Multimedia and the Superhighway

Bridget Godwin provides some thoughts on "multimedia", copyright and the licensing of works.

This article looks at some of the general implications for copyright law of the building of the superhighway, and one product which will be available on the superhighway - multimedia. It also looks at some specific problems with the Copyright Act ("the Act") which among others will need to be addressed to enable the provision of services on the superhighway.

multimedia issues

One of the new products we might expect to be delivered on the superhighway - multimedia - raises particular issues.

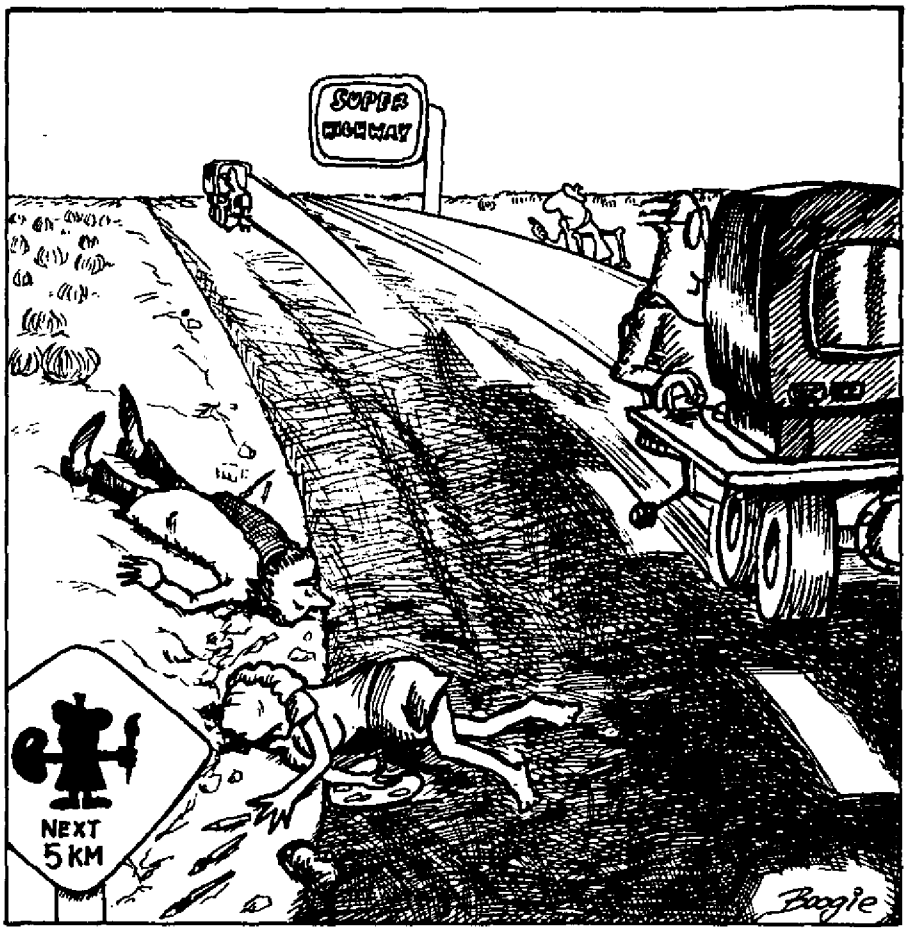
Next to the words "information superhighway", the most popular word in the techno-junky's vocabulary is "multimedia". What is multimedia? At a seminar, a speaker pointed out that the large and expensive conferences convened to discuss various aspects of the multimedia industry still contain sessions entitled "What is multimedia?" If the people making the products are still asking the question, what hope do the rest of us have? Definitional problems abound.

However, leaving aside the semantic uncertainties, most people seem to understand multimedia works to consist of combinations of text, visual images (still or moving) and sound stored in a digital form. The work may also include software to search, retrieve and manipulate a work.

There are two issues which multimedia producers most often highlight as causing difficulties. The first of these is the question of subsistence of copyright in multimedia works themselves. The second issue is licensing of copyright works for inclusion in multimedia products.

subsistence of copyright

In order for copyright to subsist in a work, there must be some level of originality. This requirement is usually fairly easily satisfied. For example, copyright subsists in tables of commonly available information, such as weekly television programs. Quite apart from any original software a multimedia producer might create, and the separate copyrights in underlying works, it seems reasonable to view a product which combines various elements which are generally available to create a new product with its own flavour as a product which incorporates the necessary level of originality.



The question is then: what category do multimedia works fall into for the purposes of copyright protection? Opinion is divided on this issue.

Some commentators have suggested that multimedia works may be protected as computer software. It will often be the case that although the multimedia producer needs computer software to enable the user to search, retrieve and manipulate the various component parts of the product, the producer is not the author of the necessary software. It may be just another original work utilised by the multimedia producer in order to create the final product. Even where there is original software in the product, what about the other bits, and what about the product as a whole?

It is also possible the work may be protected as a database or compilation. This means that it would be protected as a literary work under the *Act*.

However, the copyright category which bears most resemblance to the multimedia product is the cinematograph film, and it seems logical to accord it similar levels of protection. Like films, multimedia products involve the combination of individual constituent parts to form a new entity which while incorporating each of the individual underlying works, brings into being a whole which is greater than the sum of its parts.

The difference is that multimedia products may also be interactive. The order in which the action or information unfolds is up to the user. Do multimedia products fall within the definition of cinematograph film in *the Act?* The answer is maybe, or sometimes, or sometimes not. The definition of a cinematograph film in section 10 of *the Act* requires the work to be capable of being shown as a moving picture. Not all multimedia works meet this criterion. Some may not incorporate any moving pictures. Even if they do, it is still open to some question whether a product which is intended to be stopped and started and where the viewer may move between windows at will is really capable of being shown as a moving picture.

The cry has gone up for the creation of a new copyright category: the multimedia work. As mentioned earlier, "multimedia work" is an amorphous term whose scope is

unclear even to those involved in the industry. This is not a promising starting point for a new copyright category.

It may be useful to consider whether multimedia works are so different from existing categories of protected materials that they require special treatment. It would seem more logical to expand the category for cinematograph films to make room for multimedia products than to create a separate category for a similar, but undefinable, product. The term "cinematograph film" is one of those categories found so often in *the Act* which are linked to particular technologies. Views have been expressed at the international level which call for the replacement of the term "cinematograph film" with a new category of protection for audio-visual works. Films may or may not need to be a sub-category of audio-visual works, depending on whether they are deemed worthy of special treatment.

licensing of works

Multimedia products, and often the individuals and industries involved in their creation, are outside the pre-existing categories of creative endeavour with which we are familiar and which may contribute to a multimedia work such as books, music and film.

However, to create a multimedia work, a producer will need to obtain the agreement of authors, actors, writers, directors, musicians, composers and computer programmers. Each owner of underlying rights wants to contract on the basis of established business practices in each of their relative industries. This makes the process of putting a multimedia product together a difficult and often frustrating process.

Some producers of multimedia products have called for a statutory licensing scheme and the establishment of a specialist collecting society for multimedia copyright clearances. Film makers have been negotiating the ability to combine various separate works into one work for some time. It is difficult to see why producers of multimedia products will not be able to do likewise once the commercial and practical uncertainties associated with the value of the licensed material and monitoring of subsequent uses of multimedia works are closer to resolution.

Recent developments at the international level in copyright are moving away from notions of compulsory licensing. Statutory licences are intended to draw a balance between the rights of the copyright owner and the public interest that particular persons have access to the copyright material without the necessity of obtaining the copyright owner's permission. Voluntary collective licensing may be a more appropriate path to take for the inclusion of works in multimedia. Multimedia producers may wish to establish a clearing house to chase down copyright permissions from established collecting societies.

Copyright owners are understandably nervous about granting permission for the use of their works in the new digital environment. The ease with which their property may be reproduced and manipulated from digital formats and the uncertainty as to what is a reasonable sum to charge are all factors which cause anxiety and therefore inaction. Copyright owners are not sure what it is they might be giving away. However, the answer is surely not to force copyright owners to leap into the unknown by means of government imposed licensing schemes.

New uses of copyright material are ultimately in the interests of copyright owners, as they provide new sources of remuneration. That is of course dependent upon the ability to control subsequent uses of the new product. Without these, the licensed material loses its value once it is incorporated into the multimedia work. The solution to the difficulties faced by multimedia producers in obtaining rights and copyright owners in licensing them is ultimately going to be a commercial and possibly partly a technical one. Multimedia is a new industry - both sides will need to feel their way into it and cautiously formulate new business practices and industry norms.

Of course there will be casualties along the way. There will be the rights owner who charged too little and the licensee who paid too much. These events are unavoidable in an environment where the sands are constantly shifting. It happened to the Beatles and countless others in striking deals in the earlier days of the record industry. The boundaries of licensing practices will be pushed by both sides until a mutually satisfactory point is reached.

While I am not without sympathy for the losers along the way, it is doubtful whether the fallout from ordinary commercial rough and tumble could be avoided by means of legislation, or whether business dealings should be heavily regulated without there being a clear public benefit. The development of the multimedia industry is not one which raises these sort of pressing public policy concerns.

This article is an edited extract from a paper by Bridget Godwin (Co-ordinator, Copyright Convergence Group) entitled "Entertainment Services on the Superhighway".

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