the copier's work, and the purpose (commercial or non profit educational) for which the copying occurred; (2) the nature (factual or fanciful) of the copied work; (3) the qualitative and quantitative substantiality of the copying; and (4) the effect of the copying on the potential market for the copyrighted work. As the Supreme Court recently declared, the "transformative" nature of the second work, and its impact on the market for the first work, are especially important considerations.<sup>23</sup>

One might contend that the incorporation of extracts of pre-existing works into a multimedia product such as the one envisioned here would "transform" the extracts, by mixing them with other elements, and melding them into an overall new work which, albeit commercial, would also have an educational character. However, the "transformative use" that the Supreme Court addressed was a parody, that is, a use that distorted for satiric effect the words and music of the targeted song. Similarly, other classic examples of "transformative" copying concern works of criticism or biography; works that do not simply reprise the extract, but comment on or rework it.<sup>24</sup> Indeed, when biographers merely repeat the subject's words without productive commentary, courts have rejected fair use defenses, holding that the biographer is quoting merely to "enliven" the account, rather than to use the quotes as the basis for

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<sup>22</sup> Codified at 17 U.S.C. § 107 (1988).

<sup>23</sup> *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1171 (1994).

<sup>24</sup> Criticism and biography are examples cited in the preamble to 17 U.S.C. § 107. On "transformative use," see generally Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105 (1990).

critical argument.<sup>25</sup>

By contrast, in the imagined multimedia product, some, if not all, the excerpts would be incorporated “as is,” for the same intrinsic purpose. The excerpts’ juxtaposition with other elements may be enriching, but the incorporating work may not be commenting on the copied material. Rather, it may be using the copied material not merely to convey information, but to convey it through the eyes of the original reporter. As a result, it is uncertain how well the multimedia product would fare under the analysis of the first fair use factor. On the one hand, the multimedia work endeavors to “promote the progress of [knowledge]” (a constitutional goal<sup>26</sup> that underlies the fair use doctrine as well), but the work’s content is a kind of patchwork of extracts that may not be subjected to critical analysis.

In the case of multimedia, the third fair use criterion — amount and substantiality of the copying — may be particularly important. If the extract is truly *de minimus*, qualitatively as well as quantitatively, then permission might not be required. However, it is not clear what would be considered “*de minimus*” in this context. The visual impact of even a very brief excerpt may be substantial.

The fourth fair use factor, market impact, is also difficult to apply here. If one thinks only of the market for the entire works from which the copied material has been extracted, one might conclude that a very brief excerpt, for example, a few seconds from a science-fiction film, would not prejudice the exploitation of the work as a whole. However, the copyright law considers not only current or traditional modes of exploitation, but potential exploitations as well.

For example, caselaw and commentary concerning photocopying recognizes that the “potential market” for the work includes a market for portions of or extracts from the work.<sup>27</sup> As a general proposition, when new technology creates a market for new forms of exploitation of the copyrighted work, the control over this mar-

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<sup>25</sup> See, e.g., *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), cert. denied, 484 U.S. 890 (1987); *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987).

<sup>26</sup> See U.S. CONST. art I, § 8 cl. 8.

<sup>27</sup> See, e.g., *American Geophysical Union v. Texaco Inc.*, 32 U.S.P.Q. 2d (BNA) 1545 (2d Cir. 1994); *Basic Books v. Kinkos Graphics Corp.* 758 F. Supp. 1522 (S.D.N.Y. 1991). See generally Jane C. Ginsburg, *Reproduction of Protected Works for University Research or Teaching*, 39 J. COPYRIGHT SOC'Y 181 (1992) (discussing the applicable legal rules for photocopying in the academic environment).

ket should belong to the copyright owner.<sup>28</sup> In the case of photocopying, technology created a market for extracts; the reproduction of these extracts by means of photocopying comes within the author's monopoly — at least when the reproduction is systematic and for commercial purposes.<sup>29</sup> As a result, such copying should not be considered fair use. Applying these principles to multimedia products, one would contend that multimedia has further enhanced the market for excerpts, and that that market remains within the copyright owner's control — at least “where the [transactions] cost of negotiating a license is not insurmountably high.”<sup>30</sup>

The impact of transactions costs on the fair use analysis may favor our entrepreneur in the short term, but work to her disadvantage in the long run. Some decisions and considerable academic commentary perceive a close relationship between a finding of fair use and the copyright owner's inability to implement “reasonably priced, administratively tolerable licensing procedures.”<sup>31</sup> If the costs of seeking out and negotiating with the hundreds of copyright owners whose permission might be required proved so burdensome that they threatened the execution or even initiation of multimedia products, it might be possible to argue that stringent enforcement of copyright would be stifling, rather than promoting the “progress of science,” and thus would work against the goals of the copyright system.<sup>32</sup> This argument, however, has a tendency to prove too much. Moreover, the argument depends on the persistence of “market failure.” If copyright owners develop nonburdensome ways of licensing the right to incorporate extracts, then this fair use justification would no longer obtain.<sup>33</sup>

Despite the uncertainty of its application here, the U.S.-law

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<sup>28</sup> See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: THE LAW AND LORE OF COPYRIGHT FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 179, 202, 216 (1994).

<sup>29</sup> Cf. 17 U.S.C. § 108 (1988) (provisions on library photocopying).

<sup>30</sup> GOLDSTEIN, *supra* note 25, at 179

<sup>31</sup> *American Geophysical Union v. Texaco Inc.*, 802 F. Supp. 1 (S.D.N.Y. 1992), *aff'd*, 32 U.S.P.Q. 2d (BNA) 1545 (2d Cir. 1994). See generally Wendy Gordon, *Fair Use as Market Failure, A Structural and Economic Analysis of the Betamax Case and its Predecessors*, 82 COLUM. L. REV. 1600 (1982) (arguing that courts employ fair use to permit uncompensated transfers that the market is incapable of effectuating).

<sup>32</sup> Cf. *Rosemont Enters. v. Random House*, 366 F.2d 303 (2d Cir. 1966) (to serve goals of promoting progress of science, “courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in maximum financial return to the greater public interest in the development of art, science and industry”), *cert. denied*, 385 U.S. 1009 (1967).

<sup>33</sup> See, e.g., *American Geophysical Union v. Texaco*, 32 U.S.P.Q. 2d (BNA) 1545 (2d Cir. 1994).

fair use doctrine is generally more flexible and welcoming than some of its civil law counterparts. Hence, the multimedia entrepreneur must remember that even if the extracts might escape copyright liability in the United States the same result may not obtain abroad.

b. *Foreign-law Exceptions*

I will examine the exceptions set forth in the French copyright law as representative of many civil law copyright regimes. The Code of Intellectual Property excepts from copyright infringement "analyses and brief quotes justified by the critical, polemical, pedagogical, scientific or informational character of the work in which they are incorporated."<sup>34</sup> Does the multimedia product envisioned here meet this standard?

While the product is informative and arguably educational, the terms "pedagogical" and "informational" most likely concern copying of a different character. "Pedagogical" implies a closer link to formal education, and "informational" probably envisions more journalistic uses (to conflate "informational" with "informative" risks inflating the exception to swallow the rule).

Moreover, caselaw interpreting this provision indicates that the excerpts may not be deemed "analyses" or "brief quotes." The French Court of Cassation has characterized an "analysis" as a "summary" of a preexisting work.<sup>35</sup> Here, by contrast, the multimedia compiler would not be summarizing the incorporated works; rather, she would be incorporating portions of them verbatim (or the visual equivalent).

The "brief quotes" category is also problematic for certain kinds of excerpts. The exception is phrased in terms of literary works; its application to visual works is uncertain at best. Indeed, the French Supreme Court recently held that a very small-scale, but complete, reproduction of a painting was not a "brief quote" under the statute.<sup>36</sup> A partial reproduction, for example, a detail of a hand or face depicted in the painting, might be considered a "brief quote," but the painting's author might object that showing such a sliver of her work violates her right of integrity in the image.

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<sup>34</sup> C. PROP. INTELL. art. L. 122-5.3.a. (Fr.); *see also* Spain, Copyright Act of 1987, art. 32; Italy, Copyright Act of 1941, art. 70; Belgium, Copyright Act of 1994, art. 13.

<sup>35</sup> *See* Judgment of Oct. 30, 1987, (*Microfor v. Le Monde*) Cass. ass. plen., 135 REVUE INTERNATIONALE DU DROIT D'AUTEUR [R.I.D.A.] 78 (Jan. 1988).

<sup>36</sup> *See* Judgment of Nov. 5, 1993 (*Fabris v. Loudemer*) Cass. ass. plen., 159 R.I.D.A. 320 (Jan. 1994).

Even in the context of literary works, the application of the "brief quotes" standard to multimedia may be elusive. For example, highlighting a paragraph from a newspaper account of the moon landing might constitute a "brief quote," but showing the entire cover page on the screen, to zoom in on the paragraph, might not.<sup>37</sup> The uncertain application of domestic and foreign law exceptions to copyright suggest that a safer course for our entrepreneur would be to obtain permission to incorporate excerpts from works still protected by copyright.

*B. Copyright Permission Required*

If our entrepreneur must seek permission, from whom should she secure it?

1. From the Producer or Employer, if the Work was Made "For Hire"

If the preexisting works targeted by our entrepreneur are works made for hire, the employer or producer would be the person entitled to grant permission to incorporate portions from it. Works for hire include not only audiovisual works, as indicated earlier, but also compilations and collective works, such as newspapers and periodicals. Thus, identifying the person to approach to obtain clearance to copy from science fiction films, television series and news programs, newspapers and magazines, should be rather straightforward. Where the contributors to the works in question were independent creators rather than employees, the multimedia entrepreneur should endeavor to verify that proper work for hire agreements were in fact executed. The fear of inadequate documentation supporting characterization of the work as "for hire" is not fanciful: by their own admission, many Hollywood producers "do lunch, not contracts."<sup>38</sup>

It is also important to recall that the categories of commissioned works capable of being works made for hire do *not* include sound recordings. Thus, if our entrepreneur wishes to incorpo-

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<sup>37</sup> The French law also includes an exception for "revues de presse," see C. PROP. INTELL. art. L. 122-5.3.b, which permits news organizations to gather and quote from a collection of journalistic sources' accounts of a particular event. However, this exception implies coverage of a contemporary event. Twenty-five years later, assembling twenty different front page accounts of the first moon landing probably would not qualify.

<sup>38</sup> *Effects Assocs. v. Cohen*, 908 F.2d 555, 556 (9th Cir. 1990) (rejecting producer's excuse for failure to execute a written transfer of copyright ownership), *cert. denied sub. nom.*, *Danforth v. Cohen*, 498 U.S. 1103 (1991).

rate, for example, excerpts of a preexisting recording of the Boston Pops Orchestra performing a suite from John Williams' music for "Star Wars," it will be necessary to obtain the permission of the copyright owners of the sound recording (as well as the copyright owner of the recorded musical composition). In the absence of a contract of transfer of rights to the record company, the copyright holders of the sound recording would be the orchestra and its conductor, in this case, also John Williams.<sup>39</sup>

If the preexisting work is not a work made for hire, the multimedia entrepreneur must seek out the author or the author's successor.

## 2. From the Author

In general, the author (the actual creator) will be the initial copyright holder of "traditional" works, such as novels and musical compositions — works that do not require the participation of multiple authors. The latter kinds of works, such as motion pictures, periodicals, encyclopedias and similar compilations, tend to be works made for hire. However, even in the case of works made for hire, there may be an underlying work whose copyright remains, at least in part, with the author. For example, a motion picture may be based on a novel. While the author of the novel will have granted permission to create an audiovisual work from the novel, the transfer of rights may not be so broad as to cover subsequent digital exploitations of the resulting movie. In these instances, it becomes necessary to construe the original agreement of transfer to determine if it encompasses new media.

### a. *Problem of Application of Old Licenses to New Exploitations*

The "old license/new media" problem has persisted in copyright law at least since the advent of motion pictures, when it became necessary to determine whether a grant of rights to "dramatize" a literary work should be limited to stage versions, or should extend to the new form of cinema.<sup>40</sup> While the caselaw is not uniform, some general guidelines emerge. First, if the contract unambiguously states that the author grants rights in all media now

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<sup>39</sup> The recording engineer is also a co-owner of copyright in a sound recording. If the engineer is employed by the record company, the record company becomes a co-owner by virtue of the employment relationship branch of the work for hire rule. Any co-owner of copyright may grant non exclusive rights to exploit the work; an exclusive grant requires the accord of all the co-owners. *See, e.g.,* *Oddo v. Ries*, 743 F.2d 630 (9th Cir. 1984).

<sup>40</sup> *See, e.g.,* *Manners v. Morosco*, 252 U.S. 317 (1920).

known or later developed, courts may hold the author to that grant.<sup>41</sup> However, if the contract is ambiguous as to its coverage of future modes of exploitation, and if the new medium was "completely unknown at the time when the contract was written,"<sup>42</sup> courts will decline to interpret the contract as covering the new use.<sup>43</sup> Where the parties to the transfer could, at least in theory, have anticipated the new medium, some courts place the burden on the author to reserve new media rights,<sup>44</sup> while others would resolve the ambiguity in favor of the author.<sup>45</sup> The nature of the new mode of exploitation is also relevant: where it is not closely analogous to the exploitation rights conveyed, courts will be reluctant to extend the contract to the new use. Thus, several courts have determined that grants of "exhibition" or "television" rights did not encompass distribution of videocassettes, because this kind of exploitation was qualitatively different from theatrical exhibition or broadcast.<sup>46</sup>

Applying these principles to digital exploitation of excerpts of motion pictures, the entrepreneur would need to investigate whether: 1. The grant of rights in the underlying work clearly covered future media; 2. if not, does the date of the contract suggest that the parties could not reasonably have anticipated digital media and multimedia products; 3. if the contract is sufficiently recent to make multimedia reasonably within the parties' anticipation, how close is a multimedia exploitation to the kinds of exploitations for which rights were granted? Depending on the information received, our entrepreneur may need to obtain permission not only from the motion picture producer but also from the author of the underlying literary work, as well, potentially, as from the author of musical compositions incorporated in the motion picture.

Many foreign jurisdictions are likely to be even more protec-

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<sup>41</sup> *Rey v. Lafferty*, 990 F.2d 1379, 1396 (1st Cir. 1993); *Brown v. Twentieth-Century Fox Film Corp.*, 799 F. Supp. 166, 170 (D.D.C. 1992); *Platinum Record Co. v. Lucasfilm, Ltd.*, 566 F. Supp. 226, 228 (D.N.J. 1983); see also *Rooney v. Columbia Pictures Indus.*, 538 F. Supp. 211 (S.D.N.Y.) (right of publicity claim), *aff'd*, 714 F.2d 117 (2d Cir. 1982), *cert. denied*, 460 U.S. 1084 (1983).

<sup>42</sup> *Bartsch v. Metro-Goldwyn-Mayer, Inc.*, 391 F.2d 150, 154 (2d Cir.), *cert. denied*, 393 U.S. 826 (1968).

<sup>43</sup> See, e.g., *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163 (N.Y. 1933).

<sup>44</sup> See, e.g., *Bartsch*, 391 F.2d at 155.

<sup>45</sup> See, e.g., *Rey*, 990 F.2d at 1390; *Cohen v. Paramount Pictures Corp.*, 845 F.2d 851, 854 (9th Cir. 1988).

<sup>46</sup> See, e.g., *Rey*, 990 F.2d at 1391; *Cohen*, 845 F.2d at 854; *Tele-Pac, Inc. v. Grainger*, 570 N.Y.S.2d 521, *appeal dismissed*, 588 N.E.2d 99 (N.Y. 1991); *General Mills, Inc. v. Filmtel International Corporation and Producers Associates of TV, Inc.*, 599 N.Y.S.2d 820 (N.Y. App. Div. 1993).

tive of authors of underlying works, requiring explicit grants of rights in future media,<sup>47</sup> or even prohibiting grants of rights in media unknown at the time of contracting.<sup>48</sup>

Finally, even if the author of an underlying work would be deemed to have transferred digital exploitation rights, the question arises in many civil law countries, whether the new exploitation would violate the author's moral rights to attribution and integrity. This question also applies to individual authors whose works are directly incorporated into the multimedia product, including the contributions of the entrepreneur's employees.

#### b. *Moral Rights*

The entrepreneur may satisfy the rights of attribution of direct and indirect contributors to the creation of the multimedia product by including a detailed "credits" section in the product. Conforming to the right of integrity may be more problematic. Where the contributor has expressly consented to incorporation of the work into the multimedia product, it is reasonable to conclude that the consent extends to the kinds of remanipulation of text and image that multimedia make possible. Where, however, the entrepreneur is relying on a generalized consent, particularly one that predates the advent of multimedia, it is possible that an author will object to the incorporation of her work, on the ground that the multimedia product will distort or otherwise alter her creation. It may be too soon to tell how civil law countries' courts would assess such a claim. On the one hand, the recent decision of the Court of Appeals of Versailles in the John Huston "Asphalt Jungle" colorization controversy,<sup>49</sup> suggests that where a non copyright holding creator has consistently objected to the application to his work of a new, altering, technology, courts solicitous of moral rights will honor the author's artistic vision. On the other hand, where an author appears to be invoking moral rights in order to extort enhanced compensation from the copyright owner or exploiter, courts will reject the pretext.<sup>50</sup>

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<sup>47</sup> See, e.g., C. PROP. INTELL. art. L. 131-6 (Fr.).

<sup>48</sup> See, e.g., Germany, Copyright Law of 1965 (as amended 1990), § V, art. 31.4.

<sup>49</sup> Judgment of Dec. 19, 1994 (Turner Entertainment v. Huston Heirs), Cour d'appel, Versailles, 164 R.I.D.A. 389 (Apr. 1995).

<sup>50</sup> See, e.g., Judgment of May 14, 1991, Cass. civ. 1re, 151 R.I.D.A. 272 (Jan. 1992) (pretextual invocation of moral right of withdrawal); Judgment of Feb. 6, 1986, Cour d'appel, Paris, 1988 JOURNAL DU DROIT INTERNATIONAL [CLUNET] 1021 (July 1988) (pretextual invocation of right of attribution).

## CONCLUSION

This overview of the questions the entrepreneur must confront in compiling the multimedia product might suggest that the entrepreneur should seek other employment, or at least dispose of considerable cash, persistence, and willingness to take chances. However, the problems the multimedia entrepreneur encounters are not substantially different than the kinds of copyright clearance questions a producer must resolve in the course of preparing an "ordinary" product, such as a television documentary film containing many excerpts from multiple sources. The difficulties are of degree rather than of kind. But the extent of the degree may prove discouraging. The development or improvement of private law collective licensing procedures, and/or public law registries in the U.S. and abroad would considerably facilitate the entrepreneur's task . . . and would enhance the likelihood that authors will be consulted about, and compensated for, the inclusion of their works in multimedia productions.