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From: Fred Ward <fred@fredwardgems.com> Save Address Reminder
To: Andrew Berger <berger@thshlaw.com>, Nathan Benn <nathan.benn@orangelogic.com>, ttochoa@scu.edu, Idaz & Jerry Greenberg <lulukiku@bellsouth.net>
Subject: Re: photographers vs. National Geographic Society/response::: Tyler T. Ochoa Nathan Benn Jerry Greenberg
Date: Friday, November 21, 2008 5:12:05 PM [View Source]

Andy,

We have trudged this uphill battle for years and apparently still mired in phony word plan.

Every photographer worth his salt knows a couple of things for sure. The USA has copyright laws. I abided by all of them, as did my friends. NGS stole my material.... deliberately, obviously to save NGS some money, and now it wants to use my material without payment.

This was absurd years ago when we started and it still is absurd. The justices in this care are so off-base and so wrong that a law clerk could see through it.

We do have copyright protection in this country.... but you wouldn't know it from the NY justices.

This is grand theft, pure and simple. And no one seems to be able to stop it. I am appalled.

Fred Ward

>>> Tyler T. Ochoa
>>> Professor, School of Law
>>> Santa Clara University
>>> Santa Clara, CA
>>> ttochoa@scu.edu

Nathan Benn [mailto:nathan.benn@orangelogic.com] .

Jerry Greenberg

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On Nov 21, 2008, at 11:17 AM, Berger, Andrew wrote:

> As per my voice mail message to you yesterday let me suggest that I
> believe you are misreading Judge Kaplan's decision.
>
> Judge Kaplan did not hold that a publisher can
> reproduce their publication without limitation...as long as publisher
> maintains the original format and context.
>
> Instead he found that the photographers had established a course of
> dealings arising from their failure to object to the use of microfilm
> reproductions of their works and that because the NGS (in the Judge's
> view) is like microfilm, that course of dealings meant that they could
> not complain or demand further payment when their works were
> reproduced
> in the CNG.
>
> That is his holding. I disagree with it (I could use stronger
> language)
> but that is what he found and unfortunately the Court of Appeals
> agreed
> with him
>
> Judge Kaplan noted NGS's argument that NGS :
>
> asserts that "[s]ince neither the editorial content of the
> Magazine nor the editorial content in which Plaintiffs' contributions
> appeared in the Magazine were altered in the CNG, and since it is
> not a
> 'new collection,' 'a new anthology or an entirely different magazine
> or
> other collective work,' it cannot be a 'new' or 'further' editorial
> use
>
> the Judge said the argument has some appeal but he didn't buy it.
>
> So don't think you can say that the court has vaporized contracts etc.
>
> He ruling depends on the establishment of a course of dealings arising
> from conduct or in our case silence. That is as far as he went.
>
> Thanks
>
> Andy
>

> Andrew Berger
> Tannenbaum Helpern Syracuse & Hirschtritt LLP
> 900 Third Avenue
> New York, NY 10022
> Email: berger@thshlaw.com
> Tel: (212) 702-3167
> Fax: (212) 371-1084
> http://www.thshlaw.com/AttorneyBios.aspx?A=11
> www.thshlaw.com
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>
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> -----Original Message-----
> From: Nathan Benn [mailto:nathan.benn@orangelogic.com]
> Sent: Monday, November 17, 2008 8:27 PM
> To: Fred Ward
> Cc: Berger, Andrew
> Subject: Re: photographers vs. National Geographic Society
>
> Fred,
> Thanks for the note and for fighting the good fight!
> I met Prof. Ochoa at a conference last week. Jeff Sedlick of the PLUS
> Coalition (www.useplus.org) had made a presentation to museum pros
> about the PLUS initiative on licensing agreements. I asked about
> effect of Ward et al vs. NGS. Sedlick didnt really have an answer, but
> Ochoa chimed in from the audience. He identified himself as an
> attorney , and he was a speaker on the following panel about IP in
> cyberspace.
>
> Ochoa's comment from the floor was that I was "misinformed..." i.e.,
> he said that the publisher did not have electronic rights to the print

> version if the contract specified limitation to the rights granted. I
> told him that he was wrong, and that Kaplan viewed the contract terms
> as irrelevant since the CNG was not a "Further use." I don't think he
> believed me at the time, so I followed up with the documents.
>
> Kaplan's decision vaporizes the meaning of contracts and licensing
> agreements. Based on Kaplan, it appears that a publisher can
> reproduce their publication without limitation...as long as publisher
> maintains the original format and context. CNG is just tip of the
> iceberg. Why would NGS not put all NGMs on the web, as long as they
> keep the full page layout in sequence? What would stop any publisher
> from reproducing all their back issues in all electronic formats? Why
> limit it to electronic formats only? If a publisher licenses our
> images for a press run of 100 copies, and then copyrights the
> pages....what prevents publisher from printing another 100,000
> copies...as long as he keeps same layout? Kaplan reasoning is that
> this is not a further use...as long as the publisher is keeping the
> original layout.
>
> What value are agreements if derivatives of first publication are not
> further use?
>
> It is interesting that an IP attorney does not realize the reasoning
> and impact of Kaplan's decision. I will be eager to see how he
> responds.
> Best regards,
> Nathan
>
>
> On Mon, Nov 17, 2008 at 7:41 PM, Fred Ward <fred@fredwardgems.com>
> wrote:
>> Thanks Nathan,
>>
>> I appreciate your efforts to see that this nightmare may someday be
> over.
>> I'm still in the game although it has been an expensive run to keep
>> up
> with
>> the filings, etc.
>>
>> Let's stay in touch and see if there is anything else we can do about
> this
>> tragic loss.
>>
>> Regards,

>>
>> Fred
>>
>>
>> On Nov 17, 2008, at 11:19 AM, Nathan Benn wrote:
>>
>>> Tyler T. Ochoa
>>> Professor, School of Law
>>> Santa Clara University
>>> Santa Clara, CA
>>> ttochoa@scu.edu
>>>
>>> Dear Tyler:
>>>
>>> It was good to meet you last week at the Museum Computer Network
>>> conference in Washington. Thank you for enabling a spirited
> discussion
>>> regarding the case law around the National Geographic Society CNG
>>> products.
>>>
>>> As we discussed, Andrew Berger represented Fred Ward and me as
>>> plaintiffs against NGS. Different attorneys represented additional
>>> photographers. Judge Kaplan summarily dismissed the case, and the
>>> appeals court upheld his decision.
>>>
>>> I was not a party to the actions regarding copyright. I only
>>> participated as a contract claim. All of the photographer contracts
>>> involved were governed by the standard NGM contracts that provided
>>> further payment for "Further use." Here is a definition regarding
>>> the
>>> meaning of "further" from Encarta dictionary:
>>>
>>> Further
>>>
>>> Additional
>>>
>>> Supplementary
>>>
>>> fur*ther adj
>>> that is more than or adds to the quantity or extent of something
>>>
>>> ad*di*tion*al adj
>>>
>>> The CNG had more than 100 SKU products that generated $70 million in
>>> revenue. It is hard for me to understand how CNG is not a "further

>>> use."
>>>
>>> Many of the relevant contracts, especially after 1990, specified
>>> that
>>> "no electronic rights" were granted to NGS. However, the court
>>> decision allows NGS to produce CNG, and presumably unlimited other
>>> electronic versions, as long as the full-page layout of the original
>>> NGM is intact.
>>>
>>> Furthermore, CNG was not a product of NGS. CNG is a product line
>>> from
>>> content licensed to various third-party publishers by NGM.
>>>
>>> I have attached several documents related to the case. I am sure
>>> that
>>> Andy Berger would be willing to discuss this with you if you want to
>>> further investigate.
>>>
>>> When we discussed the case at MCN, you said that contract language
>>> would protect rightsholders from unlicensed or forbidden use of
> images
>>> etc. Regrettably, this is not the case in Kaplan's court. My
>>> understanding is that the publisher can infer unlimited electronic
>>> derivatives of the original product as long as the original layout
> and
>>> context are maintained (though CNG is actually quite different from
>>> the original NGM). Kaplan dismissed as irrelevant the contract terms
>>> regarding "further use" and "no electronic rights."
>>>
>>> I would very much appreciate your thoughts on this. If you see it
>>> differently, I am eager to learn from you. But as it appears to me
>>> now, the integrity and intention of licensing agreements has been
>>> destroyed.
>>>
>>> Kindest regards,
>>> Nathan Benn
>>> Cell (347) 886 6677
>>> Nathan.bennn@orangelogic.com
>>>
>>> Cc: Andrew Berger, Fred Ward
>>>
>>>
> <6_17_08_Second_Circuit_Summary_Order.pdf><NYDOCS1-#814768-v1-
> Ward_Reply
> _B><Kaplan

>>> NGS - summary
>>>
> dismissal.pdf><771789-v1-
> final_draft_memo_in_o><16256pdfBerger.pdf><Fred
>>> Ward vs NGS><benncomplaint_v1a.DOC>
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