

# **R**IGHTS



## **IN THE POCKET**

**PRACTICAL GUIDE TO THE LEGAL  
ASPECTS OF MULTIMEDIA PUBLISHING**

**DIRK J.G. VISSER**



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# INTRODUCTION



• • • • • The Dutch Association of Producers and Importers of image and sound carriers (NVPI, branch organisation for the entertainment industry: audio, video film and entertainment software, [www.nvpi.nl](http://www.nvpi.nl)) and the Dutch Publishers Association (NUV, branch organisation for publishers of books, daily newspapers and magazines and multimedia, [www.nuv.nl](http://www.nuv.nl)) promote the (collective) interests of their members. These interests are increasingly showing common ground, pre-eminently in the development and commercialisation of multimedia products. For these reasons in 2002 the NVPI and the NUV entered into a cooperative venture in the form of a foundation called: Platform Multimedia Producers.

This foundation supports the (collective) interests by:

- financially supporting combating piracy;
- promoting public affairs on behalf of multimedia producers;
- promoting internal and external information;
- promoting good product information;
- distributing collectively collected monies such as the private copying levies and public lending right payments.

For this reason, the board of the Platform Multimedia Producers thought it would be a good idea to act as partner in the organisation of the international Copyright Symposium which took place on 21 and 22 April 2008 in Amsterdam.

*The symposium *The Book in the Internet Era: Copyright and the**

*Future for Authors, Publishers and Libraries*, was the first event of the Amsterdam World Book Capital 2008 – 2009.

Platform Multimedia Producers not only helped to make the realisation of the symposium possible, but would also like to offer something to anyone who wants to publish multimedia, starting with all participants at the symposium.

In collaboration with the law firm Klos, Morel, Vos & Schaap ([www.kmvs.nl](http://www.kmvs.nl)), and in particular with Professor Dirk Visser, also affiliated with this firm as a partner, we are offering you this practical guide. A handy checklist of all legal aspects which you as an author, publisher or producer will encounter, along with Dutch examples and models in a digital appendix, which you can take advantage of. Obviously these examples are based on Dutch law, but our sister organisations who are active in other countries are herewith invited to add their own examples. Dirk Visser's checklist may be used freely, as long as the source is cited.

The practical guide with its digital appendix is written in Dutch and is translated in English by JMS Textservice. JMS Textservice has spent years perfecting the art of professional translation for a growing number of legal and financial service providers who expect top quality translations ([www.jmstextservice.nl](http://www.jmstextservice.nl)). The translation of the text of the practical guide is edited by Dr. C.Th.L. Visser-Fuchs.





• • • • • Dear reader or listener,

You are now reading or listening to the introductory chapter of the paper or digital version of a practical guide to the legal aspects of multimedia publishing. This guide is itself a multimedia publication and in this first section we will explain what you are allowed to do with it from a legal point of view.

If you are reading the paper version you have not yet performed any legally relevant act. Opening a book and starting to read it does not fall under copyright law.

However, if you are reading the digital version or listening to the digital audio recording, you have already performed one legally relevant act, though probably without realising it: you have copied the information from the USB memory stick to the main memory of the computer. This means you have performed a copying act which is covered by copyright law act. Is it prohibited? No, of course not, it is precisely what you were expected to do, as long as you are using the original memory stick, obtained in a legitimate manner. If you are using an “illegal copy” of the original memory stick, which you did not obtain in a legitimate manner, merely consulting it is a violation of many kinds of rights.

Hopefully all readers and listeners of an illegal copy have now quickly deleted it and we will continue with you, the user of a legal version. You may read or listen to this publication in full as often as you want, but what else are you allowed to do with it, and what not?

You may *give or sell* the publication, the book or the USB stick to *someone else*. Giving or selling a legal copy containing a protected work does not fall under copyright law or any similar law. You may also lend the book or the USB stick to someone else. But you are not allowed to rent it out without permission from the owner; because that does come under copyright law.

In some countries you can make a *full copy* or even several copies for your own private use. In other countries that is only allowed if the publication is sold out and will not be reprinted. Practically everywhere you may photocopy *short sections* of this publication for your own private use.

You cannot reproduce this publication for the use of others or republish it, for example by putting the text on the internet or reading it or playing it in a public place in front of an audience, or broadcast it on radio or television. You cannot make the digital version of this publication available on your company's or institution's intranet. You need permission to do so.

# 1 INSTRUCTIONS FOR USE



Within the limits of the right to quote, you are allowed to copy or publish short sections of this publication, provided that these quotations form a functional and subordinate part of a serious treatise, discussion or the like, and that you cite the title of this book and the name of the author.

This all results from copyright law and not from the forbidding little text at the beginning of most publications which says, for example: "No part of this publication etc.", or the copyright notice (©), which is meant to remind you of the copyright.

In fact foreign publishers and producers organisations affiliated to IPA of IFPI may do much more with this publication. It is offered to these organisations by the Platform Multimedia Producers, a collaboration of the Dutch Publishers Association – the branch organisation of publishers of books, magazines and newspapers – and the NVPI, the Dutch branch organisation of the entertainment industry, in particular the department NVPI interactive. Platform Multimedia Producers and the author, Dirk Visser, give permission to process this publication and its appendices and to adapt them to the national situation of each user, provided the source is cited. The Dutch examples in the appendices are based on Dutch practice and drawn up according to Dutch law. These examples can be replaced by national examples or can, where necessary, be adapted for use in another country.



• • • • • This is a practical guide and will discuss what the *producer* of a multimedia product may actually do and not do, and in particular what he must sign up in order to ensure that he can do what he wants and others cannot do what he does not want them to do. What do we mean by multimedia producer? A “multimedia producer” is someone who manufactures an informational product consisting of text and images in combination with sound and/or moving images and/or computer software, with the intention of offering it to the public for use. A strict definition of what exactly multimedia are or a producer is, is not needed here. We are talking of a very wide category, varying from a traditional publisher publishing an audio book, an amusement park issuing a computer game, a paint factory publishing an interactive annual report on CD-rom, to the website of a minor showing films and photographs of his or her pet, or favourite pop star or film star.

A common characteristic of these multimedia producers is that, often without realising it, they may find they have to deal with a large number of different rights belonging to a large number of different owners, because they are “publishing” and “reproducing” in the sense of many different copyright laws and neighbouring laws and agreements.

As soon as you copy or make work of others available to the public (i.e. other than for your own use) in any way, you are dealing with the rights of others.




In the digital appendix an English audio version and an English and a Dutch version of this guide have been included, as well as a number of translated Dutch models and publications by the Dutch Publishers Association, as examples and as practical aids. The guide also contains various helpful suggestions and cross-references to the appendices.

It is possible to approach the many rights you may come up against in many different ways and on different conditions. The order in which they are dealt with here is a little arbitrary. We will look first at the origin of the idea and next at the rights of others. The rights of others are divided into those of the makers of text, the makers of images and sound, and special attention will be paid to databases and software. Obviously the moral rights will be included, as well as the legal restrictions on exclusive copyright. Finally, the protection of the exploitation of rights will be discussed, and we will conclude with a summary checklist. • • • • •




The production of a multimedia product starts with the initial idea for such a product and the subsequent initiative to produce it. From the very first, and this applies to the initial idea and to all other aspects and stages of the development of the product, the producer is able to choose between *purchasing* something *existent or creating something new*. However, non-elaborated (not fully developed) ideas are not protected by copyright. For example: the idea of making a computer game in which the player appears to be riding a horse and holding the reins is, as such, not protected, but the fully developed computer game is. It is often difficult to determine where the boundary lies between an unprotected, non-elaborated idea and a protected, fully developed, idea.

In fact, inventive technical ideas as such, i.e. ideas in which new technical processes play a role, can in some circumstances be protected under patent law. It is difficult to say in general when this is the case and it is an issue which falls outside the scope of this brief practical guide. One point of advice, however: in case of doubt whether the idea is perhaps a new, technical invention, the producer should always consult a professional patent agent as soon as possible, and always before the idea is made public in any way. By revealing a technical idea that may be eligible for protection under patent law before applying for a patent, one forfeits the possibility of patenting and gaining legal protection.

 Inventive technical ideas can sometimes be protected by patent law. This means that secrecy is required until the time patent is applied for. When in doubt consult a professional patent agent first.

The only way to protect a non-technical, non-elaborated idea is keeping it secret, but there are many ideas which cannot be exploited if they are kept secret at the same time. However, you can temporarily protect ideas by keeping them secret until the moment you are going to put them on the market. That is why confidentiality agreements, in particular for ideas that cannot be protected by law, are important in practice. A confidentiality agreement should be signed before the idea is shown or presented for inspection to anybody.

 Do not accept a confidentiality agreement which is too broad: maybe the same idea is already known internally, or it is not completely new. A confidentiality agreement concerning an external idea must also be limited in time.

The first right to be discussed here is the (copy)right of the initiator, the author of the (first) elaborated idea or concept, the format or the basic work: an “internal idea” (3.a). It is quite possible that the multimedia producer or one of his employees is the initial author. But often it is an external author, sometimes of an existing work,



## 4 TEXT




• • • • • Text or alphanumeric information (letters and/or figures) is in most cases protected by copyright. The most important exception is the work of writers who have been dead for more than 70 years; this is no longer protected. For almost all use of text by writers who have been dead for less than 70 years permission is required from the owner. We discuss next: who is the owner of copyright (4a); indemnification (4b); own investigation (4c); and transfer or license (4d).

### 4.a Who is the owner?

The legal owner of the copyright is the author, the person who wrote the text. *Initially* at least, the author is the owner. Copyright can be transferred (and inherited), however, and so by no means always lies with the original author. In many cases the copyright has been transferred to some one else, for example a publisher. Even if there has been no transfer, it is possible that the author has concluded an exclusive licence agreement or other contract, which means that *he can no longer* give permission for the use of his work.

When a publisher wishes to use a work which he has already published as a book for a multimedia work, he should first review its contract with the author, to see whether such use of the work was included and what agreements, if any, still have

to be made. Printing or publishing on demand, the e-book and Google Books are all forms of digital publishing. The contract with the author is often primarily focussed on publication in book form. Obviously a publisher cannot exercise more rights than he has himself, or grant them to third parties..

 The checklist digital publishing (appendix II) focuses mainly on the agreements, made and to be made with the author of a book, that make the digital publication possible.

### 4.b Indemnification

Whether it concerns a first edition of the work by an author, or a multimedia edition of his work to which the publisher/producer owns the rights, it is always advisable to include a provision in a (new) contract in which the author states that he is the (sole) owner of his work and indemnifies the publisher against claims from third parties. Such a provision has a preventive effect if nothing else. However, indemnification does not mean that the producer/publisher does not suffer any damages at all if, after the conclusion of the publication, a third party is able to demonstrate that he or she is the owner. Because it is the producer/publisher who publishes the work, he is the party who will be sued by this third party. The producer/publisher can then (attempt to) recover from the author any damages he suffered, but in many cases the extent of the damages is so great that (full) recovery is not possible.



For this reason it is advisable that the producer/publisher does not merely rely on the contract with the author, but when there is any doubt also investigates whether the author is really the (sole) legal owner (see 4.c)



Be sure that the indemnification is clear and also who is liable for what. For examples see the model agreement for the publication of literary works in appendix I.

#### 4.c Own investigation

Below are listed some examples of questions that could be asked as part of such an investigation by the producer into the rights of a work. Did the author ever work for an employer to whom the rights could have accrued or been transferred (for example an university or other educational institution)? Has he concluded any agreements with (other) publishers in the past? If it concerns text which is part of a published book, one should find out of course whether the rights belong to the publisher of that book. It is also necessary to investigate whether the author is not being represented by an agent or other intermediary. Even if there is another publisher or agent involved and the publisher/producer can reach an agreement with them, it should not be automatically assumed that this publisher or agent has all the rights needed to give permission for use in a multimedia product. There is no harm in asking this publisher or agent to check this in

their contract with the author and asking for explicit confirmation. Prevention is better than cure!

Finally the publisher/producer should check whether the author, when quoting others, has sufficiently respected the rights of these authors and their publishers.



In doubtful cases investigate as far as possible whether the contract partner really is the owner, and ask again, in any case.

#### 4.d Transfer or licence?

When acquiring rights, a transfer or a licence can be opted for. The most important difference is that in principle a transfer is definitive: the copyright becomes the full property of the producer to whom the right is transferred. A licence is only the permission to use the work. The difference is comparable to the difference between renting and buying. From the producer's point of view, transfer provides more security and is therefore more attractive. Some authors, however, are not prepared to transfer their copyright. In many countries a transfer needs to be made in a specific format, such as setting it out in writing and signing it.



In the case of licenses always remember the questions *whether, how, why and when* the licence can be terminated.

## 4 TEXT



In practice a licence can be sufficient for a producer to exploit a product properly. The licence must be sufficiently broadly formulated and it must be clear whether the licence is exclusive or not. The most important aspect of a licence is, again, the possibility to terminate it: can the licence be terminated by the author and if so, in which situation and under what conditions, and within or after what period of time?



An example of an exclusive licence set out in detail, in this case for the publication of a book in printed and in electronic form, including various subsidiary rights, is included in appendix I: [model agreement for the publication of literary works](#).

It is also important to remember that the copyright can be split up in many ways and licensed in parts, or transferred. Splitting up can be done according to commercial format (newspaper, magazine, book, CD-rom, on-line), by country or by language version. The parts can be transferred or licensed separately.

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• • • • • Images, by which are meant still images, such as drawings, cartoons, photographs, but also graphics, symbols and trademarks, are also usually protected by copyright. For this material the same rule applies as for alphanumeric work: work from creators who have been dead for more than 70 years is no longer protected. But there may be a catch: generally there is copyright on *photographs of*, for example, paintings of Old Masters, namely the copyright of the photographer. It is usually assumed that a photograph of an (old) painting is itself a copyright-protected work of the photographer. Therefore there is much less right-free material around than you would expect. We will now discuss: ownership (a); accumulation of rights (b); who is the owner? (c); portrait right (d); and finally pictorial marks (e) will be dealt with.

### 5.a Ownership

In the case of visual material there is often the added complication that the owners of unique visual material act as though they have the copyright on this material. Museums, archives and libraries often set many (financial) terms and conditions for the use of visual material of which the originals are in their collection. Such terms and conditions are not based on any copyright, but purely on the monopoly position they have as owner of these originals. They just

will not provide a (digital or otherwise qualitatively sufficient) image to users who do not first agree to their terms and conditions. These terms and conditions usually contain a (considerable) fee which must be paid, certainly for commercial use, but often also for use in scientific publications, which make no money at all, but only cost money. Museums, archives and libraries are often forced to do this by the people or organisations that subsidise them. Whatever the reason, this is a reality that must be taken into account for copyright-free visual material a fee often has to be paid because of the terms and conditions set by the owner, unless the image can be obtained from another source, which is freely available.



Copyright-free visual material often still has to be paid for, because the owner or proprietor of the original (for example a museum), can set contractual terms and conditions because of his monopoly position as owner.

### 5.b Accumulation of rights

The phenomenon of accumulated rights often occurs in the case of visual material: when a photograph shows a work of art, for example a statue or a painting, not only the rights of the photographer but also the rights of the creator of the work of art are involved. For the use of photographs permission is usually needed from both. With audiovisual material we will encounter an even greater accumulation of rights.



### 5.c Who is the owner?


For visual material its intellectual creator is usually the first owner. The (cartoon) artist is entitled to his drawings, the photographer to his photographs and the painter to his paintings. Here, too, there may be a case of transfer to others or of exclusive contracts with others. In the case of authors there may be agents who exercise the rights, sometimes this is the publisher or another company. Photographers can be affiliated to a photo press agency which exercises certain rights. Finally, many graphic designers are affiliated to a CISAC organisation, an organisation which collectively exercises the reproduction rights of many graphic designers, sometimes through sister organisations elsewhere in the world.

#### *CISAC-organisations*

CISAC organisations represent many graphic designers and are exclusively authorised to give permission for use on their behalf. This generally concerns reproduction rights to existing work. For commissioned works, agreements must generally be reached with the author or his agent. A current list of members of CISAC societies for visual art can be found on [www.bildkunst.de](http://www.bildkunst.de). An overview of CISAC societies (including those for visual art) can be found on [www.cisac.org](http://www.cisac.org).

If it is clear that a graphic designer is registered with an agent, a photo press agency or a CISAC society, the rights for use in a

multimedia product must be sorted out with them. Usually there is no doubt that such a professional organisation does indeed have the rights to grant the required permission. Conversely, if an author registered with such an organisation gives permission himself, then this permission is without value.

 Always check whether a graphic designer is a member of a CISAC-organisation. If so he can not give permission for the use of his work and clarity on the terms and conditions for use may be quickly obtained from the collective rights organisation.

#### *Photo stock agencies*

One can buy visual material from a photo stock agency. Such material is usually offered by a photo stock agency against payment under certain contractual terms and conditions. Sometimes there is an additional statement that the material is “copyright-free”. This may give the impression that the user can do anything with it, but generally that is not the case: copyright is not exercised, but the contractual terms and conditions of the photo stock agency still apply. Again, these contractual terms and conditions may contain many kinds of restrictions and perhaps do not include indemnification against claims from third parties. Therefore check the delivery terms and conditions properly!



 Always take great care with regard to the extent of the indemnification by photo stock agencies.


#### 5.d Portrait rights

With regard to visual material special attention should be paid to the use of portraits. In most countries commercial rights and rights based on privacy law apply with regard to the use of portraits. These are rights which have nothing to do with copyright (there is no copyright on someone's face as such) but must be settled before portraits can be used. Well-known people such as pop stars, famous sportsmen and women, and obviously models, are able to earn money by using pictures of themselves, usually for advertising purposes. In many cases people can object to the use of their portrait for reasons of privacy.

##### *Commercial interests*


In practice, commercial portrait right appears to be very similar to copyright. Famous people can offer or permit the use of their portrait in accordance with certain financial terms and conditions. How this is done differs slightly from country to country. As a rule of thumb it can be assumed that if someone is well known to be able to money with his or her image and in practice already does so, then this person has a commercial

portrait right that is rather uncontroversial. The use of portraits in news reports (editorial use) generally does not fall under portrait right, but all use of such portraits to increase the appeal of a product, particularly in advertising, does.

 When portraits are used always check whether there is permission for their use in a particular context.

##### *Privacy*

For portrait right based on privacy much depends on how and in which context a portrait is used. Photographs of people taken at moments when they are particularly zealous of their privacy can usually not be used, unless there are particular social implications, such as a politician accepting bribes. In such cases freedom of information prevails over privacy. Portraits which appear to be completely innocent may be violating portrait right in a specific context, for example if the portrait is used in a derogatory way, showing the portrayed person behaving violently or criminally, or clearly drunk or unattractively obese or deformed.

 Particularly when a portrait of an unknown person is to be used in a negative context, it is important that clear, and preferably written, permission is obtained from the portrayed person in advance.



## 5.e Pictorial trademarks

As well as portraits, trademarks also deserve special attention. The rules of trademark law apply to pictorial marks. Affixing marks to multimedia products is only allowed with the permission of the trademark holder. Depicting pictorial marks *in* multimedia productions is often possible, however. The rules which apply can be compared to the right to quote, discussed below. Prominent use of marks of others to promote one's own sales is generally not permitted. Conversely, the use of marks in a very negative context is sometimes also not permitted, as is the misleading use of marks. Depicting marks to make something clear, for example the purpose of one's own products, is often permitted. In case of doubt it is possible to ask permission from the mark holder, but not always necessary.

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Setting out the rights for audio material is often unfamiliar territory to publishers of traditional books, newspapers and magazines. Audio material is subject to rights and the organisation which grants these rights is a different one from the one that grants rights to text and image. Here, too, the rights originally lie with the author, the composer, the text writer or the performing artist, but in actual practice the rights are almost always exercised by other parties. In practice there are always one or many more rights to audio material. First, in the case of audio material we can differentiate between music (with or without lyrics), spoken text and other audio material. Music is the most important category.

We will deal with them in this order: composition and lyrics (a); performing and recording (b); broadcasts (c); spoken text (d); and other audio material (e).

### 6.a Composition and lyrics

Composition and lyrics are copyright-protected for 70 years after the death of the creator. In practice this copyright is usually exercised by a collecting society. In this case, too, these are organisations that work together on a reciprocal basis with other comparable organisations active in this field. There are two sorts

of collecting societies: organisations involved in the rights with regard to *playing* music and organisations involved in the rights with regard to *recording* music. At first, playing music used to happen in public places and later also on radio and television. Recording mainly concerned making records and CDs. If you are making an *off-line* multimedia product you are normally only concerned with the recording rights and the relevant organisation. For an *on-line* multimedia product, permission is often needed from the organisation concerned with playing music.

In many cases the collecting societies concerned with these two types of use work together closely or even form one organisation. In the Netherlands, Buma and Stemra work closely together ([www.bumastemra.nl](http://www.bumastemra.nl)). In Germany and France, GEMA ([www.gema.de](http://www.gema.de)) respectively Sacem ([www.sacem.fr](http://www.sacem.fr)), form one organisation. In the United Kingdom, PRS and MCPS are separate organisations that work together ([www.mcps-prs-alliance.co.uk](http://www.mcps-prs-alliance.co.uk)). In the United States there are two rival organisations for playing music ASCAP ([www.ascap.com](http://www.ascap.com)) and BMI ([www.bmi.com](http://www.bmi.com)) and for recording rights there are several organisations of which the Harry Fox Agency ([www.harryfox.com](http://www.harryfox.com)) or HFA is the biggest and most well-known. The worldwide alliance of organisations for playing music is the CISAC ([www.cisac.org](http://www.cisac.org)) and for recording rights BIEM ([www.biem.org](http://www.biem.org)).

## 6 AUDIO



All these organisations have contracts and rates for the use of music (the audio reproduction of compositions and lyrics). The rights for the use of music use can be efficiently settled with them. One advantage is that these organisations are not allowed to refuse permission. One complication is that for some types of (commercial) use permission from the individual owner may also be needed. But if that is the case, the collective interest group will inform you.


There are some composers who are not members of any such organisation and who exercise their own rights, but this is a very small minority.

It is important to know that commissioning and paying a composer to *compose* a piece of music (for a multimedia product) does not automatically result in the right to *use* this music without additional payment. If the composer is a member of one of the above collecting society, and most of them are, then the organisation concerned must *also* be paid.

 In the case of the use of music use you should first consult the collective music rights society in your own country about the rates and terms and conditions. Even if you commission someone to compose music, it is advisable to find out first which rights you may have to settle with

the collective organisation, so you can take these into account in your agreements with the creator of the music and there will be no surprises later.

If you are making an audio book you should not only check whether you have the rights to do so, but also whether these rights have not already (also) been granted to a collecting society by the author. You must also settle the rights for the use of music if you are going to use it in the foreground or background.

 Appendix III contains a [checklist for producing an audio book](#). Do I have the rights and what agreements do I make with a licensee or distributor of audio books?

### 6.b Performance and recording

In the case of music other than composition and lyrics we are also concerned with the rights of the performing artist(s) and the “phonogram producer”. In most countries, for example in the whole of Europe, so-called “neighbouring rights” exist (neighbouring on copyright) on recordings of musical performances. In some countries, for example in the United States, there is *copyright* on audio recordings. The American copyright on audio recordings can be settled in the same way as copyright on compositions and lyrics. In this country the neighbouring rights are mainly used.





• • • • • Moving images, audiovisual material and film fall under many kinds of different rights. The advantage is that in most cases almost all rights rest with the film producer. That does not apply to music copyright. The rights over/to the music for a film usually have to be settled with a collective music rights organisation. For the use of moving images permission from the individual film producer is generally required. There are no organisations concerned with the film rights for a multimedia product.

The main problem is that if someone wants to use a large quantity of audiovisual material in a multimedia product he has to track down several film producers and ask them all individually for permission. For the use of amateur films on the Internet, permission from their makers is also required.

For audiovisual material, portrait rights must be taken into account in the same way as for still visual material. • • • • •



• • • • • Data collections of all kinds are often protected, either by copyright, or, as in Europe, by a separate database right. Data collections which show that creative choices were made, for example the 100 “most beautiful” poems, are protected by copyright. Data collections which have clearly required a “substantial investment” are protected in Europe from being used by others either in their entirety or a “substantial part” of them. The right lasts for 15 years from the creation of the database, but is always extended when a substantial new investment is made in the database. The right rests with the producer, i.e. the person who took the financial risk of the investment in the database, in most cases the publisher.




Always sign up who has the database right.

Mainly in forms of collaboration in which one party is the initiator and commissioner, another party coordinates the publication, and important data collections are purchased by a third party, it is very important to lay down contractually who has the database rights (and the copyright) to the multimedia product. • • • • •




• • • • • In most cases the backbone of a multimedia product is the computer program or software. The software for such a product is often especially and in most cases externally developed. Software is protected by copyright everywhere in the world: to use it permission from the author is required. For the production of a multimedia product an agreement is usually concluded with a company that takes care of the actual production of the software part and also has or settles the rights.

 Agree beforehand that if the collaboration is terminated, the supplier of the software is required to provide all data and afford all cooperation, so that the multimedia producer, if desired, can continue independently.

In the case of software contracts it is important that the producer of the multimedia product has, as far as possible, the rights needed for further exploitation, and is not bound to the software supplier forever. The most important issue is again how things are organised if the collaboration comes to an end, and who can continue with what. In the case of software this is not just a question of having the required rights, but also of having the source codes and such like. When one has the rights but not the codes it is usually impossible to continue without the original supplier. Therefore sign up as far as possible, in advance, that in case the collaboration is terminated, the software supplier is required to provide all data and cooperate in

every way, so that the multimedia producer, if he so wishes, is able to continue independently. Part of the agreement could be that the source codes for the software are deposited with an independent third party, for example a civil-law notary, which means that they are always available and cannot be made inaccessible.

 See the checklist in the appendix IV: [making a multimedia contract](#) in which the ownership issue of source codes is dealt with, but also the other points of attention to e considered in a contract for a multimedia publication. The checklist assumes the situation in which the publisher or producer is commissioning a multimedia developer to make an interactive software program. The checklist refers the publisher/producer to a large number of points of attention during negotiations with the developer.

For a multimedia product which is offered on-line the website design is essential. The design of the website must comply with many functional requirements and be adaptable when necessary. The publisher must have the right and the option to change the website if necessary. This must also be laid down and settled beforehand. Preferably the copyright to the specific design of the website is fully transferred to the publisher and the publisher should have the source code and other information needed to carry out the amendments without the help of the supplier. • • • • •

## 10 MORAL RIGHTS



• • • • • In most countries there are moral rights, based on copyright, as well as exploitation rights. The most important moral rights are the author's right to having his name mentioned and the right to oppose changes to or mutilation of his work. These rights are not transferable and some of them cannot even be waived.



It is advisable to list in the contract all conceivable changes and versions that could possibly meet with objections from the author and to ask explicit permission for such changes. In that case an author can no longer reasonably object to them. Obviously "mutilation" is never allowed.

From the perspective of the multimedia producer it is important, if possible, to agree that the author does waive his moral rights as far as he can. Mentioning his name is not always possible or desirable and changes are often needed. Of course, the producer has no intention of mutilating the work, but the difference between changes and mutilation is sometimes hard to define. In most countries moral rights cannot be set aside by contract and sometimes not even restricted. Agreements based on moral rights therefore remain an uncertain factor. • • • • •

# 11 LIMITATIONS



• • • • • In some cases one can use material of third parties without their permission. This possibility is based on some restrictions to copyright. These restrictions can differ from country to country and there is often room for discussion on their exact scope. The law of the country of the user determines whether an appeal can be made to a legal restriction. If a Dutch publisher uses a quotation from a foreign publication, the scope of the right to quote is determined by Dutch law. In doubtful cases it is advisable to ask permission from the owner because that prevents discussion on the applicability of a restriction and the resulting uncertainty. This is often a sensible thing to do and a professional approach often solves many problems in advance.

The following restrictions will be discussed below: right to quote (a); material in a public place (b); news exception (c); education exception (d); and parody (e).



To find out whether permission should be asked or whether one should at least get in touch with the other party, it is useful to take a look in the mirror: what would I do (or my author) if another publisher did this with my publication? Often you will find the right answer.

## 11.a The right to quote

In most countries the right to quote others without permission from the owners has certain limits. To quote means “citing” the work of others to make one’s own work clearer. When discussing the acceptable use of quotations the essential words are functionality and proportionality. Still images, moving images or music can also be “quoted”.

A quotation should always have an informative context, in which it is functional and clarifies something that is relevant in the context. Quoting must always be subservient to the context; it must be subordinate. Quoting merely to make one’s own product more attractive is not permitted. The quotation should also not dominate the context. In most countries quoting is only permitted in more or less serious information products “for criticism and review and similar purposes”. In the most important copyright treaty, the Berne Convention, it is phrased as follows: “It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose.”

In most cases the name of the author and the source must be mentioned with the quotation and it must be taken from a work that was made available lawfully, that is, usually, with the



## 12 PAYMENT TO OWNERS AND THE SCOPE OF THE ACQUIRED RIGHTS



• • • • • During the settling of any rights the question may arise what must be paid for and how. Obviously it is important to set this out properly. The following situations will be discussed below: no payment (a); user generated content (b); lump sums (c); and royalties (d).

### 12.a No payment

At one end of the spectrum there are owners who are not (do not have to be) paid at all. For example people writing letters to the editorial of a newspaper or magazine. By sending their letter they give implicit permission for its publication. But what is the extent of this implicit permission? Is the publisher of the newspaper also allowed to put the letter on the newspaper's website, on a CD rom containing all the issues of that year and/or in the internet archive which is freely accessible to anyone. In most cases this depends on whether the writer knew that by sending in his letter he was giving permission for these forms of use, but what a sender knows beforehand is sometimes difficult to establish.

Authors of scientific articles are often not paid at all for the articles they send in. What matters to them is professional recognition and the resulting career opportunities. But in these cases, too, the issue of the extent of the permission often arises.

### 12.b User generated content

For some time now unpaid contributions from internet users, such as reviews, photographs and films - so-called user generated content - have been an important basis for successful multimedia products. It is often not clear how far the implicit permission granted by these users extends. If it has not been made clear beforehand that a certain re-use is intended, for example using online restaurant reviews in a paper publication, then permission should still be asked afterwards for this kind of use.



It is essential that people who send things to a website with user generated content are warned beforehand about the intended forms of use, preferably by clicking on the agreement to the terms and conditions for re-use. The same applies to all senders of unpaid content.

### 12.c Lump sum

Payment for the use of a work in a multimedia product can take the form of a one-off fixed amount, a so-called lump sum. In this case the crucial question is, again, which form(s) of use are covered by the payment of this lump sum. It is the responsibility of the publisher to make clear which forms of use, including any online and multimedia applications, he is allowed to use in exchange for the agreed payment. He must inform the owner in writing and the owner must agree before the amount is paid.

## PAYMENT TO OWNERS AND THE SCOPE OF THE ACQUIRED RIGHTS



 Do not pay before the desired permission has been signed and received. If payment has been made before the signed agreement is received, the publisher has lost much of his bargaining position.


### 12.d Royalties

Another form of payment is the paying a certain amount per exploitation unit, usually expressed in a percentage of the sales price, sometimes as a fixed amount per unit sold.

With books the exploitation unit on which the royalty is calculated is usually every single paper copy. For multimedia products, in particular multimedia products containing the work of many different authors, it is not so simple.

For off-line products such as CD ROMs it is obviously still possible to calculate royalties per copy sold. For on-line products it depends very much on the manner in which the ultimate user pays and which data about the user become known to the producer.

If the user of an online multimedia product has a subscription and pays a fixed amount per time unit, irrespective of the extent to which he uses the product, royalties to be paid to the owner can only be calculated from that fixed amount.

 The choice between lump sum and royalty will depend less and less on the medium, but be related to the extent of the contribution to the final product. For some authors sharing the profits is still a good option, but for relatively minor works, which are also replaceable a lump sum is the only option because it is easily implemented.

Sharing of the royalties by various owners can be based on the size of the share the owners have in the product, or on the proportion in which the contribution of each party to the product is used. In the latter case the actual use of the product must be recorded by the producer or user. ● ● ● ● ● ● ● ●



In this section the acquisition and protection of the ownership of rights by the producer or publisher of a multimedia production will be discussed: titles or trademarks (a); legal protection (b); contractual protection (c); and technical protection (d).

### 13.a Titles and trademarks

When choosing a title for a multimedia product the fact that various rights can rest on titles must be taken into account. Titles, in particular longer and creative titles, may be protected by copyright. This protection arises by itself.

In addition titles can be protected as a mark or enjoy comparable protection. In most countries trademark protection is acquired by registering it at the national trademark office or the European trademark office. These days it is easy to check on-line in the trademark register whether and which similar trademarks already exist. See for European Trademarks Register: <http://register.boip.int>.

It is possible to register a trademark yourself. The websites of most national trademark offices provide sufficient information. It may still be advisable to obtain the services of a trademark agent to determine for which class of products the title and any other characteristics or components of the multimedia product should best be registered as a mark.

If, to save money, you wish to register a trademark for a multimedia product yourself, without the help of a trademark agent, a trademark application in, for example, the (international) goods and services classes 9, 16, 41 and/or 42, in which only the standard description of these classes is included, usually suffices. The websites of the national or the European trademark office give sufficient additional information to effect the trademark registration yourself. If your budget allows it, however, it generally makes more sense to bring in a professional agent, in case there are any complications.

Goods and services classes in which the title of a multimedia product can be registered as a trademark could be:

Class 9 Scientific, nautical, surveying, photographic, cinematographic, optical, weighing, measuring, signalling, checking (supervision), lifesaving and teaching apparatus and instruments; apparatus and instruments for conducting, switching, transforming, accumulating, regulating or controlling electricity; apparatus for recording, transmission or reproduction of sound or images; magnetic data carriers, recording discs; automatic vending machines and mechanisms for coin operated apparatus; cash registers, calculating machines, data processing equipment and computers; fire-extinguishing apparatus.



- Class 16 Paper, cardboard and goods made from these materials, not included in other classes; printed matter, bookbinding material; photographs; stationery; adhesives for stationery or household purposes; artists' materials; paint brushes; typewriters and office requisites (except furniture); instructional and teaching material (except apparatus); plastic materials for packaging (not included in other classes); printers' type; printing blocks.
- Class 41 Education; providing of training; entertainment; sporting and cultural activities.
- Class 42 Scientific and technological services and research and design relating thereto; industrial analysis and research services; design and development of computer hardware and software.



You can register a mark for a multimedia product yourself, for example in mark classes 9, 16, 41 and/or 42.

### 13.b Legal protection

The content of a multimedia product is automatically protected by copyright all over the world. No registration or any other formality is required. Copyright exists in practically all countries

of the world, although in some countries it is easier to enforce than in others. It is not obligatory to include a copyright notice (©), followed by a year, the name of the owner and his place of origin, but such statements do provide clarity about the identity of the (supposed) owner and the date of the work.

### 13.c Contractual protection

In most countries texts such as "No part of this publication etc." on or in a multimedia product have little meaning in practice. They do not add anything to the existing legal protection. General terms and conditions, too, placed somewhere on a product or a website often do not have the desired effect.

In the case of multimedia products it is often possible to have the user agree to certain terms and conditions of use first by clicking on something before the product can be used. The validity of these kinds of "click-through" licences, which in actual practice are usually not read by the user, is assessed differently from country to country. In reality it does not add much to the existing legal protection, nor does it lessen any liability for possible shortcomings of the product.

#### *Creative Commons*

A special form of contractual protection is the so-called Creative Commons licence. This licence is meant to give users a large

# 13 THE RIGHTS OF THE PUBLISHER




measure of freedom, but also makes clear which actions by users are not permitted.

A number of abbreviations and symbols are used for Creative Commons licenses. The explanation below has been taken from the Creative Commons website. (<http://creativecommons.org>). This is allowed because the text is provided under a Creative Commons licence which merely requires that the source is cited.

### *Creative Commons Licenses*

The following describes each of the six main licenses offered when you choose to publish your work with a Creative Commons license or when you want to use a work under a Creative commons license. We have listed them starting with the most restrictive license type you can choose and ending with the most accommodating license type you can choose.

*Attribution Non-commercial No Derivatives (by-nc-nd)* 

This license is the most restrictive of the six main licenses, allowing redistribution. This license is often called the “free advertising” license because it allows others to download the work and share it with others as long as they mention the rightsholder and link back to the rightsholder, but they can’t change the work in any way or use it commercially.

*Attribution Non-commercial Share Alike (by-nc-sa)* 

This license lets others remix, tweak, and build upon the work non-commercially, as long as they credit the rightsholder and license their new creations under the identical terms. Others can download and redistribute the work just like the by-nc-nd license, but they can also translate, make remixes, and produce new stories based on the work. All new work based on the original work will carry the same license, so any derivatives will also be non-commercial in nature.

*Attribution Non-commercial (by-nc)* 

This license lets others remix, tweak, and build upon the work non-commercially, and although their new works must also acknowledge the rightsholder and be non-commercial, they don’t have to license their derivative works on the same terms.

*Attribution No Derivatives (by-nd)* 

This license allows for redistribution, commercial and non-commercial, as long as it is passed along unchanged and in whole, with credit to the rightsholder.

*Attribution Share Alike (by-sa)* 

This license lets others remix, tweak, and build upon the work even for commercial reasons, as long as they credit

## 13 THE RIGHTS OF THE PUBLISHER



the rightsholder and license their new creations under the identical terms. This license is often compared to open source software licenses. All new works based on the original work will carry the same license, so any derivatives will also allow commercial use.

### Attribution (by)

This license lets others distribute, remix, tweak, and build upon the work, even commercially, as long as they credit the rightsholder for the original creation. This is the most accommodating of licenses offered, in terms of what others can do with the works licensed under Attribution.



Most users of Creative Commons restrict the permitted use to non-commercial use. That means that publishers and producers generally have to ask permission for use. But as you have seen, some creative commons licenses permit commercial use. As far as the value of that particular (part of the) work is concerned one should realise that exclusivity is not possible.

### 13.d Technical protection

Technical protection of multimedia products and technological protection against copying, which limits or registers use, is being actively developed. Some publishers and producers have placed all their hopes in this, others believe that any protection can

be hacked and that it is often user unfriendly. Any multimedia producer should consider his own (commercial) options in this matter. Including technical protection is not required to be eligible for legal copyright protection through copyright. At the same time it is also not prohibited to make copying impossible. There is no positive right to make a private copy in the sense that producers are not allowed to make it technically impossible to make a private copy. However, most copyright laws allow a private copy to be made and in actual practice much use - or should one say abuse - is made of this option. Whether (an attempt at) technical protection is the right answer is one of the most controversial issues in copyright law at the moment. ● ● ● ● ●

## 14 USERS RIGHTS



• • • • • For professional users who have concluded an individual written agreement, a user licence is of great importance. In the user licence is set out, for example, how many persons may use a particular multimedia product (“authorised users”). Many other aspects of the use can be laid down in a user licence, such as the number of (parallel) users, the copying and printing possibilities and the option to re-use information in an altered format, internally or externally.



A sample of a user licence is the model - included in the appendix V - setting out the [terms and conditions for e-publications from the Educational Publishing Group](#). On behalf of educational publishers and institutions, the Educational Publishing Group of the Dutch Publishers Association has drawn up a model agreement, with the relevant general terms and conditions for delivery and use, and for delivery and use of electronic publications to and by educational institutions. Parties can customise their agreement within the uniform conceptual framework. This model may serve as example and checklist for other licenses for use.

In a user licence with professional users it can and must be set out how the use of the multimedia product will be paid for. In the business-to-business market, which includes the market for education and science, contractual good faith has turned

out to be the best and most practical protection for electronic products. These contracts generally do not mean that use is restricted, but actually give the authorised user all desired possibilities, which are paid for according to the number of users (not per use).

# 15 CHECKLIST



Are the rights demonstrably regulated, therefore in writing, with regard to:

- the initial idea
- all text
- all drawings and graphics
- all photographs
- all works of art visible in photographs
- all persons visible in photographs (portraits)
- all (pictorial) marks
- the music: composers and writers
- the music: performers and producers
- narrated text: narrators
- other audio: the producer
- radio or television recordings: the broadcaster
- moving images
- databases /data collections
- all software
- citing the name (moral rights)
- changes and alterations (moral rights)?

And remember:

- Inventive technical ideas can sometimes be protected by patent law. This means that secrecy is required until the time patent is applied for. When in doubt consult a professional patent agent first.

- Do not accept a confidentiality agreement which is too broad: maybe the same idea is already known internally, or it is not completely new. A confidentiality agreement concerning an external idea must also be limited in time.
- For internal ideas, also set out the confidentiality and the transfer to the own company in writing.
- If a transfer of all rights is not possible, and a form of permanent collaboration is agreed on, it is essential to set out how either party can terminate the collaboration when and if they wish and can continue on their own, that is, who is to have which rights. The temptation not to discuss the possibility of terminating collaboration is great, but this can lead to very problematic situations.
- Be sure that the indemnification is clear and also who is liable for what.
- In doubtful cases investigate as far as possible whether the contract partner really is the owner, and ask again, in any case.
- In the case of licenses always remember the questions whether, how, why and when the licence can be terminated.
- Copyright-free visual material often still has to be paid for, because the owner or proprietor of the original (for example a museum), can set contractual terms and conditions because of his monopoly position as owner.

## 15 CHECKLIST



- Always check whether a graphic designer is a member of a CISAC-organisation. If so he can not give permission for the use of his work and clarity on the terms and conditions for use may be quickly obtained from the collective rights organisation.
- Always take great care with regard to the extent of the indemnification by photo stock agencies.
- When portraits are used, always check whether there is permission for their use in a particular context.
- Particularly when a portrait of an unknown person is to be used in a negative context, it is important that clear, and preferably written, permission is obtained from the portrayed person in advance.
- In the case of the use of music use you should first consult the collective music rights society in your own country about the rates and terms and conditions. Even if you commission someone to compose music, it is advisable to find out first which rights you may have to settle with the collective organisation, so you can take these into account in your agreements with the creator of the music and there will be no surprises later.
- Always ask extensive written permission from the person who spoke the text.
- Always sign up who has the database right.
- Agree beforehand that if the collaboration is terminated, the supplier of the software is required to provide all data and afford all cooperation, so that the multimedia producer, if desired, can continue independently.
- It is advisable to list in the contract all conceivable changes and versions that could possibly meet with objections from the author and to ask explicit permission for such changes. In that case an author can no longer reasonably object to them. Obviously "mutilation" is never allowed.
- To find out whether permission should be asked or whether one should at least get in touch with the other party, it is useful to take a look in the mirror: what would I do (or my author) if another publisher did this with my publication? Often you will find the right answer.
- Quotations must always be functional and proportional and be used in a serious informative context.
- It is essential that people who send things to a website with user generated content are warned beforehand about the intended forms of use, preferably by clicking on the agreement to the terms and conditions for re-use. The same applies to all senders of unpaid content.
- Do not pay before the desired permission has been signed and received. If payment has been made before the signed agreement is received, the publisher has lost much of his bargaining position.

## 15 CHECKLIST

- The choice between lump sum and royalty will depend less and less on the medium, but be related to the extent of the contribution to the final product. For some authors sharing the profits is still a good option, but for relatively minor works, which are also replaceable a lump sum is the only option because it is easily implemented.
- You can register a mark for a multimedia product yourself, for example in mark classes 9, 16, 41 and/or 42.
- Most users of Creative Commons restrict the permitted use to non-commercial use. That means that publishers and producers generally have to ask permission for use. But as you have seen, some creative commons licenses permit commercial use. As far as the value of that particular (part of the) work is concerned one should realise that exclusivity is not possible.

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# RIGHTS IN THE POCKET

Professor dr. Dirk J.G. Visser (1969) graduated from Leiden University in 1992 where he subsequently lectured and researched, obtaining his Ph.d with a highly acclaimed dissertation on copyright in the digital environment in 1997. He was appointed full Professor of intellectual property law at Leiden University in 2003.

Dirk was admitted to the bar and joined the Stibbe firm in 1996. He quickly became widely renowned as a litigator in the field of intellectual property handling a number of groundbreaking cases involving trademark, copyright, internet and technology related issues. In 2004 Dirk became partner of the Amsterdam based firm of Klos Morel Vos & Schaap, founded in 2002 by a group of experienced and highly regarded intellectual property partners of various renowned large Dutch and international firms. Klos Morel Vos & Schaap is entirely dedicated to the practice of intellectual property law and has since its formation quickly and firmly established itself as the leading and largest boutique firm in this area in the Netherlands.

Dirk's clients include a considerable number of major brand owners, leading publishing houses and television production companies.

Dirk is a prolific publicist in his field. He is the author of numerous scientific as well as popular books and articles on intellectual property and is the president of the editorial board of the leading copyright review.

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