Manoeuvring through the Malaise: Contractual Management of Multimedia Production

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Introduction

Multimedia is classically defined as *"a production that uses a combination of digitised text, images, moving pictures, sound and computer programming".*[1]

If we were to list the essential features of multimedia, we would have to refer to these three:

- First, it utilises a wide range and variety of material, sourced from many contributors. For example, a multimedia product may include video, audio, software, still photographs, computer animation, interactive content or even just plain old text.
- Second, it is technology neutral. Early examples of multimedia designed for mass market consumption were games using a cartridge which was inserted into a device attached to a television monitor. Media storage methods have since developed, generating further multimedia consumer electronic material, such as the widespread use of CD-ROMs. CD-ROMs are expected to remain the primary means for delivery of multimedia products in the immediate future. Beyond that point, it is anticipated that on-line services using narrowband and eventually broadband networks will take over as the dominant form of delivery of multimedia to the home. In the not too distant future, digital television is expected to bring interactive television services into the home.
- Third, multimedia product can be copied, manipulated, and distributed with ease.

It is these features that make multimedia a challenge for the law.

The first part of this paper will overview the various types of intellectual property rights associated with multimedia production.

The second part of the paper will look at contractual management of the multimedia development process, with the focus being on the use of content in multimedia and licensing issues facing a multimedia producer.

Finally, there will be a discussion of some relevant areas of law reform.

1. Part I - Multimedia and Intellectual Property Rights

Intellectual property law impacts on the multimedia production process in a number of different ways, copyright being the dominant form of IP protection which relates to multimedia.

Original artworks that are included in a multimedia product may still retain the copyright protection that was afforded them in their original state. If protection still exists, a multimedia producer will need to determine who to approach, in order to obtain their consent for the use of the artwork in the multimedia product.

Intellectual property rights may also attach to the finished product, however this is an area of the law which remains uncertain. This aspect of copyright law will be discussed in later sections.

1.1 General Principles of copyright protection

Copyright law protects "works" such as artistic works (paintings, sculptures, drawings, photographs), musical works, dramatic works and literary works (including computer programs); and "other subject matter", comprised of sound recordings, films, broadcasts and diffusion of other cable services. Copyright protection is free and automatic.

A work will be eligible for copyright protection so long as:

- it is reduced to material form,
- a relevant connecting factor exists between the work and Australia,
- it is original, in that the expression of thought conveyed by the work was not itself copied. A work may still be original if it reproduces another work, provided the artist exercises a sufficient degree of independent skill, labour and experience.

Under section 31(1) of the *Copyright Act 1968* (Cth.) an owner of the copyright in a work has the exclusive right to:

- *reproduce the work in a material form,*
- *publish the work,*
- *perform the work in public,*
- *broadcast the work,*
- *cause the work to be transmitted to subscribers to a diffusion service; or*
- *make an adaptation of the work.*

Copyright in "subject matter other than works" includes the right to make copies of the work, cause it to be heard in public, broadcast it and cause it to be transmitted to subscribers to a diffusion service.[2]

The duration of copyright varies according to the category of the work. For literary, dramatic and musical works published, performed or broadcast in the author's lifetime and artistic works (other than photographs), the period is the life of the author plus fifty years. For the same works published or performed after the death of the author, and for photographs, the period is fifty years from the first publication or performance. Performers' rights only last for twenty years.

Multimedia producers who use a particular work in a multimedia product, or an adaptation of a work, in a manner which is exclusively the right of the copyright owner will need to get permission from the owner.

However, copyright clearance will not be needed if:

- the material the producer wishes to use is not a type of material protected by copyright. To give an example names and titles are not protected by copyright (but may be protected by other laws such as trade marks), and "non-original" elements are not protected by copyright,
- the copyright in the material has expired,
- only part of the material is used, and the part is not "substantial",
- the producer owns the copyright, or
- use of the material falls within a statutory exception to infringement of copyright in art works.

If a producer is considering entering international markets or making content available on the Internet in multiple jurisdictions, it is important to remember that content may be protected under the copyright (or other intellectual property) laws of other countries. Careful checking is therefore required in relation to the same content in different territories.

1.2 Obtaining permission for use of content in multimedia

Assuming that a multimedia product will include a number of types of content, all of which may be protected by copyright, the multimedia producer needs to know who to approach to obtain consent to their use.

Text

Looking first at literary texts. The first point of contact in order to obtain permission to incorporate material published in book form would be the publisher. Generally the publisher will have acquired rights in the work through an assignment or licence from the author. In some cases however, the author may not have granted the publisher the necessary subsidiary rights for them to be able to license the incorporation of material in the multimedia product. If not, a direct approach to the author may be required.

Material published in newspapers or journals

The position in relation to ownership of copyright between employed journalists and their employer was altered by reforms passed by the Senate on 11 July 1998. The amendments ensure that newspaper proprietors are free to develop new modes of distribution, such as the Internet, for their publications while leaving employed journalists with the right to reproduce their articles in book form.

As a result, multimedia producers will generally need to approach newspaper proprietors for permission to use newspaper articles in any digitised product. Producers will also still need to be aware of the distinction between an employed journalist and a freelance contributor. The producer should contact the newspaper proprietor first to obtain advice as to whether or not they have the necessary authority to grant the licence.

'Still' or short extracts from films

It is unclear whether the use of a 'still' or a single frame from a film would represent a substantial part of the film, and thereby require the producer to obtain permission for its use. In an English case, *Spelling Goldberg Productions Inc v BPC Publishing Ltd*[3] a single frame of a film was held to constitute a copy because it was part of the film. If any part of a film is used in the process of multimedia production, caution suggests that the film production company should be contacted.

The producer should also be aware that multiple copyrights subsist in films. For example, the author of the story, the script-writer, and the writer of any incidental music may need to be contacted. The High Court has recently held that the broadcasting of a film involves the broadcasting of the sound recordings incorporated into the film.[4] Depending on whether the definition of "broadcasting of a film" is read broadly to include distribution of a multimedia product, separate permission may also need to be obtained from the recording company in relation to the sound recording.

Photographs and fine art

Ownership of an artistic work, such as a photograph or painting does not of itself imply ownership of copyright in the work (the owner of the art would need to have been assigned copyright in compliance with the *Copyright Act* before he/she could be said to own copyright in the art). Where an artistic work has been published, the publisher should be contacted in order for permission to be granted, or for assistance to be provided in contacting the artist. Authority to use a reproduction of an artistic work held by a gallery or a museum may be able to be provided by the gallery or museum itself, but this will depend on the terms of the contract existing between the artist and the gallery/museum owner. Recent reforms also provide photographers with ownership of copyright in commissioned

photographs.[5] Copyright in photos commissioned for private and domestic purposes, however, will remain with the commissioner, and the producer will need to contact the commissioner directly.

Clip art
Clip art, a collection or library of images, sold in CD-ROM form or as provided with software programs, may be able to be used in multimedia production with permission from the publisher. Clip art may be provided with the licence already attached, and the licence will provide guidance as to the uses which will be permitted.

Radio or television broadcasts
Incorporating extracts from radio or television broadcasts may prove complicated. Within a broadcast there may be several copyrights. For example, a television broadcast may contain copyright in the actual program, a separate copyright in the script, copyright in the theme music and copyright in the broadcast itself.[6]

There is the added confusion that is unclear whether a single frame of the television broadcast is defined as a photograph, or represents a part of the broadcast. If it is the former, then permission is definitely required before it can be copied. Otherwise the producer would need to consider whether the frame represents a substantial part of the broadcast, in which case permission is also required.

'Samples' of recorded music
Permission will be required from the owner of copyright in respect of a portion of music that is not an insubstantial part of the work. Even reproducing a very small sample may be substantial enough to pose copyright difficulties.

The owner of the copyright in the music is usually the publisher. As with book publishing contracts, there may be uncertainty regarding the extent of the rights that are held by the publisher, and the composer may need to be contacted directly.

In sound recordings, there will be a copyright in the music itself and, where the lyrics are performed, a separate copyright will subsist in the lyrics as a literary work. In addition, copyright may exist in a sound recording of a musical work, and performers rights in the actual performance represented by that recording. Copyright in the musical work may have expired but the actual sound recording may still be subject to copyright. In relation to the copyright in the sound recording, usually the recording company will need to be contacted.

Live performances
Performance rights must be considered if the multimedia product features a recording which is the first recording of a live performance.[7] A performer's consent is needed before a performance is recorded, broadcast or transmitted to subscribers to a diffusion service. Performers also have rights over certain uses of unauthorised recordings (including broadcast and transmission to subscribers to a diffusion service), and the right to consent to use of an authorised sound recording on a soundtrack.[8] It is unclear whether the sounds which accompany the visual images in a multimedia product could be regarded as a "sound track" for the purposes of the *Copyright Act*.

This area of the law is subject to review over the coming months. A discussion paper on performer's intellectual property rights has been circulated and submissions are currently under consideration.

Unpublished material
Old unpublished works held in libraries and archives may be copied "with a view to publication".[9] The Act does not define "publication", but assuming it to mean "the right to make a work public for the first time"[10], it would be broad enough to allow for the material to be included in multimedia production. Permission from the library would involve a written request and signed declaration from the producer requiring the copy be made, and detailing the purpose of its use.

Published edition
Multimedia producers will also need to keep in mind that a publisher may have copyright in the typographical arrangement of a published edition, which is separate to the copyright in works reproduced in the edition. This point is relevant where copyright in the work is owned by someone other than the publisher.

Digitised material/software
Downloading material from a networked database to a personal computer for use in a product involves the reproduction of digitised copyright material, and will require permission from the owner. This is likely to extend to copying of an executable computer file or compressed text file.[11]

Using an authoring program to make the product in the first place may involve copying of some parts of the program. The licence conditions governing the use of the software must be examined carefully to ensure that products made by the producer can subsequently be commercially exploited.

1.3 Collecting societies involved in the contracting process

Collecting societies may hold licences or may be the body appointed by the rights holder to be responsible for giving permission for use of the art work.

Different societies serve different purposes. However the societies are increasingly interactive and are learning from each other about licensing and royalties, leading to the development of a more uniform standard to be applied across all agencies as the multimedia industry grows.[12]

For the present there is the problem that very few of the collecting societies have the power to represent electronic rights, and there is limited use made of the collecting societies by those developing multimedia projects.

Australian Mechanical Copyright Owners' Society
The Australian Mechanical Copyright Owners' Society (AMCOS) administers mechanical rights[13] for music publishers and writers. Since

mechanical rights refer solely to the reproduction of a musical work in an audio format, multimedia producers may not be concerned with obtaining permission in relation to this right.

Multimedia producers will have to concern themselves with the fact that they are reproducing a musical work in digital format, or reproducing a sound recording in digital format, in conjunction with images or text. This form of reproduction is referred to as "synchronisation" and usually the producer will have to negotiate directly with the music publisher or the recording company, respectively, in order to gain permission to merge the works in this way. In the case of sound recordings, the Australian Record Industry Association (ARIA) collects royalties for the reproduction of the performance of sound recordings. In addition, the reproduction of lyrics or music on covers or in booklets accompanying the product will need additional licences, directly obtainable from the music publisher.[14]

Australian Performing Right Association

The Australian Performing Right Association (APRA) represents the performing rights of almost every Australian and New Zealand composer.

Producers wishing to package their product as a CD ROM or video game cartridge, would not need to be concerned with performing rights.[15] Producers transferring their multimedia product over the Internet are also not (as yet) responsible for this activity. Instead APRA considers the Internet service provider (ISP) to be responsible for "causing the [multimedia] work to be transmitted to subscribers to a diffusion service"[16]. This supposition was confirmed recently in the settlement of a legal dispute between APRA and OzEmail, whereby OzEmail agreed to make payments to APRA in relation to the transfer of music over the Internet.[17] This area of the law does remain unsettled in view of the changes that are expected to be made to the *Copyright Act* in 1999.

Copyright Agency Limited

If a producer wishes to include print in a new product, then he/she may need to contact Copyright Agency Limited (CAL). CAL has one scheme in place purely for digital copying, the *New Media Licence Scheme*. Members of the scheme, authors, publishers and journalists, have given CAL permission to act as their agent with respect to any digitised usage of their work. CAL can then license others on a non-exclusive basis to copy members' copyright material. CAL is also authorised to grant licences to persons who have been supplied with New Media Products. These persons are called New Media Users.

The scheme is very new and is as yet under-utilised. Another scheme in place, *Copyright Express*, is a blanket licence scheme that administers all forms of copying, including digital. This scheme is currently being overhauled.

VISCOPY

Producers wishing to include visual art in their multimedia product should contact VISCOPY. VISCOPY acts as agent for 30,000 artists worldwide. With respect to digital copying, VISCOPY obtains permission from the relevant artist member for the copying to be done. VISCOPY then licenses the producer to copy the work (usually a one-way licence is issued). It is reported that to date there has been much successful licensing of art works for use on the Internet.

Screenrights

Screenrights (the Audio Visual Copyright Society) represents owners of copyright in films, sound recordings and works included in audio-visual products. It administers the statutory licence for educational copying from television and radio. Presently, Screenrights help producers to locate copyright owners, but has not yet established a concrete multimedia copyright clearance scheme.

1.4 Intellectual Property protection in the finished product

Copyright

Copyright laws were enacted prior to convergence of new technologies. Not surprisingly, therefore, they do not directly cater for multimedia products.

Elements which may not be eligible for protection include the design and concept of the work, the functionality of the work, user interfaces and the selection and juxtaposition of visual elements.[18]

The main difficulty with a multimedia product as it relates to copyright law, is that it does not clearly fall within any of the traditional headings listed in the Act. For example, one multimedia product may look more like a film than a computer program, whilst another may have more of the characteristics commonly associated with computer programs. Both products being 'multimedia' would lead to the assumption that they would be treated in the same manner. However, under the Copyright Act, cinematographic films and computer programs are treated differently.

Commentators make an academic guess that it may be possible to squeeze the definition of multimedia work into several different categories of "works" or "subject matter other than works" under the *Copyright Act* in order for the product to attain copyright protection; for example, "cinematograph film", "literary work", "compilation" or "dramatic work".

In an unprecedented case on this subject, Burchett J considered the legal status of certain computer games, "Virtua Cop" and "Daytona USA" in the case *Sega Enterprises v Galaxy Electronics* (1996) 35 IPR 161. He held that the games were "cinematograph films" as defined under section 10(1) of the *Copyright Act*, despite the fact that the actual two dimensional screen images were not stored in the computer.

Justice Burchett's decision was upheld by the Federal Court.[19] The Court reiterated the idea that the

emphasis in the definition of cinematograph film should be on the end product - the motion picture - rather than the means to create those pictures.[20] The visual images were "the effect" and were to be distinguished from the computer program itself. Further, the fact that the sequence of images on the screen varied according to player action did not mean that the sequence was incapable of coming within the definition of "cinematograph film".[21]

Multimedia products consisting of moving images interspersed with still images, or still images only, would arguably not be protected under the category of film. Nor would multimedia products be eligible for protection as computer programs, since the images were held to be only part of the end presentation of a computer program and not necessary for the functioning of the program.

A multimedia product, being a "selection of media elements arranged in a particular manner"[22], might be capable of falling within the category of "compilation"[23]. However the compilation must be expressed in "words, figures or symbols" and be of a literary character in order to gain the protection. Therefore it may be that products containing sound and video as a dominant feature would not be considered compilations for the purposes of the Act.

One commentator has suggested that multimedia works may be regarded as "dramatic works".[24] A dramatic work is defined to include "a scenario or script for a cinematograph film".[25] So the scenario of the end presentation of a multimedia product could be considered a dramatic work, in so far as the multimedia product fits within the accepted definition of cinematograph film. Alternatively the scenario of a multimedia product may be considered a dramatic work in a broader sense, because it could be viewed as a "work intended to be performed or represented as opposed to read or narrated".[26]

It seems doubtful that the category of dramatic work could be distorted to accommodate for such an ephemeral concept as multimedia. Several cases have rejected the notion that the format of a television show is a "dramatic work" that is worthy of protection. In the case *Green v Broadcasting Corp of New Zealand*[27] the format of a program was too vague a concept to be the subject of protection under NZ copyright law.

Patents

Patent laws depend on new "methods of manufacture", and protect new inventions, processes or an advancement in current technology. Once the patent is registered, the patent holder maintains a monopoly over the invention for generally 16 years and the consent of the patent holder must be obtained before the invention can be manufactured.

Patents do not play a large role in the multimedia area. This is because multimedia programs are primarily composed of computer software and usually computer programs are considered unsuitable candidates for patent protection.[28]

The majority of applications for registration of software are denied. In a landmark case in the United States in 1989, the US publisher Compton was denied a patent for its specification for the user interface for access to multimedia encyclopedias.

There may yet be multimedia products which venture beyond being merely "software", in which case patent law may be relevant. However due to the fact that producers of multimedia are creating the product for a known consumer base and use standard materials in order to be able to sell the product, it may be unlikely that patent laws will become any more relevant to the protection of multimedia products.

Trade marks

Trade mark law only protects the name of the product or the drawings, illustrations, symbols, colour or sounds that make up the product. The Australian Copyright Council gives an example of a logo used on the packaging of computer software material as worthy of protection under trade mark law.[29] Registration of a trade mark is not compulsory, but provides benefits to the trader.

Designs

The form or shape of functional articles can be protected for up to 16 years by way of design law. Design law also protects ornamental aspects of useful articles. However regulation 11 of the Commonwealth *Designs Regulations 1982* prevents articles that are primarily literary or artistic in character from being registrable, which may deny protection to a multimedia product.

There is also the additional qualification that design law provides protection for "one particular individual and specific appearance"[30], and multimedia, taking its form from an almost infinite array of appearances would seem to be antithetical to the purpose of this protection.

Passing off and consumer protection laws

"Passing off" developed as a remedy for traders whose established business reputation in a name or other distinctive product feature is misappropriated by a rival trader seeking to take advantage of this reputation by adopting a deceptively similar name or feature. The second trader will be prevented from deceiving the consumer and injuring the goodwill belonging to the first trader.

Consumer protection laws such as the *Trade Practices Act (Cth.)* and Fair Trading legislation in the States and Territories, may also be relevant against the misleading use of titles and other features of software.[31]

2. Contractual Management of Multimedia

2.1 The 'family' of multimedia contracts

The producer of a multimedia product may be faced with a multitude of contracts:

- If a producer needs to obtain a loan or final investors, he or she will probably need to sign

investment or finance agreements.

- If the producer is using contractors to assist in the production process, he or she will need to consider consultancy agreements.
- A producer may need to enter into a publishing or distribution agreement to provide for the publishing, promotion, distribution or marketing of the product, assuming that it is the producer that is not doing these acts him/herself.
- Finally the producer will have to consider what licensing agreements he or she will need in order to obtain the rights to content. The terms and conditions that may be included in these types of agreements by the producer, will form the focus of the second half of this paper.

2.2 *Intellectual property ownership*

The ownership of rights is an important feature of such a contract. Alternatives for the producer are to buy the intellectual property rights to the content, or simply to license content.

The producer might decide to acquire ownership of the copyright in the artwork outright, since this simplifies later arrangements and reduces the risk of conflicting claims to ownership of the material. This may be by way of an absolute or partial assignment.

On the other hand, a licence may be preferable because the producer is then not unduly burdened by ownership of copyright in the many different component parts of the product, but is only responsible for licensing (and paying for) as much as he or she needs for the project. Rights holders also generally prefer licensing their work because it enables them to retain control over the use of the work.

2.3 *Exclusivity and scope*

In the case of a licence, the exclusivity and the geographic scope of the grant should be specified.[32]

The granting of world-wide rights is seen to be an industry standard.[33]

Exclusivity is a matter for negotiation and depends on:

- the nature of the project;
- how much the producer can afford to pay;
- the form of the work;
- its significance to the project; and
- the relative bargaining power of the parties.

Usually non-exclusive licensing is considered appropriate unless the work is unique to the product, although the licensor might undertake not to license the same material to the licensee's competitors.

2.4 *Specification of uses*

It is important that the agreement clearly detail the uses which have been authorised by the rights holder, for example:

- will the rights holder allow the finished product to be installed on a hard drive for transmission over a computer network or via the Internet?
- will users be permitted to copy material to a hard or floppy disc, or print-out the digitised version of the existing (licensed) work from within the multimedia product?

The rights holder may want to limit the grant of rights in the work for use only in the medium in which the product is being sold, and perhaps only for advertising, marketing and promotion purposes. The rights holder may also wish to place restrictions on the number of copies that are made or limit the amount of work used in the product.[34] The rights holder and the producer should also determine their position in relation to updates and further products. Rental of the multimedia product is also a negotiable item.

The issue of sub-licensing rights acquired by means of the agreement should be addressed. If the producer is not distributing the product, then he/she will need to be able to sub-license rights for that purpose. Rights may also need to be sub-licensed to users of the final product.

2.5 *Distribution*

Of particular concern for producers, in addition to the above mentioned issues, is ensuring that the contract specifies the "platform" (computer system) on which the software product will run. Most entertainment software is sold as magnetic disks for use on MS DOS-based computers. This is an important issue because it can determine market opportunities.[35]

2.6 *Moral rights and accreditation*

Although not yet recognised in Australian copyright law, moral rights are on the agenda for inclusion in a reform bill later this year. They are personal rights belonging to the creators of artworks, and include the right of the creator to be identified with his/her work, and the right to object to alteration or other derogatory treatment of the work that would be prejudicial to the creator's honour or reputation.

Moral rights are already recognised in other countries, and contracts, such as a product development/ consultancy agreement or an intellectual property licence, will therefore need to deal with the existence of moral rights in other jurisdictions. Commonly other jurisdictions permit some, if not all, moral rights to be contractually waived by an author, and this is a common term in production agreements.[36]

If the work is intended to be manipulated, for example, in the case of an interactive product, then this should be discussed with the creator at the outset. A creator with significant bargaining power might attempt to secure approval over the final work; or the creator might attempt to secure

a right of first refusal in relation to any changes requested by the producer.

Whether the original creator is provided with production credit is a matter for negotiation. The producer should make sure that he or she does not attribute falsely the authorship of a work by putting another person's name to it. Nor should the producer knowingly attribute falsely the authorship of an altered work.[37]

2.7 Warranties and indemnities and other obligations

There will need to be specifications as to warranties and indemnities. In the case of a content acquisition agreement for example, a creator might be required to provide warranties with respect to the fitness of the product, that there would be no conflicting claims regarding ownership of the intellectual property rights in the product, and that there are no agreements which are inconsistent with the rights granted to the producer.[38]

The producer may also endeavour to obtain indemnification from the creator with respect to loss or damage suffered or expenses incurred as a result of breaches of the warranties.

Depending on the nature of the product, the creator may not wish to guarantee that the product is error free or virus free, or that the use of the product will be without interruption. Part of the delivery of materials by the creator may well involve the supply of technical information in order that the producer can set up any user help line. In the event that errors do become apparent in the product, or legal action is threatened against the producer, the producer should reserve the ability to suspend distribution of the product.

2.8 Term of the licence

Producers will usually seek a perpetual term for an intellectual property licence. Alternatively the term of the licence might endure for "the term of any intellectual property rights" in the licensed property. The rights holder might seek to limit the term to a defined number of years, with options for additional terms and additional payment. What is appropriate will depend on the particular product, and whether it is likely to have a short or long life span.

Commentators warn that the term of the licence should not be too limited, otherwise distributors or publishers will refrain from enthusiastically promoting the product for fear that they will lose the publishing/ distribution rights before the promotional investment can be recouped.[39]

2.9 Payment

Agreements should clearly specify the amount and manner of payment to the licensor. This could be by way of royalty or by up-front payment, or by a combination of both.

The producer may be obliged to "endeavour" to maximise commercial returns on the multimedia product, although a producer may wish to qualify this obligation so that its exercise of the rights is "consistent with good business judgment and commercial practice".[40] Otherwise provisions ensuring some minimum amount of return to the licensor might be inserted.

There should be provisions included in royalty-based contracts that deal with accounting, auditing and reporting requirements.

2.10 General provisions

Provisions with respect to confidentiality of information, arbitration and/or mediation, publicity regarding the agreement, and termination of the agreement should be considered in all contracts.

In the case of an intellectual property licence, a licensor in a powerful bargaining position might attempt to negotiate for termination at their election in the event that the producer fails or ceases to comply with the terms of the contract, for example, fails to begin distributing the multimedia product within a specified period of time. In the event of termination, the copyright owner will usually want all rights to revert to him or her, without prejudice to any claim he or she may have in damages.[41]

Producers may be wise to ensure that the copyright owner will only be entitled to claim for damages in the event of termination. This would prevent the rights holder from interfering with the distribution of the product in the event of a producer failing to comply with obligations under the contract.[42]

3. Copyright reform and new directions for multimedia

Copyright has proven a difficult area of the law to reform because of the rapidly changing technological environment.

Outstanding issues that were identified by the Copyright Convergence Group (CCG) in its report *Highways to Change*, 1994, and incidental issues raised in the Copyright Law Review Committee (CLRC) Report *Computer Software Protection*, 1995, were only just being considered by the CLRC in July 1998.

Relevant issues from the CCG Report include:

- deciding whether the present definition of "cinematograph film" in the Act remains an adequate category of copyright protection or whether it should be replaced by a new broad category of "audio-visual work" to expressly cover multimedia works;
- whether there is a need to provide a definition of "reproduction" in the Act to ensure that new uses of copyright materials would be controllable by copyright owners;
- whether the definition of "copy" in the Act extends only to cinematograph film or whether it should extend to material stored in a non-permanent medium;
- whether the definition of "publication" should be

amended so as to provide copyright protection for sound recordings delivered to the public in an intangible form;

- reconsidering the definition of "broadcast" in the Act, having regard to the increasing number of types of electronic delivery of materials;
- whether the jurisdiction of the Copyright Tribunal should be extended to cover all forms of collective licensing, and if so, whether this can be done in line with Australia's obligations under the Berne Convention;
- considering the need to provide a mechanism for the use of copyright material where the copyright owner is unknown or cannot be traced; and
- whether the scope of the statutory licence for the broadcast of sound recordings, provided under section 109 of the Act, should be extended to include broadcasts offered for valuable consideration.

The Copyright Law Review Committee believes that issues arising from these proposals will not be acted on by the Government until late this year.[43]

Other reform proposals include the introduction of a workable moral rights regime, extending performers' intellectual property rights, changes to the 'fair dealing' provisions in the Act, and digital agenda reforms.

Producers will need to be cognisant of the potential impact that these changes will have on the production process. For example, the proposed moral rights regime will have a far-reaching impact on the multimedia industry, considering that multimedia is essentially about fragmentation and digital manipulation of works. Creators will be provided with increased control over the uses that are made of their work. At the same time, changes proposed by the CCG Report will allow the producer greater opportunity to create a bigger and better multimedia product, for example, the advent of a collective licensing scheme and the recommended statutory protection for a multimedia product in its final form.

Distribution of multimedia over the Internet, will also be affected by digital agenda reforms. Proposals to date, promise the introduction of a new right of communication to the public and new enforcement remedies against Internet piracy, with limitations placed on the liability of telecommunications carriers and Internet service providers.[44]

Besides developing statutory support for multimedia production, the Federal Government indirectly plays a role in supporting the industry through funding.

The Federal Government's newly established Innovation Investment Fund, is set to provide more than $200 million to innovative Australian companies. Momentum Funds Management Pty Ltd also offer investment funds worth $30 million for businesses involved in high-technology, including multimedia production companies.

Victoria is leading the way amongst the states in terms of its support for the industry. The government established Multimedia Victoria (MMV) as a Victorian Government agency in May 1996. MMV offers many supporting programs... "to lead...a multimedia skilled community through the transition to an information economy".

This paper was presented by Denise McBurnie at the Bullet-Proofing Your IT Contracts conference in September 1998.

1 Gerdsen, T, J, *Copyright. A User's Guide*, 1996, RMIT Press, at 229. "Multimedia producer" as it is used in this paper, refers to the person primarily responsible for directing and co-ordinating the production of a multimedia product, and who is responsible for the acquisition of the various items of content to be included in the product.
2 *Copyright Act 1968*, sections 85 - 88.
3 [1981] RPC 283
4 *Phonographic Performance Company of Australia v Federation of Australian Commercial Television Stations* (1998) AIPC 91-416
5 Alston, R, Senator, "Media Release", 15/7/98, http://www.dca.gov.au....newsroom
6 Gerdsen, T, *Copyright. A User's Guide*, 1996, RMIT Press, at 239-240. In the case *Television New Zealand Ltd v Newsmonitor Services Ltd* [1994] 2 NZLR 91, videotapes of televised news programs infringed copyright in the broadcast, as well as copyright in the cinematograph films comprised by the pre-recorded segments of the programs, and the scripts for the programs.
7 Breen, P, "Negotiating a Multimedia Contract" (1995) 4 *IPAsia* 11, at 14
8 *Copyright Act 1968*, Part XIA
9 *Copyright Act 1968*, sections 51 and 110A
10 Gerdsen, T, *Copyright. A User's Guide*, 1996, RMIT Press, at 241
11 Australian Copyright Council, "Multimedia Producers and Copyright", July 1997, at 13, referring to the case of *Autodesk Inc v Dyason* (1992) 173 CLR 330
12 The Australian Coalition of Service Industries has called on the private sector to establish competing companies which would operate as one-stop shops for copyright clearance: Australian Copyright Council, "Licensing Content for Multimedia", December 1997, at 41
13 Mechanical rights are defined as being rights to reproduce musical works in audio format. See AMCOS, "The Mechanical Right", 1997, http://www.amcos.com.au/general/mechanic.html. Synchronisation refers to the reproduction of sound recordings or musical works onto film. See AMCOS, "Some Film Industry Terms Relating to Music use", 1997, http://www.amcos.com.au/film&vid/terms
14 AMCOS, "What Royalties Must I Pay?", 1997, http://www.amcos.com.au/audiorec/royalty.html
15 Although if the product is to be distributed by computer network, then the producer may need to consider performing rights.
16 *Copyright Act 1968*, section 31 (1)(a)(v)
17 See APRA, "What's New, Media Releases", 9 June 1998, http://www.apra.com.au/htm/index2.htm
18 Australian Copyright Council, *Multimedia Producers and Copyright*, July 1997, at 33
19 *Galaxy Electronics v Sega Enterprises* (1997) 37 IPR 462
20 (1997) 37 IPR 462, at 469
21 (1997) 37 IPR 462, at 470-471
22 Douglas, J, "Too Hot to Handle? Copyright Protection of Multimedia" (1997) 8 *Australian Intellectual Property Journal* 96, at 100
23 "Compilation" is included in the definition of "literary work" in section 10(1) *Copyright Act*.
24 Douglas, J, "Too Hot to Handle? Copyright Protection of Multimedia" (1997) 8 *Australian Intellectual Property Journal* 96, at 101
25 Section 10(1) *Copyright Act 1968*
26 Douglas, J, "Too Hot to Handle? Copyright Protection of Multimedia" (1997) 8 *Australian Intellectual Property Journal* 96, at 101, quoting from Ricketson, *The Law of Intellectual Property*, 1984, Law Book Company, para 5.66
27 [1989] 2 All ER 1056
28 Leong, Tham Kok, "Multimedia: New Legal Dilemmas" (1995) *IP Asia* 2, at 5
29 Australian Copyright Council, *Computer Software & Copyright*, October 1997, at 38
30 *Halsbury's Laws of Australia*, 1998, Butterworths
31 Australian Copyright Council, *Computer Software & Copyright*, October 1997, at 39
32 Berman, A.R., "Picture This: The Licensing of Graphic Art Images for an Enhanced CD", http://www.degrees.com/melon/archive/pictures.html

33 Australian Copyright Council, "Licensing Content for Multimedia", December 1997, at 19
34 If less than a substantial portion of the third party's material is to be used, then the producer may not have to be concerned about infringing the copyright in the third party material, and copyright clearance will therefore not be necessary.
35 Breen, P, "Negotiating a Multimedia Contract" (1995) 4 *IPAsia* 11, at 16
36 It is interesting to compare Australia's moral rights proposals. The Attorney-General, in an address at the Moral Rights Consultation Forum on the 18 August 1998, revealed that Australia's legislation will include some form of waiver provisions, and these are likely to apply to all creators of copyright works and films. There was still uncertainty as to the extent of the waiver provisions, but it was stated clearly that the legislation will not provide for a general waiver of moral rights.
37 Sections 189 to 195AA of the *Copyright Act 1968*.
38 Gill, J, ed. *Multimedia Contracts Handbook. An Industry Guide*, 1998, Prospect, at P5-23
39 Breen, P, "Negotiating a Multimedia Contract" (1995) 4 *IPAsia* 11, at 15, 16
40 Gill, J, ed. *Multimedia Contracts Handbook. An Industry Guide*, 1998, Prospect, at P6-19
41 Australian Copyright Council, "Multimedia Producers and Copyright", July 1997, at 31
42 Australian Copyright Council, "Multimedia Producers and Copyright", July 1997, at 32
43 Conversation with Caroline Goldsteen, from the CLRC, on the 17 July 1998
44 Rees, D, "The Government's Proposals for Copyright Reform and the Digital Agenda" (1998) 17(2) *Communications Law Bulletin* 20

E-commerce welcomes Lawyers to the New Economy (current as at 19/10/98)

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1. Introducing the New Economy

Welcome to the new economy. A world in which mind share replaces market share, knowledge capital is more valuable than plant and equipment, innovation is more important than mass production and where products are not sold but given away.

After 200 years of industrialisation there is a new economy emerging with new rules and a whole new language to learn.

Digital networks have replaced information as the basic building blocks of the economy. Where once value resided in those who controlled information, it is now shifting to those who use enabling technologies, such as the Internet, to create a wealth of new business relationships.

This paper focuses briefly on what the new economy means for lawyers. It looks at the themes of the new economy, the skill sets required to practice within it and considers some strategies needed to survive and prosper.

2. What is the New Economy?

At the core of the new economy is the concept of the networked world where digital technology and the Internet enable unprecedented interaction between individuals and organizations.

From this basic proposition has emerged powerful themes, some common sense others counter-intuitive, like the notion that more value is created when a product is given away than sold, but each designed to exploit the globalisation of networks. These themes include:

2.1 Co-opetition

When competitors co-operate. A nightmare for the Australian Competition and Consumers Affairs Commission but increasingly seen as a means of ensuring markets grow faster.

2.2 Convergence

When everything from the images of a sporting event, to the words of a book, to the sounds of music can be represented by binary 1's and 0's and delivered down the same pipe. The prospect of convergence is touted as the true "killer application" of the new economy.

2.3 E-commerce

When innovation and technology are applied to business processes. E-commerce, whether it's business to consumer or business to business, is now a mainstream business methodology that is destroying some old business conventions and mores.

2.4 Just in time learning

When the concept of just in time delivery seen in manufacturing is applied to knowledge professionals such as lawyers. It's about using technology to deliver the right tools to the right people when they need them.

2.5 Mindshare

When everyone knows your name. Its seems everyone knows who Amazon.com is. It is replacing market share as businesses realize that it is not so much what you buy and sell today which is important. Rather, it's what people will be talking about tomorrow.

Whilst, many of the above themes may appear foreign to a traditional legal adviser, there is at least one theme of the new economy which all lawyers understand: speed. Above all else, the new economy is about speed.