

A PRACTICAL GUIDE TO LICENSING AND CLEARANCES

DECISIONS, DECISIONS...

To clear or not to clear? This is the question frequently asked by even the most experienced producers. Often the answer is simple; if you incorporate a copyrighted property (or excerpt thereof) into your production, you need to clear the use with the copyright owner.

Where the clearance process becomes confusing is when you start to analyze exactly what rights a copyright owner is authorized to grant. It is often necessary to construct and secure a "package of rights" for what appears to be a single production element. This is where educated decision making must be employed. It is best to discuss copyright related matters before you begin your production so you can establish a copyright game plan. Doing so will allow you to treat these situations with consistency which is always a good rule.

HELPFUL CLEARANCE STRATEGIES

- Copyright clearances are a vital pre-production step. In order to avoid costly problems and delays it's important to integrate the clearance process into the production process.
- Whenever you use someone else's copyright in your production you need to budget time for the clearance process and money for the licensing fees.
- Be organized. Decide exactly which elements need to be cleared. Prepare a comprehensive asset list of all the film clips, music and other known copyrighted elements you wish to include in your production. Treatments, breakdowns and storyboards are always helpful.
- Plan alternatives. It's possible you won't be able to clear or afford every element on your list. It's a good idea to have back-ups just in case your first choice is not available.
- Know your Grant of Rights. The term, territory, media and use you are licensing should run parallel to your known and/or potential distribution. If possible, avoid going back to the copyright holders to ask for additional rights.
- Minimize the number of copyright holders involved in your project. Make as many volume deals as possible.
- Be informed and if you don't understand something, ask questions.

MUSIC

Music Publishing (PA copyright) is created by the composer (songwriter) of a musical work and is most likely administered by a music publishing company. There are three different types of licenses most commonly secured for publishing rights;

Mechanical License - the right to make an audio-only reproduction of a musical composition. There is a statutory rate for a mechanical use. To reduce this rate, one must seek permission from the copyright owner.

Synchronization License - the right to synchronize a musical composition to a visual element (film, TV, home video, mullet-media, etc). There is no statutory rate in the U.S. for this use. All

approvals and licensing fees are subject to negotiation with the music publisher. Fees are usually determined by the popularity of the song, the grant of rights, and the prominence of the song in the production.

Note: it is possible for a song to be owned/represented by more than one music publisher. You must clear one hundred percent of the song's ownership before using it in your production.

Public Performance License - the rights secured by the venues or the stations (TV, radio, concert hall, stadium) to publicly perform or broadcast musical compositions. These licenses are sought on a "blanket" basis from the three performing rights societies (ASCAP, BMI & SESAC). It is rare for the producer of a program to be involved in these matters.

RECORDINGS

Sound Recording (SR copyright or mastering right) is created by the performing artist and most likely financed and owned by a record company.

Producers are required to clear a sound recording when they have used an actual record (CD, audio cassette, etc.) as the source material for the music in their production. A live "visual-vocal" performance of a song usually doesn't require any record company clearance because no master recording was used (beware of lip-synched performances!).

Blocking rights: A situation whereby a record company can block the new use or re-use of a live performance that was created while an artist was under an exclusive recording contract.

Prior Approvals: When clearing a musical composition or a sound recording, the record company or music publisher may have a contractual obligation to consult with the artist and/or songwriter prior to granting you permission to use their work and negotiating a licensing fee. A prior approval requirement is unavoidable and will inevitably delay the overall clearance process.

CLIPS

film, television, newsreel, stock footage and other moving images

It is often necessary to construct and secure a "package of rights" for what appears to be a single production element.

One might have to go to several different parties to effectively clear all the various elements represented in the clip; the physical footage may be available from one source, while the copyright in and to the footage may be represented by another party. It is the responsibility of the new program's producer to make sure any talent featured in the clip, any underlying music, any union/guild new use/re-use fees and/ or any other third party rights are secured.

TALENT

The need to clear someone's name, voice and/or likeness relates not to copyright law but to common law rights of privacy, an area of tort law which is closely related to trademark and unfair competition law. These laws differ greatly from state to state. Whether or not a producer is obligated to obtain releases from artists and/or the actors appearing in clips is a decision that should be made in conjunction with one's legal counsel.

DURATION OF A COPYRIGHT

The life of a copyright is determined by a number of factors;

If the work was created on or after January 1, 1978, copyright protection lasts the life of the author plus another 50 years. In the case of joint authorship, the "life" ends when the life of the last living author ends.

For works made before January 1, 1978, things can get complicated. Congress has extended the terms of some copyrights which were originally protected under the Copyright Act of 1909 (the current Act is the Act of 1976). Normally, works protected under the 1909 Act have a life of 28 years. Under certain circumstances, this term is renewable for another 28 years.

PUBLIC DOMAIN

The phrase "public domain" refers to the loss or expiration of the copyright holders rights in and/or to a work. When a work is in the public domain, it is available to the public for copying, distribution, publication, display or other use. One should be absolutely certain that a work is in the public domain before using the work without a license. Also note that a new arrangement of a song that is in the public domain can constitute a new copyright. Uses of the new arrangement must be approved by the copyright owner.

FAIR USE

In the U.S. fair use is a defense to a claim of copyright infringement. In the rest of the world, a fair use defense is not necessarily applicable. The Copyright Act provides for this defense and instructs the courts to balance four factors in determining whether the use by the defendant was "fair". The four factors are (1) the purposes of the use, including non-profit, educational purposes; (2) the nature of the copyrighted work; (3) the amount of the copying; and (4) the effect of the copying on the potential market for, or value of, the original work.

Remember, fair use is a defense. One must be involved in some form of litigation before this defense can be used. Also note, a fair use defense is not necessarily applicable outside of the U.S.

DO YOU KNOW...

- About the voluntary PBS/ Harry Fox Agreement which covers the use of musical compositions on public television.
- That licensing practices outside the United States, unencumbered by anti-trust laws, are often handled differently than in the U.S. In most European territories and in Japan, collective bargain societies exist. Under certain circumstances these societies can grant certain rights on a more-or-less blanket basis.
- The length of copyright protection in European territories is longer than in the U.S. Therefore, a copyright might be in the Public Domain in the U.S. but is still copyright controlled outside of the States.
- If you use a copyrighted property that was originally created pursuant to a Guild or Union contract, you might have a new use or re-use obligation to such Guild and/or Union. Some of the more common organizations you may need to deal with are:

The American Federation Of Musicians (AFM)
Recording Industry Association of America (RIAA)
Screen Actors Guild (SAG)
Directors Guild of America (DGA)
Writers Guild of America (WGA)

HOW WE CAN HELP

Our clearance affiliate is a full-service, international copyright clearance company. Our goal is to keep you informed and minimize any last-minute surprises that might affect your production, making life easier on both the nerves and the budget.

Our experience in negotiating licensing fees and knowledge of the marketplace gives us the ability to secure favorable deals on your behalf. This will save you time and money. Our comprehensive administration and clearance services can also help:

- establish an overall clearance strategy and procedure for your project
- organize and facilitate the clearance process
- consult on all clearance related matters as they arise
- offer sound advice on how to collect your elements and set up a production resources library
- assist in the preparation of the agreements and releases
- assist in the preparation of credit information
- prepare all necessary guild and union reports
- administer certain payments on your behalf
- establish a system whereby both contract administration and accounting flow smoothly
- generate cue sheets
- keep track of your advertising and promotional rights
- register your new program for copyright

Note: This guide is not meant to be a substitute for your attorney. We strongly recommend an attorney be assigned to the project and that this person be included in the risk management and decision making process. Nothing contained herein is intended as legal advice.