

12-1994

## In Search of the Multimedia Grail

Daniel L. Brenner  
*National Cable Television Association*

Follow this and additional works at: <https://www.repository.law.indiana.edu/fclj>



Part of the [Antitrust and Trade Regulation Commons](#), and the [Communications Law Commons](#)

---

### Recommended Citation

Brenner, Daniel L. (1994) "In Search of the Multimedia Grail," *Federal Communications Law Journal*: Vol. 47 : Iss. 2 , Article 10.

Available at: <https://www.repository.law.indiana.edu/fclj/vol47/iss2/10>

This Essay is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Federal Communications Law Journal by an authorized editor of Digital Repository @ Maurer Law. For more information, please contact [rvaughan@indiana.edu](mailto:rvaughan@indiana.edu).



**JEROME HALL LAW LIBRARY**

INDIANA UNIVERSITY  
Maurer School of Law  
Bloomington

# In Search of the Multimedia Grail

Daniel L. Brenner\*

There are very few practicing lawyers in multimedia. Unlike other emerging communications industries, little law governs this area. Multimedia lies at the intersection of video software, information distribution (or telecommunications), and interactive personal computer interfaces. The fact that multimedia covers all three disciplines leads to some confusion about what multimedia is and how we should think about it.

From a cable television perspective, the distributive aspects of multimedia are the most significant. But what you see depends on where you sit. A representative of the computer industry or the author's guild would offer a different perspective. What unites all three orientations in pursuit of the multimedia grail is the ability of each to extend its line of business by harnessing the attributes of the other two. Without the combination of all three players—software, telecommunications, and computers—multimedia will not emerge.

Consider how multimedia exists when two of the three pieces converge. This would be the formation of a duomedia. For example, the CD-ROM marketplace is growing—that is a convergence of software and computer minus telecommunications. There are about 2500 CD-ROM titles in circulation with an estimated 5000 titles by year's end.<sup>1</sup> The number of households owning personal computers with compact disc players increased nearly fourfold last year to 1.9 million households.<sup>2</sup> By 1995, it is estimated that there will be 8.6 million households with CD-ROM capacity in their computers.<sup>3</sup>

Likewise, the duomedia of telecommunications and computers (but without video) comprise the exploding world of on-line services, from e-mail to Prodigy to LEXIS. Take the duomedia of telecommunications and

---

\* Vice President for Law and Regulatory Policy, National Cable Television Association. A.B., A.M., 1973, Stanford University; J.D., 1976, Stanford Law School.

1. *From Prime Time to My Time*, ECONOMIST, Feb. 12, 1994, at 9, 10.

2. Steve Lohr, *Company News: Multimedia Annual Reports*, N.Y. TIMES, Mar. 5, 1994, § 1, at 41.

3. *Id.*

video: without personal computer interactivity, the combination of video plus telecommunications minus computers is cable television, ADSL, pay-per-view TV, and other forms of video on demand using a terminal box on the TV set. Perhaps the most mature form of interactive communications in this combination is home shopping by television. QVC and the Home Shopping Network lead a field of networks, and existing players like MTV are adding home shopping to their programming arsenal. America's mail order and home shopping industries do an estimated \$80 billion a year in business.<sup>4</sup> So the duomedia world is with us today. The demand for each duomedia in this decade has made the search for the multimedia grail a worldwide preoccupation. The excitement and profits that ought to reside at the intersection of all three—video, telecommunications, and computers—entice players in these markets, as well as those who serve these three major markets, to embark on their quest.

Much of what has been discussed in the popular and trade press about multimedia is the stuff of dreams. There were 780 NEXIS database stories mentioning the information superhighway or multimedia between January 2 and 9 of this year; between February 2 and 9 the number rose to 890. There are dollars to be chased, from the \$80 billion home shopping and mail order business, to the \$15 billion generated every year in video rentals,<sup>5</sup> to the \$35 billion on-line information services business.<sup>6</sup> These figures reflect just a shadow of the multi-billion dollar magazine and television businesses and the \$17-billion-a-year book-publishing business that are also loosely described as "information services."<sup>7</sup>

There are skeptics of an ultimate convergence. They believe convergence conflicts with the fundamental character of what many suppose is the building block of multimedia—television. As Ted Turner said, "Every single interactive TV experiment has failed. Most people want to sit back and watch—interacting is hard work."<sup>8</sup> Frank Biondi of Viacom reminds us that "television is, at bottom, a passive experience—which is its beauty."<sup>9</sup>

No one doubts that there is a business in interactive video at some level. The *Economist* recently calculated that Nintendo makes more money

---

4. *From Prime Time to My Time*, *supra* note 1, at 10.

5. *Id.*

6. *Id.*

7. Alan Deutschman, *Scramble on the Information Highway*, *FORTUNE*, Feb. 7, 1994, at 129, 131.

8. John Heilemann, *What If They're Right?*, *ECONOMIST*, Feb. 12, 1994, at 3, 3.

9. *From Prime Time to My Time*, *supra* note 1, at 10.

than ABC, CBS, and NBC put together;<sup>10</sup> video games are as big as the film or music business and are growing faster than either. So far the only stars of the new medium are the Super Mario Brothers and Sonic the Hedgehog. Imagine when things get more sophisticated. What regulatory principles work and do not work in describing this new medium, or in this case, a new medium of different media? We should acknowledge the reality that in this age of convergence, we face overlapping and often conflicting regulatory structures, detailed and untested statutes like the 1992 Cable Act,<sup>11</sup> and unsettled intellectual property rights.

First, market definition will be difficult in the multimedia world. The first examples of interactive in the mid-1980s involved applications in education. Multimedia was a natural for bringing together text, sounds, and video or film in an interactive experience. The interactivity of the process made education come alive for the student. Mixed media made the presentation more fascinating than simply reading it in the traditional linear book form. Even "plain Jane" books on computer—which allow you to search for certain words or characters on "pages" before or after the page you're reading—have advantages over the traditional book. For example, reading Dostoevski on computer would permit you to jump to references to characters 100 or 200 pages earlier that you might have forgotten but whose behavior explains what happens on the page you're reading. Books on computer even permit you to turn a page over electronically, just as one folds over the corner of a book page.

But measuring multimedia effectiveness is a tricky matter. Keeping a student's attention in an interactive, multimedia context may be no easier than in the lecture hall. There's a study reported in Martin Greenberger's *Multimedia In Review* about a teacher who was talking about Genghis Khan's invasion of China in 1213.<sup>12</sup> Of the twenty-seven students in the class, only two were thinking about anything remotely resembling China. Most were thinking about the lunch they were expecting, the weekend they were looking forward to, a boyfriend or girlfriend, or some sporting event. Of the two students who were thinking about China, one was recalling a meal his family had at a Chinese restaurant the previous week. The other was wondering why Chinese men wore pony tails.

Whatever the effectiveness of multimedia, its licensing will prove to be a significant business hurdle and not simply a legal afterthought. While

---

10. *Id.*

11. Cable Television and Consumer Protection Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified in scattered sections of 47 U.S.C. §§ 521-611 (Supp. IV 1992)).

12. Miahaly Cfikszentmihalyi, in *MULTIMEDIA IN REVIEW* 32 (Martin Greenberger ed., 1992).

cross-licensing in the video games market is just underway, full-scale licensing from other media for multimedia will prove to be very difficult.

Obtaining proper authorization to use music, film, or text as part of a multimedia work involves complicated, as yet undetermined, contractual arrangements. Bits of a music score, a scene from *King Kong*, or the opening paragraphs of *Bonfire of the Vanities* might all fit as part of a multimedia artist's conception. However, setting the value of those uses is difficult. It is little wonder that the first release of 7th Level, a multimedia company co-owned by a former saxophonist of the rock group Pink Floyd, is a storybook consisting of forty-two public domain songs, including *Old MacDonald Had a Farm* and *Itsy Bitsy Spider*. No one knows how widely multimedia will evolve. No rights group wants to be excluded from potential profits down the road. What if one portion of a multimedia CD is constantly replayed, while other segments, although licensed, remain unused? Does frequency of use, or mere use, govern? Added to these problems is the multiplication of intellectual property through morphing, sampling, or more garden-variety derivative work creation like adding music to what was once only text.

Furthermore, it may be within the power of the user, not the author, to combine multimedia elements to create new derivative works. The user will not be licensed by the copyright owners for such creation and those expected uses must be included in any license granted to the author, or, more accurately, the assembler of the elements of the derivative work. The result is that licensing intellectual property for multimedia is not an issue that can be thrown to lawyers with instructions "to work it out." In addition to the drafting guidance in the multimedia licensing treatises, let me suggest a few general directions.

During this development period of multimedia, it will be useful and necessary (though risky) for the major contributors to multimedia of source material—music, film, television, and text—to create "voluntary compulsory" license terms with a later accounting, as the value of these elements in multimedia becomes better understood.

Any such leap of faith by copyright holders, however, needs some approximation of how long of a leap and how profound the faith. Perhaps capping the allowable number of consecutive seconds of any film clip or phonorecord would be a way to describe an allowed use. Morphing and sampling would be disallowed without license. The total royalty to source providers could be capped at some percentage of the wholesale purchase price of the CD.

So, for example, if the contents of a multimedia CD consisted of no more than 20 percent of its material coming from derived sources, the

copyright owners of those sources would be entitled to share some percentage of the wholesale price of the CD. The compulsory license would last for a fixed term (for example, seven years), after which an accounting would be made to determine whether or not the users had been adequately compensated.

Additional restrictions might be placed on such a compulsory license right. For instance, any source material should be available in copy form to the public generally. Thus, movies that have never been released on video cassette or TV commercials not generally available in copy to the public could not be accessed under a compulsory license. While these proposals are merely a starting place, in order for multimedia to develop using existing sources, a compromise will have to be found.

Furthermore, the distribution aspects of multimedia present a serious regulatory issue. One important question is the right of a multimedia "speaker" to access wireline or wireless bandwidth to disseminate a product. One reasonable approach would be to impose on traditional common carriers the obligation, where bandwidth exists, to sell capacity to multimedia customers. For nontraditional common carriers, it is not as clear that a common carrier duty of transport should be extended. That is because carriers such as cable television or wireless cable do not hold themselves out as common carriers. Instead, they are packagers of the programs that they offer to subscribers, generally speaking. Cable's leased access obligations do not extend to two-way communications.<sup>13</sup>

On the other hand, in the future, where cable and other one-way technologies become two-way technologies and hold themselves out as common carriers, it will be harder to exclude multimedia from their platform simply because some aspect of their enterprise remains one-way downstream. Still, there may be a distinction between companies, including cable operators who offer "plain old video services" on a switched basis and those who do not install such facilities.

Other licensing problems will emerge. Will copying of multimedia programs for personal use be allowed? Can customers who develop valuable derivative works from multimedia works enjoy compulsory licensing of their derivative works? Should there be a common rights organization like ASCAP or Harry Fox to expedite the compulsory license?

While seldom the task of lawyers, there are still many questions to answer about multimedia and society. Some believe multimedia will liberate the learning process by taking the best of education and entertainment and invoking it to assist the next generation to expand its understand-

---

13. 47 U.S.C. § 543 (Supp. IV 1992).

ing of nature and the universe—multimedia as an ontological enterprise. Others wonder about a screen-based form of education, whether the screen is computer, television, or something in between. Does it amount to little more than a creative plaything, distant from the serious work of education?

Outside of the schoolroom, one has to wonder how many more hours in the day there can be for multimedia in addition to all the other demands made by leisure time pursuits. Navigational aids like *Your TV* will make the 500 channel environment workable and television viewing time better spent. Add interactive information services to TV watching time, and multimedia will have to either displace something in the schedule or meals will get cut even shorter—faster fast foods. Since there is a natural minimum time to microwave a Lean Cuisine meal, mealtime cannot be cut much more.

For lawyers hoping to guide multimedia clients, the task should be to simplify the rights process on the one hand and the regulatory process on the other so that this new medium of media—multimedia—can have a chance to demonstrate its utility. Otherwise, acquisition of rights will become gnarled in a knot of claims for compensation based on fear of the unknown, and multimedia's potential will be limited.

Similarly, if broadband networks cannot be expanded to deliver the capacity needed for two-way multimedia, the industry will remain a duomedia phenomenon. To put it another way, multimedia is at the pre-bottling stage. Until Coca-Cola was bottled, the only way to get a Coke was to go to the local drugstore. Today, virtually the only way to use CD-ROM and home video is to go to the book, computer, or video store to acquire it. It is worth noting that a market-driven licensing right led to the bottling of Coke and its adoption as something to be consumed at home.

In sorting out these legal and regulatory questions, we can take a cue from the computer industry. While computer software writers have resorted to the courts to protect computer programs, the history of computers—the third part of multimedia—has not been one of intense regulatory oversight or government-mandated standards. The heavy helping hand of Washington has not significantly intruded in the computer industry, and the result has been a continuing story of cheaper, more powerful, and more versatile computing. Law and regulation are not always the culprits in preventing advances in technology in the media. But copyright law and regulation entry in this area could stand as real stumbling blocks, given the complexities of rights and the pathways that in the past have been highly regulated. Relaxation of the usual legal throttles could let market forces, which have

done a splendid job in bringing low cost, high quality computing to the world, help us to find our way to the multimedia grail as well.

