MEMORANDUM

To: Jean Perwin
From: Applicant
Date: Feb 26, 2006
RE: Harris v. CBL.

I. The character "Blinkx" is not owned by CBL as a
"work for hire.

Under § 201 of Title 17, initial ownership of a copyright
in a protected work initially vests in the author of the
work. Under subsection (b) of § 201, an "work will vest
in an employer or other person (not the author) in certain
circumstances. Wilkins v. Monterey Festival provides
 guidance in interpreting this section. Harris is clearly

not an employee of CBL, however, "Blinkx was
expressly created by Harris to be part of an audiovisual work, under §101(2), Blinky is subject to the Work-Made-for-Hire (WMFH) doctrine. However, this does not mean the doctrine will bind Blinky (or Harris).

Blinky will only be considered a WMFH if a written instrument signed by Harris (or agent) expressly agrees to WMFH status for the character. Here, none of the original emails state that the character created by Harris would have WMFH status. The only such written, signed agreement came after the character was created (or substantially created). Wilkins elsewhere states that ordinarily, an AFTER-SIGNED agreement will not meet the statutory requirement. Here, there is no reason to deviate from the normal rule by the written
The agreement was not a confirmation of a prior oral or implicit agreement. First, CBC's original solicitation for entries did not mention WMFH, nor did any subsequent email communication. Second, while not dispositive, the fact that Harris both filed for copyright protection and included the © symbol in his submission clearly indicate his intent to retain copyright of the character.

The Harris executed no other transfer of ownership in "Blinky".

To the extent that it is ineffective at all, the December Marketing Services Agreement (MSA) served to transfer the MSA is not an effective assignment of the copyright in Blinky. future (post-Agreement) copyrights to CBC. This means that CBC will have copyright to all future created AV work used in its multimedia campaign. However, Blinky would remain an independent protected over weight status. Ex. 1.11 110
would have copyright in the plot, script, etc. of a commercial or promotional ad, but Harris would retain (c) of Blinky.

III. Court is likely to find implied nonexclusive license granted by Harris to CBL.

While Harris retained ownership rights to the "Blinky" copyright, by his action, it is likely that he has granted CBL an implied nonexclusive license. Such a license will arise when (following the Atkins v. Fisher rule) a party solicits creation of a work, which another party duly creates and both parties intend that the work be copied and distributed by the first party. Here, CBL solicited creation of work from Harris & others. Harris created a work to meet the needs & specifications of CBL. While CBL made no promise of use or compensation to Harris for his work, both parties...
Clearly intended that the work (if satisfactory) would be copied & distributed by CBC.

Like all licenses, the license CBC received from Harris was merely a right of use, NOT a transfer of ownership

Where the licensee exceeds the scope of the grant, the owner (here, Harris) is still entitled to bring a cause of action for copyright infringement.

IV. Determining the scope of a nonexclusive license is a highly fact specific inquiry, but in the current case, the facts appear to favor CBC.

In Atkins, the court provided a non-exhaustive list of factors to be considered when determining the scope of a license.

First, the court is likely to consider the amount of consideration exchanged & the creator's economic investment in the work.
Here, Harris has worked approximately 30 weeks on the initial character and it is unclear how much (if any) work he performed in developing the multimedia campaign. For this work, he will receive $15,000. A court is likely to see this amount as an indication of a fairly extensive license.

Harris, through his ongoing contact with EBL also knew of and acquired to the exact behavior he is now complaining against. He created Blinky knowing the character would be used in a media campaign, and that he would be compensated for his work only if Blinky was selected.

The text was also specifying although both parties provided hints that they expected future involvement by Harris.

Harris did, by filing & using the © mark indicates his intention to retain ownership of Blinky. However, taking all
In their totality, it appears that Harris granted the license to CBL at least up through their current marketing campaign.

V. Plush Doll & future uses

While CBL may have a license for use in multimedia campaigns using audio-visual works, this license will not extend indefinitely. Harris will at some future date (in excess of six months) be able to successfully bring his claim against CBL.

Furthermore, the use of Blinky in any other capacity (such as the creation of a plush doll for marketing by CBL) clearly exceeds the scope of the license, and Harris should be able to enjoin such use, or recover money damages for infringement of his copyright.