

Story 161

NATIONAL GEOGRAPHIC POTPOURRI

July 30, 1998

CD-ROM Travel Planner

From the phone calls I have been receiving lately it appears that National Geographic Interactive is working on several CD-ROM projects. Several people have been receiving requests for re-use of previously published images in a CD-ROM Trip Planner. The rights requested are: Non-exclusive, for 5 years, worldwide, English language with the following media definitions.

NGI may use the Materials solely in the Program and Versions of the Program in any manner and in all electronic media, their successors or replacements, currently known or subsequently devised including without limitation CD-ROM, DVD and commercial online electronic transmission (the "Media"). Supplier grants to NGI the right to duplicate the Materials, incorporate the Materials into the Program and Versions of the Program, and exploit and distribute the Program and Version of the Program with the included Materials in the Territory during the Term. NGI shall have the right solely in connection with the Program or Versions thereof to adapt, rearrange, add to, or subtract from the Materials, and to combine them with other materials, music or recording, and Supplier on behalf of the owner of such right waives any right of "droit moral" or similar right, except that NGI shall not digitally alter the Materials (except to crop or color correct.)

A few points to consider:

- They start out by saying "solely in the Program and Versions of the Program," but then they go on to say "and in all electronic media." Is this license only for these specific programs, or is it for any electronic media use that National Geographic has in mind? Given the "and" it could be interpreted to mean all electronic media and these two particular program. One thing you can be sure, based on past experience, you can depend on them to interpret the language in the broadest possible way, and you will have to take them to court if you want to challenge their interpretation.
- Clearly, on-line use is eventually intended.
- They don't say whether they are going to make electronic duplicates, film duplicates, or both. Both are possible.
- In some agreements NGI is also claiming the right to use the materials for promotional purposes without additional compensation.

For these uses they are offering to pay \$100. Photographers and agents who are receiving these offers appear to be taking three courses of action:

- They are rejecting the offer outright as the money offered is way too low for the rights requested.
- They are trying to negotiate for lesser rights. It appears from everyone I have talked to that NGI is unwilling to make any modification of the rights. I would be interested in hearing from anyone who has been successful in narrowing the types or term of use.

NATIONAL GEOGRAPHIC POTPOURRI

Page 2 of 3

- They are asking for a much higher fee for this conglomeration of uses. Some report that on past CD-ROM projects when the offer has been \$100, and they have sent an invoice for significantly more than double the offer, they have been paid for the use with no question. Maybe NGI expects everyone to ask for more money. We don't know of anyone who has been paid more than the \$100 for this particular project, but it may be worth asking for a higher fee before rejecting the use out of hand.

One photographer reports that he was called about the use, before receiving any paperwork. The lady at NGI said they wanted to use one his images for a CD-ROM and that they were offering \$100 for the use.

Photographer: "What are the rights your asking for?"

NGI: (She laughs) and then explains the rights.

Photographer: "Send me that in writing and I'll get back to you."

It would appear that they may have been getting the question about rights a lot, and they know that anyone who asks the question is not likely to accept their offer.

108 Years of National Geographic CD-ROM

NGI is planning to also offer the "108 Years of National Geographic" on DVD in the near future. Many photographers and stock agents think this is another new use, and that another fee should be paid for this use. Of course two times \$0 is still \$0.

As reported in March, Jerry and Idaz Greenberg have filed suit in federal court in Miami against National Geographic for copyright infringement in connection with the use of their images on the 108 years CD-ROM project, as well as a previous infringement by National Geographic.

There are 4 counts to the Greenberg's case -- 2 in connection with the 108 years and 2 with the other infringement. In a preliminary hearing the judge issued a partial summary judgement on the two counts that were connected with the 108 years project ruling that Tasini vs. NY Times was controlling on these issues and that copying as a revision of each issue of the magazine is permitted under Tasini's interpretation of 201(c) of the Copyright Act.

ASMP has told their members that they will supply an amicus brief to the Appeals Court, if requested, and that "ASMP feels this is an important issue with far reaching consequences."

Lost Transparency Settlement

Photo Resource Hawaii recently received a settlement from National Geographic of between \$750 and \$1500 per image for the loss of 43 transparencies.

Tami Dawson reports that she had submitted 43 images at the request of National Geographic Traveler magazine. Traveler's records show that the package arrived in the building, but from that point on no one can remember seeing the images.

When Traveler magazine finally acknowledged that the images were lost they turned the matter over to their insurance company. Initially, the insurance company contacted Dawson with a very low and

unacceptable offer. At that point Dawson called the National Geographic legal department. She suggested that their insurance company might not really understand the value of transparencies. She pointed out, in a friendly way, that she really didn't want to take the matter to court, but she would if she couldn't get a better offer.

Within 48 hours she had a new offer from the insurance company "that got the ball rolling." Within a couple weeks negotiations were complete. Photo Resource Hawaii was paid between \$750 and \$1500 per transparency, depending on the perceived value of each image. All this was taken care of without the necessity of Dawson hiring a lawyer.


For those who might experience similar problems with insurance adjusters it should be noted that Photo District News has published a number of stories in the past decade, or so, on settlements for lost or damaged transparencies. PDN will provide photo copies of these stories for a fee. Sending such copies to an insurance adjuster might help justify your request for higher fees than the company's initial offer. If you need more information on this contact SELLING STOCK or PDN.


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