

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-91 (79)S
Sales Tax
December 26, 1991

STATE OF NEW YORK

COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S910808A

On August 8, 1991, a Petition for Advisory Opinion was received from Sherman Grinberg Film Libraries, Inc., 630 Ninth Avenue, New York, New York 10036.

The issue raised by Petitioner, Sherman Grinberg Film Libraries, Inc., is whether the license fees paid to Petitioner by its customers for the right to reproduce images from movie footage is subject to New York State and local sales and use taxes.

Petitioner's primary business is to catalogue and license for reproduction "stock" footage for film production companies throughout the world. In general, "stock" footage is film footage shot without "talent" (i.e., no actors, newscasters, stuntmen, etc., appear in the footage). It may include scenes of natural surroundings, wildlife, particular buildings, streets or cityscapes or it may be composed of news footage. An important element of "stock" footage is that it is not identifiable to any particular commercial film, although much of the stock footage available consists of motion picture footage and "out-takes" from major motion picture or television production.

Petitioner owns only a small percentage of the total footage which is catalogued and licensed. Nearly all the footage is owned by the studios which produced the film.

As to footage owned by the studios, Petitioner has entered into written agreements whereby the studio/owner retains all right, title and interest in and to the footage, but delivers possession of the footage to Petitioner or gives Petitioner access to the footage on studio premises for cataloging and subsequent licensing for reproduction. To illustrate, Paragraph 13 of an agreement entered into with Metro-Goldwyn-Mayer, Inc. (the "MGM Agreement") reads as follows:

"All MGM stock footage and all catalogues, files and records with respect thereto shall be and remain, so far as Grinberg is concerned, the property of MGM. MGM reserves the right to sell or otherwise dispose of same at any time or times as it may determine."

As clearly provided in the MGM Agreement, MGM retains ownership of the stock footage.

Moreover, Paragraph 4 of the MGM Agreement provides that:

"MGM hereby grants to Grinberg exclusively, during the term and subject to the provisions of this agreement, the right on Grinberg's own behalf and for its own account, to license MGM's general and special stock film for use in motion pictures.. Each license shall limit the use of the licensed film to the specific motion picture for which it is licensed, and shall be non-exclusive."

This is an exclusive arrangement in the sense that only Petitioner can license stock footage for MGM. As set forth above, MGM retains ownership of the film, but MGM grants Petitioner the right to license the stock footage to others. However, MGM requires that the license be limited to a specific motion picture. Petitioner is thus limited as to the license it can grant to its customers. Furthermore, pursuant to the MGM Agreement, Petitioner cannot grant an exclusive license to any of its customers. All licenses issued by Petitioner are on a non-exclusive basis.

Paragraph 9 of the MGM Agreement provides, in part, that:

"MGM makes no representation or warranty with respect to any of its stock film, present or future. Grinberg assumes all risks of the use of such film for stock film purposes, and shall obligate each of its licenses to assume all such risk."

The limited use of the footage is set forth in Petitioner's license contract as follows:

"The film footage licensed hereunder may be used only for the purpose specified and may not be sold or reused without the written permission of the Licensor. All film footage licensed hereunder is delivered upon the express understanding, to which the licensee agrees by acceptance of such footage, that the Licensor warrants nothing except its title to the footage licensed and that the licensee assumes full responsibility for any use which it may make of such footage or of any material contained therein, and that the licensee will hold the Licensor harmless against any liability, loss or damage arising out of or in connection with any such use or the license of such footage to the licensee. The licensee's rights in the footage licensed hereunder shall be non-exclusive."

Petitioner pays MGM a royalty based upon a percentage of gross license fees Petitioner collects from its customers. The MGM Agreement provides for a \$10,000.00 advance to MGM against royalties, but this is not typical of other written agreements. As provided in paragraph 3 of the MGM Agreement, if MGM wants to use stock footage of Petitioner, then MGM receives a forty percent (40%) discount off the applicable rate charges. As provided in paragraph 8 of the MGM Agreement, if MGM wants to use MGM footage in an MGM production, there is only a minimal labor charge to MGM. Similar discount arrangements are usually provided for in other agreements with studio-owners of footage. As provided in paragraph 6 of the MGM Agreement, Petitioner provides MGM with a monthly royalty report. This is typical of all other written agreements with studio/owners.

The MGM Agreement is used only for illustration purposes; however, the major factors discussed above are common to all Petitioner's written agreements. Title to the original negative of the film, along with all copyright and related ownership rights are retained by the studio/owner. Petitioner is typically the "exclusive" agent of the studio/owner, but this is an undisclosed agency as to Petitioner's customers, i.e., Petitioner issued the license contracts in Petitioner's name,

not in the name of the studio/owner. The footage can only be licensed to Petitioner's customers for a specific production, and all licenses are non-exclusive.

Pursuant to the written agreements Petitioner enters into with the studio/owners, Petitioner has possession of or access to the original negatives of the film Petitioner catalogues for its customers. Petitioner's customer can view the film at the Petitioner's premises. When a customer locates footage it may want to use in its production, the customer orders a "scratch" print with edge numbers or videotape with exposed time codes. Petitioner makes arrangements to have the original negative delivered to a lab or tape transfer facility where a workprint is reproduced from the original negative. Petitioner then literally "scratches" the workprint film down the middle with a paperclip rendering it unusable for anything except viewing and decision-making by Petitioner's customer. The lab or tape transfer facility delivers the original negative back to Petitioner; the customer never obtains possession of the original negative. Petitioner delivers the "scratch" print to its customer and the customer is responsible for paying the lab charges, plus sales tax.

The customer pays Petitioner a \$400.00 minimum non-refundable advance before any "scratch" print is ordered. If the customer ultimately orders a master, the \$400.00 advance is deducted from the customer's total license fee. If the customer does not order anything after viewing the "scratch" print, the \$400.00 is a non-refundable labor charge to pull film from the vault, to replace the film, and to prepare paperwork for the customer's lab or videotape transfer orders and for the research services Petitioner undertook. In certain instances with established customers, there is no "advance" charged. Instead, if the customer does not license any stock footage, Petitioner renders an invoice for "non-use" typically in the amount of \$400.00 which represents a labor charge as in the case of the non-refundable advance. This \$400.00 advance is separate from and in addition to the lab charges the customer is responsible for paying.

Once the customer has viewed the "scratch" print, the customer may order a "master" by providing Petitioner with the edge numbers on the "scratch" print. The "master" is a reproduction of the original negative, but only of the seconds or feet selected and ordered by the Petitioner's customer.

The customer is issued a license contract which grants the customer the right to reproduce the images of the particular footage the customer ordered. This reproduction is accomplished by releasing a "master" to the customer which is limited by the customer's license to its use in one particular production, etc. The "master" is an air-quality reproduction of the original negative and this reproduction is also done by a lab. Petitioner's customer is responsible for payment of lab charges as to the "master," plus sales tax. The customer cannot alter or change the images in any way. The images may only be reproduced and integrated into the customer's production, and cannot be sold or reused by Petitioner's licensee.

The license fee varies depending upon a number of factors. Petitioner has minimum fees for both 16mm and 35mm footage, and the license fee is based in part upon the number of seconds or

feet ordered. Also, the fee varies depending upon the nature of the customer's release; i.e., if the reproduced footage is to be released in an educational (no television) market, the minimum fee is \$420.00, whereas if the reproduced footage is to be released for a television (U.S.) network broadcast, the minimum fee is \$750.00.

Section 1105(a) of the Tax Law generally provides for the imposition of tax upon every retail sale of tangible personal property, with certain exceptions not relevant herein.

The term "sale" is defined for purposes of Section 1105(a) of the Tax Law by Section 1101(b)(5) of the Tax Law as follows:

"Sale, selling or purchase. Any transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, conditional or otherwise, in any manner or by any means whatsoever for a consideration, or an agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor."

Section 526.7(f) of the Sales and Use Tax Regulations provides, in part, exemption from sales and use taxes in the following instances:

(f) Reproduction rights

(1) The granting of a right to reproduce an original painting, illustration, photograph, sculpture, manuscript or other similar work is not a license to use or a sale, and is not taxable, where the payment made for such right is in the nature of a royalty to the grantor under the laws relating to artistic and literary property.

(2) Mere temporary possession or custody for the purpose of making the reproduction is not deemed to be a transfer of possession which would convert the reproduction right into a license to use. See Howitt v. Street and Smith Publications, Inc., 276 N.Y. 345 and Matter of Frissell v. McGoldrick, 300 N.Y. 370.)

Accordingly, pursuant to Section 526.7(f) of the Sales and Use Tax Regulations, Petitioner's reproduction of the original negatives to make workprints and master copies for its customers is not a taxable license to use or a sale since Petitioner merely takes temporary possession or custody from the studios of the original negatives and payments for the right to reproduce are made to the studios in the nature of royalty. Therefore, the agreements entered into between Petitioner and studios are not subject to sales or use taxes.

However, Petitioner's sale of "scratched" workprints and master copies to customers constitute the transfer of tangible personal property since customers receive the permanent possession of the workprints and master copies. The customers never obtain temporary possession

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or custody of the original negatives and payments made to Petitioner are not in the nature of a royalty as required by section 526.7(f) of the Sales and Use Tax Regulations. Therefore, pursuant to Sections 1101(b)(5) and 1105(a) of the Tax Law such sales are subject to sales and use taxes.

DATED: December 26, 1991

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.