ONE HOUR CLE CREDIT

CLEARING RIGHTS FOR ENTERTAINMENT PROJECTS

BY PROF. MARY LAFRANCE

Works of entertainment take many forms, including: films, videogames, slot machines, live and recorded music, karaoke devices, dance, comedy, magic and theater. Regardless of form, creating and exploiting an entertainment work frequently requires obtaining clearances for the intellectual property rights embedded in the work. Three categories of rights are especially important in works of entertainment: copyright, trademarks and the right of publicity.[1]

Copyright

Broadly stated, copyright owners have the right to prevent the unauthorized exploitation of their artistic, literary, dramatic, musical, choreographic and audiovisual works, as well as computer software. While works published before 1923 are in the public domain, and original works created after 1989 are almost always copyrighted, the copyright status of other works must be determined on a case-by-case basis. The copyright status of a work in the U.S. may differ from its status in another country – an important point if you export your creative work to other countries or exploit a foreign work in the U.S.

To copy or adapt another's copyrighted work, or to publicly perform, distribute or display the work, you will typically need a copyright license. The major exception is fair use, but if you are using a creative work for commercial gain, or using the work in its entirety, it is typically not a fair use. Every case turns on its own facts; even parodies are not categorically considered fair use.

Music surrounds us, but any venue where live or recorded music is publicly performed (including karaoke), must have a public performance license for every copyrighted composition performed. Typically the venue operator solves this problem by purchasing a blanket license from each of the three performing rights organizations (PROs) – ASCAP, BMI and SESAC – that represent songwriters and music publishers. A PRO's blanket license permits the venue to perform all compositions represented by that PRO, either live or as a recording.

Other uses of music require different licenses. Making and

distributing sound recordings requires a mechanical license. If music is incorporated into an audiovisual work, such as a film, videogame or karaoke device, a synchronization license is required. If the producer of an audiovisual work wants to use an existing recording of the music, rather than creating a new one, the producer will also need a master license from the record company that owns the copyright in the recording.

To stage live theater — a Broadway play or musical, for example — a producer must license the performance rights for the script, as well as for any music or choreography that will be part of the production. These will typically be licensed as a package from the agency representing the dramatic work. PRO blanket licenses do not cover dramatic musical performances.

Many works involve multiple copyrights. A videogame may incorporate musical compositions and sound recordings as well as software; it may even be adapted from another copyrighted work, such as a popular motion picture. A motion picture may be based on a novel, short story or original screenplay; its soundtrack may incorporate multiple pieces of music and/or sound recordings; and its set decoration may include copyrighted artwork. Creating and exploiting such complex works requires licenses to copy, adapt, publicly distribute and (in some cases) publicly perform or display each of the underlying copyrighted works. This requires dealing with multiple copyright owners —sometimes different copyright owners in each country where the work will be exploited. If licenses can be obtained for some materials but not for others, the problematic elements may have to be replaced, for example by finding a substitute for any unlicensed music. In the case of an older motion picture, it is possible that some elements (for example, the underlying story, or the film footage itself), may have entered the public domain, while other parts (such as the music) remain copyrighted.

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Some works of entertainment, or their components, can be created under "work made for hire" contracts. The party that pays for the creation of a work made for hire is considered the author and initial copyright owner, and therefore will not need a license to exploit the work. This approach is common in the film and videogame industries. However, even if certain components of a work are created as work made for hire, other elements may still have to be licensed.

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Trademarks

While we generally think of trademarks in connection with ordinary consumer goods, they also play a role in entertainment. The name of a musical group can be a trademark. The title or characters from a work of entertainment may become so well known that they also begin to function as trademarks. This is especially true of works in a series, such as episodic television shows or the Harry Potter books and movies. It would typically be an infringement to use the Muppets characters or the name Harry Potter prominently on a book, slot machine, videogame, motion picture or other merchandise, without the trademark owner's consent. Even a popular toy can receive trademark protection. Using the name or image of Barbie in a videogame, for example, would typically require a license from Mattel. Trademarks can be protected by common law and the federal Lanham Act, even if they are not federally registered.

Trademark and copyright protection frequently overlap. Using the image of a Muppets character, for example, can infringe the copyright in the character's appearance as well as the trademark rights arising from that character's association with Jim Henson Productions. In contrast, using the names Muppets, Kermit or Miss Piggy, without the associated images, would implicate trademark rights but not copyright.

Creators of entertainment works can run afoul of trademark laws either by creating a false perception that their work is affiliated with the trademark owner (traditional infringement) or weakening or denigrating a particularly famous trademark (dilution). For example, the use of the Dallas Cowboys Cheerleaders' uniforms in an adult film led to a preliminary injunction based on a likelihood of confusion and dilution.[2] In contrast, some unlicensed uses of trademarks in creative works are protected by the First Amendment. The song "Barbie Girl" was held not to infringe or dilute Mattel's famous trademark, even though the song disparaged Barbie, because the song was a critical commentary on Barbie as a cultural icon.[3]

Rights of Publicity

An offshoot of the right of privacy, the right of publicity allows an individual to prevent unauthorized commercial uses of his or her identity. While the protectable elements of a person's identity always encompass name and likeness, some jurisdictions take a broader approach than others. California's law protects a person's voice as well as imitations of the person's voice, while New York's law does not apply to voices at all. In some states, the right of publicity survives postmortem. This enables the estate of a deceased celebrity (e.g., Elvis Presley or Princess Diana) to control commercial exploitations of the celebrity's identity.

Under the First Amendment, a work of entertainment that comments on or tells a story about a celebrity does not violate the right of publicity. In contrast, using someone's identity for pure commercial exploitation will be actionable. For this reason, using a person's image for advertising purposes — or to decorate a slot machine — typically requires that person's consent.

Tribute bands and celebrity impersonators walk a fine line between protected expression and pure commercial exploitation. While these activities can present difficult legal questions, some states, including Nevada, have carved out specific statutory exemptions.[4]

When obtaining a copyright owner's consent to use character images from a film or television series featuring live actors, it is essential to make sure that the copyright owner is authorized to license this particular exploitation of the actors' likenesses. While film and television actors typically authorize producers to utilize their right of publicity in exploiting the films and related merchandise, these waivers may exclude slot machines or certain other specified uses; therefore, decorating slot machines with images of characters from a television show may require the consent of not only the party that owns the show's copyright but also the individual actors depicted.

The right of publicity can overlap with both copyright law (which protects tangible images of a person, such as photographs) and trademark law (because the use of a person's name, and sometimes other aspects of the person's identity, can imply endorsement or sponsorship).

While there is no federal right of publicity, the federal anti-bootlegging statute allows musical performers to prevent the unauthorized recording or broadcast of their live performances as well as distribution of the unauthorized recordings. **NL**

1. Rights not addressed in this article, but relevant to certain works of entertainment, include patents and trade secrets. These are particularly relevant to entertainment devices that use software, such as video games, slot machines and karaoke devices. Trade secrets are also relevant to magic performances.
2. *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200 (2d Cir. 1979).
3. *Mattel v. MCA Records, Inc.*, 296 F.3d 894 (9th Cir. 2002).
4. E.g., NRS 597.790 (exempting celebrity impersonations); NRS 598.0922 (permitting, inter alia, tribute bands when clearly labeled as such).

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