

~ Rights Clearances for Multimedia ~

by

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This article was written for **CD ROM Professional** in October of 1995. Some of its observations and prices are out of date. However, the article clearly explains all the clearances required for electronic/new media projects.

Rights clearances have to be one of the first things to think about when planning products for CD-ROM markets, retail or educational. Whether clearances can be obtained, which ones and at what cost will often determine the feasibility of a project. Clearances impact the project budget, its possible content and its production schedule in a major way. Moreover, the process of clearance is time-consuming. Forethought about rights will be repaid a thousand times over in frustrations avoided and dollars saved.

WHAT TO THINK ABOUT & ASK FOR

The first step in planning should be serious thinking about what rights are realistically needed, and achievable. These are basic decisions about more than rights clearances; they are about product design, markets and sales strategy too.

Territory

Where will this product be sold? Are world rights really needed? or just for the U.S. and Canada? The more territory the license includes, the higher the license fee. Also, more territories often mean more than one licensor for the same piece of material.

Language(s)

Which languages are really needed? only English? maybe Japanese or Spanish? Don't say all the languages in the world just because that sounds good. Wanting all those languages would involve many transactions, require payment of many fees and perhaps years spent on getting clearances. Clear only the languages that really matter.

Time Period

How long a selling period is needed to make this product profitable? Rights owners always limit the number of years their materials may be used in rights agreements, with 10-12 years about the longest possible. A renewal option can be included in the licensing agreement to provide more time.

Manipulation

Will the product involve editing, changing, modifying, cropping or translating other people's materials? If so (and many uses do), producers must have permission in writing for the specific change(s) planned.

Promotion

Does the sales strategy for this new multimedia product involve showing it at tradeshow or at in-store demonstrations or presentations for buyers? Then promotional rights must be part of the licensing agreement.

Exclusivity

Exclusive rights are harder to get and cost more; they should be sought only where appropriate. In some fields, such as popular songs, exclusive rights are rarely granted for any medium. A good example of when exclusive rights are appropriate is if the product means to use all of a book or reference work.

Use

How does this product mean to employ the particular piece of material being cleared? Rights owners are often sensitive about the contexts in which their works appear. A full description of intended use is always necessary.

All of these specifics need to be communicated in every permissions request. CD-ROM producers must keep in mind, however, that their desires will be limited by what different fields are able, or willing, to grant.

CORPORATE "IN-HOUSE" USE

The fees quoted in this article are those that must be paid for products that will be marketed to the public – at a retail store (Egghead, Blockbuster, book store) or to educational institutions of any kind.

When a multimedia production is created for use in-house, to be seen only by corporate employees or franchisers – for a sales meeting or for training purposes, for instance – a different fee structure obtains.

In such cases, clearance requests should not ask for multimedia rights. Corporate producers should make very clear that their product is an "in-house" use, with very few copies (if any) circulating. The fees will then be much the same as are normal for copyrighted songs and other copyrighted items used in an "in-house" video.

PRINTED WORKS: BOOKS/TEXT

Clearances for materials published in books and articles begin with the publisher of the work, but may very well not end there. Works included in anthologies (poems/essays/stories/photos), for example, rarely belong to the publisher of the anthology. The copyright owners are cited in the "Acknowledgements" section of many

anthologies or may be credited immediately below the particular piece. Maps, photos, pictures and graphs are often accompanied by this kind of credit citation, in both books and articles.

In addition, the rights needed may well involve other publishers or a literary agent.

World Rights in English

World rights to text in English are usually split between two publishers. Securing these rights often requires two negotiations and two fees.

Other Languages

Rights to texts in other languages are split according to the language. That is, a Japanese text (even if it is a translation of something originally published in English) belongs to the Japanese publisher; the Spanish translation belongs to a Spanish publisher, and so on. Rights in each language must be separately applied for. It is this fact that makes "all languages" rights clearances so difficult and expensive.

Which of Three Possible Rights?

Right #1: To print text on a monitor screen is one right, to be secured from the text's publisher.

Right #2: To have the same selection read aloud by a narrator is a different right -- called a "spoken-word" right. To make things more delicious, this right is often controlled by the author or author's agent.

Right #3: To include the selection in a printed text accompanying the CD-ROM product is yet another right, controlled by the print publisher.

Each additional right required increases the clearance fee and may involve different rights holders.

An Example-IBM's Columbus

My involvement in clearing rights to materials used in IBM's giant multimedia project, Columbus: Discovery, Encounter and Beyond, produced my all-time worst experience clearing a text. IBM needed rights to print on-screen, include in a companion book, and read aloud a 3-page selection about Hernan Cortes. The book was out-of-print, the rights owners uncertain. I had to locate and secure permission from seven (7) different rights owners -- which involved 7 negotiations (4 in the U.S. and 3 in Europe) and 7 fees. It took 50 hours. My solution is to drop such a text, but this selection was already hyperlinked and could not be deleted. There is but one thing I can say about this: "Don't do it!" The appropriate response to such clearance problems is to use something else.

Prices and Terms

Most publishers now are charging flat fees for use of a few pages of text, with fees ranging from \$300-\$1500. For a large portion or all of a book, publishers are charging an

advance against a royalty of 5-20% of the net price of the product. The advance is usually 1-2 years of projected sales and will have to be paid on "bundled" product.

Terms of clearances for text will specify a platform or platforms and a limited time period ranging from 5-12 years.

SPEECHES

Speeches, as most CD-ROM products use them, are prime examples of "two-layer" clearances, requiring two separate permissions (and fees).

Who Made the Speech?

In most cases, the maker of the speech is the copyright owner. Martin Luther King, Jr.'s estate, for example, holds the rights to all of his speeches, and permission to use a King speech in any way must be secured from his estate.

Who Owns the Recording/Clip?

But the CD-ROM product will be greatly enhanced by using a clip or audio recording of a King speech, and rights to use the recordings have to be secured from the owner of the audio or video recording. Such recordings are available (at high cost) from broadcasting networks and (at much lower cost) from stock footage houses.

The Federal Office Rule

Under law, speeches made by officials of the federal government, **while in office**, are in the public domain. So, anybody can use the texts of FDR's "fireside chats" without permission and without paying a fee, but the audio recordings of these speeches have to be paid for, a perfect illustration of the "two-layer" problem.

FILM CLIPS

Without a doubt, nothing is more fervently desired by multimedia producers than clips from famous and/or important movies. Unfortunately, whether such material is ever going to be easily available is a very real question. For example, one of the producers of Schindler's List flatly told a 1994 Digital World audience, "We're not going to grant rights for a clip from our movie to run in your CD-ROM program." Most movie companies are refusing permissions to use clips; two or three have been more amenable. Two movie listing CD-ROM discs illustrate the problem: the latest Cinemania covers 17,000 movie titles, yet includes only 22 short clips. Blockbuster's Guide achieved 40 clips for 21,000 reviews. And there is much more involved in movie clearances than the willingness of movie companies to grant clearances.

The Studio

The companies that own movies tend to think in million-dollar amounts. What they think of as no money at all — clearance fees of \$4,000-\$12,000 per minute or less for footage — are budget-breaking for most CD-ROM producers. So, while clips from a few very old

movies may be available, the cost of the clip may be totally unaffordable. And that isn't the only fee and permission required.

The Performers

In addition to getting permission from the film company for a clip, clearances are also needed from every actor, living or dead, who appears in the clip to be used. There are three basic reasons for this requirement — some or all of which may apply to any particular project. First, the Screen Actors Guild (SAG) requires that re-use fees be paid to actors for pictures made from 1960 on. Second, the film company may insist that these permissions be in hand. Third, we now have new laws regarding publicity and privacy for celebrities, living or dead, possibly requiring such clearances.

Here's an example of the problem the performers rights can cause. I often have been able to secure permission to use a clip from the classic movie It's a Wonderful Life (now back in copyright, but that's another story). Yet, I **never** have been able to secure permission from Jimmy Stewart.

Directors & Writers

Recent movies require payments to the directors and writers guilds for use of clips. These are likely to be reasonable flat fee payments of a few hundred dollars.

Other Elements

There may be other elements in the clip requiring clearance, and the studios are not at all helpful about telling you what they are. These may include clearance fees for copyrighted music, or there may be a need to clear a stuntman. Even choreography may require a clearance — I know of one company willing to pay very big bucks for a dance sequence from West Side Story who managed to get every required clearance but one. Jerome Robbins' choreography wasn't available and that one "no" stopped everything.

Terms & Fees

The one plus in this complicated rights scenario is that the movie companies do own rights for the world and thus are legally able to grant world rights.

They also own rights for the full copyright term. At present however, they seem to be limiting clearances to periods of as little as 3 years and a top of 12 years, always granted non-exclusively. The absolute minimum fee, even for easier-to-get oldies like Frankenstein or a Charlie Chaplin or Buster Keaton clip, appears to have settled at \$3,000-\$4,000 per minute or less. Stills from films are a more viable alternative, running from a \$250-\$1000 each.

There are other sources of film footage. CD-ROM producers should become familiar with the large film libraries, some of which are listed at the end of this article.

TV CLIPS

The good news is that owners of television shows are much likelier to grant permissions than movie studios. The bad news is that the same clearances are required from performers and all other elements included in the clip as is the case with movie clips. As with movies, it's the older clips that are easiest to get. With some notable exceptions like The Honeymooners and I Love Lucy, clearances for clips from many old shows (The Ed Sullivan Show, Dick Clark and Mr. Ed, for example) often can be achieved. Current hot TV shows probably will not grant licenses.

Clear Producers/Distributors and Others

The basic footage first must be cleared with the TV production company that owns the show, or its current distributor. This initial step is sometimes made difficult by an inability to find the original producers or discover who current owners are. As with movies, CD-ROM producers must then obtain clearances from all performers in a TV clip, living or dead. Writers and directors guilds may have to be paid, and separate music clearances may be necessary.

Terms & Fees

TV rights owners usually own and can license world rights. As with most other rights, clearances will be granted non-exclusively and for a limited number of years.

Fees to clear are in much the same range as for movies, but the footage comes in larger bites. At present, TV rights owners minimums cover 1-3 minute clips at prices ranging from \$4,000-\$15,000. Since these prices are probably still too high, alternate sources may be more useful. Warning: Don't count on being able to license the clips or stills you want until the permission has been asked for and granted.

MUSIC

CD-ROM producers may find music rights owners easier to deal with than other rights owners. On the other hand, they are very expensive because they require royalties. Music publishers are well organized to grant rights and have evolved standard contracts for this new technology.

The Publishers

The basic rights clearance required for use of a song comes from the music publishing company that represents the rights of composers and lyricists. Since many songs have very similar titles, it is important to correctly identify the composer/lyricist of the specific song being licensed. If producers plan to make their own recording of the song this is the only clearance they will need.

Their Terms & Fees

Music publishers have settled on fairly definitive terms and fees. Contracts are always non-exclusive and for a limited term, usually 5-7 years, and can be granted for any territory you specify, including world rights. The fee is based on a royalty per song, per copy of the product sold, with a minimum advance. These royalties have been going up

and now stand at 10-13 cents for any portion of a song. Some very important songs, of which Over the Rainbow is a good example, are more expensive.

As with books, no allowances are made for "bundling." Pilgrim New Media came up with an ingenious solution for this problem. In the "bundled" version of its women's biographical disc, Her Heritage, the portions of the disc containing music were locked and couldn't be heard. Buyers could fill out a form, and with a small added fee (which covered the royalty), receive the codes to unlock the sound.

The Record Companies

If use of a specific commercial recording — It's a Wonderful World by Louis Armstrong — is absolutely essential to a CD-ROM product, the going gets rough. In this case, a second rights clearance is required from the record company that owns that particular performance of the song. The company will probably charge the same fee as the music publisher — 10-13 cents per song per disc — making the royalty for a single song 20-26 cents.

Many record companies are not yet licensing to electronic media. If they do, they may not license particular star performers — The Beatles or Frank Sinatra, for example. Again, CD-ROM producers should not count on using a particular recording, until the clearance has been granted at an affordable price.

Other Ways

There are other good and relatively inexpensive sources for music. They include having hired talent create an original score, using public domain music, using classical music or the products available from music libraries (listed at the end of this article).

Classical Music

Since most classical music is in the public domain, no clearance from a music publisher is required. Clearance for the performance by a symphony orchestra on a classical recording, however, is. Buying such a recording from a major label such as Columbia (now Sony) or RCA (now BMG) is very expensive. Fortunately, there are many excellent classical recordings by European orchestras like the London Philharmonic that are quite affordable.

PHOTOGRAPHS

Photo rights owners are seriously concerned about the interactive capabilities of digital technology, but most are licensing just the same. Rights to use photographs, however, are another of the inherently two-layered clearances.

Who Owns Copyright of the Photo?

Photos are usually owned by the photographer who shot the picture. There are some exceptions; for example, the New York Times may own the photos that appear in its

pages. Many very good photographers are represented for rights clearance purposes by photo stock houses. Most photographers are willing to allow the use of their work given suitable safeguards.

Who Or What Is in It?

CD-ROM producers may have to be concerned about this question -- those celebrity rights rear their ugly heads again here. Whether this is a problem or not depends on the nature of the product. Educational productions, documentaries, histories and reference books have the most leeway. Using a picture of a person in a game should probably be cleared. Similarly, putting a person's photo on the cover of a product or in advertising of any kind needs clearance. Whether the particular products needs or does not need this kind of clearance impacts the product's budget and timetable in major ways. If there is any doubt, no CD-ROM developer should venture into this minefield without the assistance of a top-notch entertainment/rights attorney.

Ordinary citizens have privacy rights as well -- so make certain the photographer has written releases. And, yet other rights may crop up in a photograph. Use of trademarked identifications such as an Exxon sign, "recognizables" such as a Rolls Royce, the Concorde or a Coke bottle, may have to be cleared.

Terms & Fees

Photographers usually own all rights and can grant whatever territory the CD-ROM product needs. They almost always grant for a limited amount of time and for a flat fee.

Fees range from a low of about \$50 to more normal ranges up to \$200 (or more in the case of famous images or photographers). The lower range is only available when buying a large number of photos from a single source and making a deal. Photos often are best secured from stock photo houses such as the sources listed at the end of this article.

FINE ARTS

Here we have another example of an inherently two-layered clearance problem.

Status of the Original Work

Many famous paintings and sculptures are in the public domain, but many modern works (by Picasso or Andrew Wyeth, for example) are not. So the first determination to be made about a fine arts image is whether the original work is a) in the public domain, or b) is still copyrighted. If the work is still copyrighted, permission to reproduce it from the artist or his estate is necessary.

Who Owns the Photograph?

This second layer is the tricky problem. Who owns the copyright in the photo or transparency being used? This is a separate copyright, and it accounts for why museums are able to control the right to use paintings and sculptures that are hundreds of years old. The art objects are in the public domain. The museum, however, holds copyright in the only legal photo you can reproduce. One of the great examples of this problem is the Metropolitan Museum of Art's reluctance to allow the centuries-old Unicorn Tapestries to be used to sell perfumes and other fashionable wares.

There are some other sources for legal transparencies for fine art besides the museums.

Terms & Fees

Clearances for fine art works in the public domain are usually available for terms and fees very similar to those for other photographs. For contemporary works still covered by copyright a single minor use on a CD-ROM product may require a fee of \$300-\$1000 to the artist and a separate clearance fee for the transparency. Often the artists refuse permission altogether.

GRAPHICS/CARTOONS

Bugs Bunny, Mickey Mouse, the Pink Panther, Batman and Superman can't be thought of as fine art. They certainly are "classic" modern icons, however. So is the Tammany Tiger and many cartoon drawings by the likes of James Thurber, Dr. Seuss or Al Hirschfield. The first group are usually thought of as "cartoon characters," every one of which is rigidly controlled by megabuck companies and among the most expensive properties to use imaginable. The second group usually belong to the artists who drew them.

STRATEGIES

Following this step by step, field by field, survey of rights clearances, makers of CD-ROM products can see how essential it is to think about clearances when planning content and projects. The "Oh, I like this; Oh, I like that," method of selecting content materials invariably turns into the sort of rights clearance nightmares IBM had with its Columbus: Discovery, Encounter and Beyond project -- the need to clear hundreds of objects with hundreds of different owners. This is not the way to do it. Instead, the product planners need to think about rights strategies.

PD

One of these is to use as much public domain (PD) material as possible. PD materials are those no longer covered by copyright law, and therefore usable in any way without permission and without paying a fee. These materials can cover a lot of ground; PD music like Alexander's Ragtime Band* by Irving Berlin and Scott Joplin's Maple Leaf Rag*, beloved and well-known characters like Sherlock Holmes* or Pinocchio* are there for the taking, as are many photos, works of art and literature.

CD-ROM producers should be aware that laws determining what goes into the public domain are different in each country in the world, and are changing* -- a fact important to marketing plans. At this writing, the 15 nations of the European Community are expected to pass laws by July 1, 1995 making the period of copyright in all 15 countries the life of the author plus 70 years. That is, all works in these countries cannot become PD until 71 years after the creator's death (or, in the case of collaborations, the last author to die).

A good rights lawyer can help in negotiating this thicket, and usually expertise about the public domain is worth the trouble. BZ/ Rights publishes The Mini-Encyclopedia of Public Domain Music, the most comprehensive list of songs PD in the U.S. in print today.

Fair Use

Some copyrighted materials may, I repeat may, be available to CD-ROM products under the "fair use" provisions of the U.S. Copyright Act. While educational and documentary products have a better claim to "fair use" than others, the rules are much more complicated than the language used in the law suggests. This is one area where consulting an expert in advance is absolutely essential.

Original Materials

For obvious reasons, creating as much original material as possible for any CD-ROM project is the best way to go. IBM's 7-owner permissions problem on Columbus, for example, could have been avoided by an employee's doing a bit of research and writing an original text. Creating original materials gives the CD-ROM publisher use of them not just for a particular production, but in others as well. A great example is the original character, Carmen Sandiego, created by Broderbund. She is so successful that Carmen is being licensed to other people.

*Current note: You must check the laws of the countries you are going to market in to determine if what you want to use is PD in those countries. Also note that U.S. Public Domain laws changed in 1998 (see our PD Brief on our website at www.bzrights.com).

Deal-Making

Planning to obtain as much content as possible from a few major sources is another way to minimize clearance problems and costs.

Getting Flexible

If more producers were willing to let go of things that involve many clearances or legal complications -- or cost 10 times more than expected -- they would be spared much grief. This is one area where obsession a la Calvin Klein definitely does not pay.

Adequate Time

For a large project, the permissions process will probably require a 6 months to one year lead time. Planning on that time gives the CD-ROM producer the leeway to drop unworkable properties, choose substitutes, find good suppliers and make creative use of what they can offer.

Once upon a time there was a company called IBM doing a lot with a new technology that kept reminding its people to "Think Ahead." It's still a good idea.

Some current notes about fees

Most rights owners will accept flat fees for uses on CD ROM's and on the Internet. Copyrighted music requires royalties that may range from .05 to .50 per CD ROM sold which makes it very costly to use. Using all of a book would also require a royalty. Film & TV clips are very tough to obtain permission for and very expensive since they involve payment to the studio and all the actors. We suggest you avoid using clips if at all possible. Finally, some owners still decline to license any electronic uses.

Barbara Zimmerman is the founder-president of BZ/ Rights & Permissions, Inc., Her nationally-known service clears rights to use music, celebrities, film and TV clips, photographs and other copyrighted materials for a wide range of users. She has worked on multimedia rights for Time-Warner, Grolier, IBM and McGraw-Hill, among others.

AFFORDABLE SOURCES FOR MATERIALS

There are hundreds of good sources of materials. We have space to name only a few.

Music Libraries

ASSOCIATED PRODUCTION MUSIC, 6255 Sunset Blvd., Hollywood, CA 90028,
(800) 543-4276. Website: www.apm.com

PEER MUSIC - Los Angeles Office, 8159 Hollywood Blvd., Los Angeles, CA 90069,
(323) 656-0364. Website: www.peermusic.com or www.synchsite.com

DEWOLFE MUSIC LIBRARY, 25 W. 45th St., New York, NY 10036, (212) 382-0220.

Website: www.dewolfemusic.com

OMNI MUSIC, 52 Main St., Port Washington, NY 11050, (516) 883-0121.

Website: www.omnimusic.com

Film Footage

ARCHIVE FILMS, 530 W. 25th St., New York, NY 10001, (212) 620-3955.

Website: www.archivefilms.com

THE IMAGE BANK FILM, 111 5th Ave., New York, NY 10003, (212) 529-6700.

Website: www.imagebank.com

WPA FILM LIBRARY, 5525 W. 159th St., Oak Forest, IL 60452, (800) 777-2223.

Website: www.mpimedia.com/wpa

SUPERSTOCK, 381 Park Avenue South, Suite 1507, NY, NY 10016 (800) 828-4545

website: www.superstockimages.com

FILM & VIDEO STOCK SHOTS, 10442 Burbank Blvd., N. Hollywood, CA 91601

(818) 760-2098 website: www.stockshots.com

Note: ABC, CBS, NBC and BBC along with other broadcasters are also footage sources.

Photographs

CORBIS/BETTMANN ARCHIVE, 902 Broadway, New York, NY 10010, (212) 777-6200.

CORBIS/Seattle: 15395 S.E. 30th Place, suite 300, Bellevue, WA 98007 (425) 641-4505.

Website: www.corbis.com

COMSTOCK, INC., The Comstock Bldg., 30 Irving Pl., New York, NY 10003,

(800) 225-2727. Website: www.comstock.com

FPG, 32 Union Square E., New York, NY 10003, (212) 777-4210. Website: www.fpg.com

IMAGE BANK (65 offices), 2777 Stemmon's Freeway, suite 600, Dallas, TX 75207. (Call (214) 523-4900 for the number of the nearest office.) website: www.imagebank.com

The Picture Agency Council of America (PACA): This is the trade association for stock picture agencies. Listings of members and a lot of other valuable information may be found at their website www.pacaoffice.org.