ROGERS V. KOONS - A VICTORY OVER "APPROPRIATION" OF IMAGES

By Michael D. Remer, ASMP Legal Counsel

It is basic law that when a photographer creates an original image, that image is protected by copyright from the moment the shutter clicks. The copyright is owned by the photographer (assuming that it has not been given up under work for hire or an all rights assignment). And unauthorized use of the image infringes the photographer's copyright.

Clear enough — but apparently not to those people who feel justified in "appropriating" a photographer's copyrighted image for use in their art work in another medium.

Sculpture Based On Photograph

Such was the view of New York City sculptor Jeff Koons, who created a sculpture copied from California photographer Art Rogers' copyrighted photograph. The photograph, created in 1980, depicted a seated couple holding eight puppies on their laps. The photograph, entitled "Puppies", was published in newspapers and books, exhibited in an art museum, and reproduced — under license from Rogers — on notecards.

Koons, whose specialty is embodying items of popular culture into sculptures intended to comment on the social scene, saw the notecard reproduction of Rogers' photograph while he was preparing for his "Banality Show." Koons tore Rogers' copyright notice off the card, and sent the photograph to an Italian workshop, with detailed instructions to make as exact a copy as possible in polychrome wood. The resulting work — in an edition of four — was called "String of Puppies" and made a part of Koons' show. Each piece was 42 x 37 inches in size, on a 67 x 31 inch base. Two of the four sold for $125,000 each, a third sold for $117,000, and Koons kept the fourth as an "artist's proof" for possible later sale.

A photograph of the sculpture appeared in a newspaper story about Koons' show. A friend of the man depicted in Rogers' photograph, Jim Scanlon, called to tell Scanlon about this "colorized" version of the Rogers photograph. When Scanlon saw the newspaper photograph, he realized that it was not Rogers' photograph, but a photograph of Koons' sculpture. Scanlon told Rogers — and Rogers brought a copyright infringement suit against Koons and the New York City art gallery exhibiting the show. Rogers v. Koons and Sonnabend Gallery, Inc., U.S. District Court, Southern District of New York, 89 Civ. 6707 (1990).

Infringement Found

Koons did not deny that he "used" Rogers' photograph as "source material" for his sculpture. The Court noted that "Koons prefers to avoid the verb 'copied,'" but added, "Semantics do not decide the issue" of copyright infringement.

Koons asserted as a defense that Rogers' copyright extended only to the photograph "as a photograph", and that the sculpture embodied only "factual" and "non-copyrightable" elements of the photograph.

The court had no difficulty discarding this argument. It is true, the Court said, that copyright protection extends only to original expression, while purely factual information is in the public domain. But the Court found that this distinction did not apply here. It was a "fact" that the Scanlons' dog produced the litter of eight puppies, that they thought the puppies were cute, and that they asked Rogers to photograph them. "But the manner in which Rogers arranged his subjects and carried out his photographer's art constitute a protectible original act of expression."

This conclusion applies, the Court said, even though the sculpture was in a different medium. Koons' sculpture was based upon Rogers' pre-existing copyrighted photograph — and was therefore a "derivative work" under the Copyright Act. The Act specifically provides that copyright protection includes the exclusive right to create and license derivative works based upon the copyrighted work. "In copyright law," said the Court, "the medium is not the message, and a change in medium does not preclude infringement."

(It is worth noting that in support of this conclusion, the Court cited a 1924 case which held that "a piece of statuary may be infringed by a picture of the statuary." The Koons court observed that it was equally true that a sculpture may infringe a photographer's copyright. But photographers also should understand the lesson of the 1924 case — an unauthorized photograph of copyrighted work in any medium can infringe.)

Koons also argued that Rogers had to show "substantial similarity" between the photograph and the sculpture, and that differences in size, texture and color precluded such a showing. The Court called this argument "the discredited 'substitute medium' argument in a different form." The test of substantial similarity in this jurisdiction is "whether an average lay person would recognize the alleged copy as having been appropriated from the copyrighted work." There was "no question," said the Court, that the test was met in this case — noting that Scanlon's friend had thought that the newspaper photograph of the sculpture was Rogers' photograph.

Not Fair Use

Koons also argued that in any event his utilization of Rogers' photograph was "fair use", and therefore did not infringe Rogers' copyright.

The fair use doctrine permits limited use of copyrighted material without the permission of the copyright owner, when justified in the public interest. The Copyright Act gives these examples — criticism, comment, news reporting, teaching, scholarship, or research.

The Court noted that the sculpture did not fall within any of these statutory examples. There was a "faint sugges-

Continued on Page 12

Continued From Page 6

tion" by Koons that the sculpture, as part of his "Banality Show", was intended to comment satirically upon contemporary values. But, the Court said, the type of "criticism" or "comment" contemplated by the Act is that which specifically addresses the copyrighted work itself. Here, the sculpture didn't criticize or comment upon Rogers' photograph — "It simply appropriates it."

The Court then turned to the four factors which the Copyright Act requires to be taken into account in determining whether fair use applies.

First, the purpose and nature of the use, including whether of a commercial nature or for nonprofit educational purposes. Although the sculpture is unquestionably a work of art, it "is not unsullied by considerations of commerce." The sculpture was actively marketed, and fetched considerable prices from the public. The Court concluded that Koons' use of Rogers' photograph was of a commercial nature.

Second, the nature of the copyrighted work. Where the copyrighted work is creative, and more akin to fictional than factual work, courts are less likely to find fair use. Such was the case here, the Court found.

Third, the amount and substantiality of the portion used. Here, noted the Court, Koons appropriated the entire photograph.

Fourth, the effect of the use upon the potential market for or value of the copyrighted work. This is considered the most important factor. Koons argued that the sculpture did not impair — indeed, may have enhanced — the value of the photograph. But, said the Court, the real question is the effect upon the potential markets for the photograph. Affidavits of experts Arnold Newman and Jane Kinne clearly showed that photographers may earn additional income through sale of "art rendering" rights. Clearly, said the Court, the sculpture "undermines" Rogers' market for new versions or new uses for his photograph.

(The Court defined "art rendering" as "creating an art work based on the photograph in a medium other than photography." The ASMP Stock Handbook defines art rendering as: "Art version or copy of a photograph or portion of one by an artist/illustrator in which the photograph is recognizable." Under either definition, the critical point is that the art rendering rights belong to the photographer, and exercise of the rights without a license from the photographer constitutes copyright infringement.)

Based on this analysis of the fair use doctrine, the Court concluded that Koons' use of Rogers' photograph was not fair use.

Decision For Photographer

Accordingly, the Court found that Koons had infringed Rogers' copyright, and that Rogers was entitled to an order enjoining both Koons and the gallery from further infringing use of the sculpture. Rogers also sought $367,000 (the proceeds realized from the sales of the sculpture) as money damages. However, the Court has given Koons an opportunity to prove at trial what expenses he had incurred in creating the sculpture, and would thus be entitled to deduct from the $367,000 figure.

The court dismissed Rogers' money damages claim against the gallery, since he had not shown that the gallery knew of Koons' infringement of the photograph.

Appropriation and Copyright

ASMP has taken a vital interest in Rogers v. Koons since its inception. Matt Herron, then ASMP Northern California Chapter President and now a National Board member, led the Chapter's effort to have the San Francisco Museum of Modern Art remove the Koons sculpture from public display. Rogers' attorney, L.Donald Prutzman, of New York's Stecher Jaglom & Prutzman, consulted with me during the litigation. Mr. Prutzman believes that the defendants may well appeal the decision, and I will report on any further developments. But meanwhile there is no doubt that Rogers v. Koons is a powerful statement in support of the sanctity of copyright.

ASMP's concern about this issue is timely. "Appropriation" is very much a part of the art world. New York's prestigious Museum of Modern Art has mounted a major exhibit, "High & Low," which extensively depicts the rendering by modern artists of items of popular culture, thus transmuting the "low" into the "high". The exhibit includes work of artists such as Picasso, Braque, Gris, Leger, Miro, Lichtenstein — and yes, Koons too. No one would argue that these are not serious artists — and in some cases, recognized masters. And there can be no argument that rendering has been an element of fine art — indeed, of all of the arts — since time immemorial.

But these undoubted facts — often cited in defense of the appropriation of copyrighted work — surely beg the question. If an artist wants to render a copyrighted image in a new art work, a ready alternative to infringement is at hand — let the artist get a license from the photographer. The wellsprings of artistic creativity are not likely to dry up because of this simple requirement.

Virtually all countries of the world accord copyright protection to creators. It is a property right just as surely as the rights which protect other forms of property. Indeed, an artist's copyrights may be — and often are — the most valuable property he or she may own. Photographers would do well to be aware of these principles, and to act on them when they find that their images have been appropriated. Rogers v. Koons is an important indication that the courts will recognize the validity of photographers' rights in such cases.

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DIGITAL MANIPULATION AND THE LAW

Computer altering makes for some creative photography. But are we stepping over the boundaries of copyright? A legal expert offers this advice.

By William T. McGrath

Digital technology has met the visual arts and the relationship is flourishing. Digital manipulation of photographs, once prohibitively expensive, has become more refined and affordable. Photographs can be altered in ways never before possible. A recent *New York Times* article on digital imaging, titled "Ask It No Questions: The Camera Can Lie," contains a photo of the 1945 Yalta Conference depicting Churchill and Roosevelt seated with Groucho Marx and Rambo (shown opposite page).

As the technology matures, so do the possibilities of unauthorized copying. An ad in an electronics catalog hawks a handheld scanner candidly nicknamed the "Rip-Off Artist." The ad proudly proclaims: "With this awesome new scanner, you can 'lift' almost any graphic piece of art, photo or text, modify it to your exact specifications and incorporate it into anything you write."

Many stock photo companies either have or soon will have sophisticated digital imaging capability. Stock agencies promote the wide variety of uses of electronic technology in creating images, including the possibility of creating "composite" images

But computer manipulation raises novel issues under copyright law. Who has the right to digitally manipulate a photograph? When is manipulation an infringement of copyright?

Who Owns This Photo?

While these questions may be new, the applicable legal principles are well-established. Since its earliest uses, photography has been protected under the copyright laws. Any doubts about the copyrightability of photos were laid to rest over 100 years ago when the U.S. Supreme Court ruled that a famous photograph of a foppishly attired Oscar Wilde was protected by copyright.

Under the Copyright Act, photographs or other works of visual art are protected from the moment of creation. Copyright in a work is owned by the "author" of a work—that is, the person who created the work. (An exception is that the copyright in a work created by an employee is owned by the employer.) Thus, artists and photographers usually own the copyrights in their creations.

A copyright owner can "assign" his or her copyright (i.e., make an outright sale of the entire copyright), but to be valid an assignment must be in writing and signed by the owner. An owner can also "license" others to exercise various rights under the copyright. Unlike an assignment, an owner who grants a license retains ownership of the copyright. A license, if it is not granting exclusive rights, may be written or oral. But a license that grants someone a sole and exclusive right under the copyright must be in writing.

The real value of copyright ownership is that it gives the owner certain "exclusive rights." Among these is the right to reproduce or copy a work in any form. Another is the right to create *derivative works.* A derivative work is an adaptation or modification of a pre-existing work. The definition of derivative work encompasses any form in which work is "recast, transformed or adapted."

No one may exercise these rights without the permission of the copyright owner. To do so may constitute copyright infringement. There are some exceptions, including "fair use" for non-commercial purposes such as criticism, news reporting, teaching and research.

It Depends on the Contract

While a copyright owner has various other exclusive rights, the *reproduction right* and the *adaptation right* are the most



ELECTRONIC PHOTOMONTAGE: PAUL HIGDONNYT PICTURES

important in the computer-imaging context. Virtually any significant digital manipulation of a photograph will involve these rights. To begin with, scanning a photo into a computer constitutes a reproduction of the photo. Substantially altering the photo or making a composite will in most cases constitute creation of a derivative work.

Whether someone other than the copyright owner can digitize and manipulate a photo depends on what rights the copyright owner has granted to that person. If a photographer assigns its entire copyright or grants an "all rights" license, or specifically grants the right to reproduce the work and make derivatives, then the party to whom those rights have been granted may manipulate at will. If done without proper authorization, computerized alterations of a photograph may be an infringement of the copyright law.

In the stock photo context, whether a stock agency or its customers can digitize a photograph will depend on what the agency's contract with the photographer says. A broad grant of rights as described previously would authorize digital modifications. But some photographers are opposed to permitting electronic manipulation of their works because they lose control over the final products. Consequently they are sometimes hesitant to grant those rights. Others, if properly compensated, are agreeable to entering broad licenses. If an agency or art director desires to engage in digital manipulation but the contract does not grant the necessary rights, it is imperative to get the photographer's permission for this type of use of the copyrighted work.

Infringement can occur even if something less than the entire photograph is copied without authorization. If the copying is either quantitatively or qualitatively substantial, it is infringing. Even taking a small element from a photo, if it's an important element, can give rise to liability for infringement. But if the copying or modification is trifling (e.g., minor retouching), it will probably not be an infringement.

The Photographer's Dilemma

Photographers often express concern that because digital manipulation can so easily alter the images and disguise the copying, unauthorized use of their photographs may go undiscovered. There will also be difficulties in demonstrating proof of copying.

How does a photographer claiming infringement prove a certain sunset photo is hers? Under traditional copyright laws, if the photographer proves the alleged infringer had "access" to the original work and the challenged work is "substantially similar," a court or jury may infer the original work was copied.

The easiest way to avoid infringement concerns (which can carry substantial monetary damage penalties) is simply to make sure proper permission has been obtained. The best practice is to get such agreements in writing.

Awareness of these concepts by all parties involved will help to avoid misunderstandings. And that should enable this amazing technology to achieve its full potential and expand the creative vistas in the advertising and visual arts field. □

William McGrath is a member of the Chicago-based law firm of Burke, Wilson and McIlvaine. He specializes in copyright infringements as they pertain to graphic arts.



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Hello All,

Here is the text of an article in today's INSIDE website. Inside is: www.inside.com

But here is the whole article.

Fred

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While Most Publishers Sweat Over Loss in Tasini Case, National Geographic
Says It Has Reason to Smile
Facing suits from photographers, magazine says its image-based CD-ROMs are
more like a microfilm than Lexis/Nexis. Since Supreme Court said publishers
didn't have to pay freelancers when reprinting editions on microfilm, magazine's lawyers claim it's home free.
by Roger Parloff

Wednesday, July 25, 2001
Though newspaper and magazine freelancers have been celebrating last month's
U.S. Supreme Court victory -- which seemed to establish that they, and not
their publishers, control the electronic republication rights to their works
unless there is an explicit provision to the contrary -- those who have

worked for the National Geographic magazine may have prematurely uncorked
the champagne.

Terry Adamson, the executive vice president and top in-house lawyer for The
National Geographic Society, maintains in an interview that the high court's
June 25 ruling in New York Times Company v. Tasini actually strengthens the
publisher's position in the numerous disputes with freelancers related to a
30 CD-ROM set, The Complete National Geographic, which first came out in

1997. Adamson argues, in essence, that the court's ruling draws a critical
distinction between products like the National Geographic CD-ROM set --
which displays the entire image of every page of every edition of the
magazine since 1888 -- and databases like Lexis/Nexis, which retrieve and
display articles isolated from their original context.

While the Tasini court found that the law required publishers to get
freelancers' permission before archiving their contributions in the latter
type of database, Adamson maintains that at the same time it found that the
law authorized publishers to create the National Geographic-type of product
-- essentially a modern version of microfiche or microfilm -- without such
permission.

By July 30, the National Geographic's attorneys, led by former presidential
scourge Kenneth Starr of Washington, D.C., and veteran copyright litigator
Robert Sugarman of New York, will present these arguments in a petition to
the Supreme Court asking it to review a case the publisher lost last

March
in the U.S. Court of Appeals for the 11th Circuit. In that suit, a three-judge appellate panel agreed with freelance photographers Jerry and
Idaz Greenberg that the inclusion of their works in the CD-ROM set without
the Greenbergs' permission had infringed their copyrights. (Since 1997, about 15 other freelance photographers and writers and one photographic stockhouse have also sued National Geographic in Federal District Court in
Manhattan, but those suits have not yet proceeded as far down the litigation
track as the Greenbergs', which was originally filed in Miami.)

Norman Davis, who represents the Greenbergs, says he "could not disagree

more strongly" with Adamson's interpretation of Tasini, while Stephen Weingrad, the attorney who brought two of the Manhattan suits against National Geographic, emits a guffaw when asked to comment on its contention.
But the argument is not as laughable as the freelancers might hope.

In Tasini, Justice Ginsburg interpreted a 1976 amendment to the copyright
laws that states that when a magazine or newspaper publisher hires a freelancer for an assignment, the publisher is "presumed to have acquired"
the right to print the freelancer's work only "as part of that particular
collective work" or a "revision" of it. Since articles in the databases at
issue in Tasini are displayed to the reader in isolation, and not "as part
of" the collective work (that is, the magazine or newspaper edition in which
it originally appeared), Justice Ginsburg concluded that the publishers had
to obtain the freelancers' express permission before selling their works to
such electronic databases.

While text-based databases like Lexis/Nexis indisputably display such works
in isolation -- without advertisements, photos, charts, and surrounding articles, for instance -- Justice Ginsburg's ruling found that even the one
image-based product involved in that suit, a Bell & Howell CD-ROM set known
as General Periodicals OnDisc (GPO), suffered from the same legal failing.
In a footnote, she explained that while the user of that product would retrieve the entire page containing the article -- not just an image of the
clipping -- the user would not be able to see what was on the pages immediately preceding or following that article without performing a new search. "The user who wishes to see other pages may not simply 'flip' to them," Ginsburg stressed.

In contrast to the GPO product, The Complete National Geographic displays
the exact image of every page of every edition of the magazine since 1888,
and allows users to "flip" pages if they so desire.

Similarly, in rejecting the publishers' claim that electronic databases were
merely the modern equivalents of microfilm or microfiche -- which publishers
can create without freelancers' permission -- Justice Ginsburg delved deeper
into the issue. "Articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper," she
wrote. "True, the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on the article, to
the exclusion of surrounding material. Nonetheless, the user first encounters the article in context." Again, the National Geographic

product
appears to come much closer to recreating the essential characteristics of
"microforms" than did either the Lexis/Nexis database or the General Periodicals OnDisc CD-ROMs.

On the other hand, The Complete National Geographic has other features --
never addressed in the ruling by Justice Ginsburg -- which could still make
it possible for a post-Tasini court to view the CD-ROM package as an entirely new product rather than a republication or revision of the original
collective work. Though the Greenbergs' lawyer, Davis, declined to provide
the specifics of the arguments he will make -- " I don't want to discuss my
brief before I write it," he says -- it's not hard to predict what some of
those positions will be.

He will undoubtedly argue, as the 11th Circuit appeals court concluded in
March, that the National Geographic's CD-ROMs differ markedly from microfilm
or microfiche in that they include, for instance, a multimedia startup sequence composed of an animated montage of 10 past cover illustrations --
one of which was contributed by plaintiff Jerry Greenberg. The appellate

court also regarded the product's sophisticated search engine as itself so
different from a conventional index as to create "a new product ... in a new
medium, for a new market," rather than a simple miniaturization or "revision" of the original magazines. The most recent versions of The Complete National Geographic -- which has been updated annually since 1997
and is now available in DVD format, too -- have also included short summaries of each article, which did not exist in the original

magazines.

In any event, the various cases against National Geographic pose a number of unique, knotty questions that were not evident in the Tasini case. Some plaintiffs are seeking compensation for assignments performed in the 1960s and early 1970s, for instance, before the adoption of the 1976 amendment that was the basis of the Tasini ruling. In one such case, brought by photographer Fred Ward for assignments he performed between 1963 and 1975, a now-retired National Geographic supervisor has corroborated the photographer's claims about the nature of his contractual agreement. "In the 1960s and early 1970s," wrote former director of photography Robert Gilka in an affidavit in March, "publishing was a much simpler business. After National Geographic published an article in the magazine, there was little else National Geographic could do with the article, except possibly use it in a filmstrip, lecture or book.... National Geographic simply wanted 'exclusive first-time rights' to publish the commissioned works.... Sixty days after publication Mr. Ward was free to do whatever he wanted with the works he created because he owned the copyright to them."

The magazine's current editor in chief, William Allen, has filed an affidavit disputing Gilka's account of the contracts, though Allen did not join the magazine's staff until 1985. Even Allen, moreover, acknowledges that in the 1970s National Geographic instituted "a policy" that "it would make additional payments for certain kinds of additional uses of such photographs" -- for instance, republication in books and filmstrips. Nevertheless, Allen insists that the publisher made these payments only "as

a matter of sound business practice" rather than out of any legal obligation, since "the Society owned copyright to assignment photography."

It would be highly unusual for the U.S. Supreme Court to elect to hear the
Greenberg case, given that it has so recently addressed very similar issues.
Nevertheless, the court might throw out the 11th Circuit's ruling and send
the case back for reconsideration in light of the Tasini decision. In that
event -- and in view of the ambiguities of Justice Ginsburg's ruling -- the
11th Circuit would still probably have leeway to come out either way after
reconsideration. And given the vehemence of that court's unanimous ruling
against National Geographic in March, it still must be viewed as the underdog in that case.

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Quest for Profits Is Shaking a Quiet Realm

By CONSTANCE L. HAYS

WASHINGTON

NATIONAL GEOGRAPHIC has always stood apart from most other magazines, a yellow-bordered aristocrat clinging to its Victorian sense of purpose: "the increase and diffusion of geographic knowledge." No miracle diets or sex tips here, just exhaustive examinations of the Roman Empire or startling pictures of somewhere on the fringes of the galaxy.

And for millions of Americans, for more than a century, that has been just fine. With a circulation of nine million, National Geographic has become as sturdy an icon as the school bus, with many a suburban bookshelf sagging under the weight of the musty magazines that people can't bear to throw away.

But now the National Geographic Society, the $500 million-a-year enterprise behind the magazine, is changing from a traditional, nonprofit monolith into an explorer of an assortment of other media, this time for profit. The move comes as Gilbert M. Grosvenor, the last link to the society's founding family — an illustrious clan that included Alexander Graham Bell — has disappeared from the daily operations, leaving brasher newcomers in his place.

And though with change there is nearly always protest, here the protest is so sustained that it suggests the society may be abandoning what has made it unique all these years — and, in the process, trading in its rather classy image for a more commonplace devotion to the bottom line.

"The question always is: When you take away what is special about the Geographic, do you take away what the audience perceives as special?" said Peter Benchley, the author of "Jaws," who has written several articles for the magazine, including the June cover on French Polynesia.

"Everybody is concerned, largely because there's uncertainty about direction," said Jennifer Ackerman, a former staff member whose article on barrier islands is in the August issue. "It has been a very rapid change."

From the way it treats its photographers, to its rush to embrace other media to its willingness to pursue corporate sponsors like Pizza Hut, the made-over society, led by its president and chief executive, Reg Murphy, has aroused curiosity and anger within and outside its walls.

Understand that it has been in a time warp, with the atmosphere of an Ivy League English department rather than a harried magazine production line. Quaint terms and titles have been preserved like butterflies on pins — captions are still called legends, and unedited articles are manuscripts. There is an editor in charge of expeditions, another in charge of archaeology.

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Quest for Profits Is Shaking a Quiet Realm

By CONSTANCE L. HAYS

WASHINGTON

NATIONAL GEOGRAPHIC has always stood apart from most other magazines, a yellow-bordered aristocrat clinging to its Victorian sense of purpose: "the increase and diffusion of geographic knowledge." No miracle diets or sex tips here, just exhaustive examinations of the Roman Empire or startling pictures of somewhere on the fringes of the galaxy.

And for millions of Americans, for more than a century, that has been just fine. With a circulation of nine million, National Geographic has become as sturdy an icon as the school bus, with many a suburban bookshelf sagging under the weight of the musty magazines that people can't bear to throw away.

But now the National Geographic Society, the $500 million-a-year enterprise behind the magazine, is changing from a traditional, nonprofit monolith into an explorer of an assortment of other media, this time for profit. The move comes as Gilbert M. Grosvenor, the last link to the society's founding family — an illustrious clan that included Alexander Graham Bell — has disappeared from the daily operations, leaving brasher newcomers in his place.

And though with change there is nearly always protest, here the protest is so sustained that it suggests the society may be abandoning what has made it unique all these years — and, in the process, trading in its rather classy image for a more commonplace devotion to the bottom line.

"The question always is: When you take away what is special about the Geographic, do you take away what the audience perceives as special?" said Peter Benchley, the author of "Jaws," who has written several articles for the magazine, including the June cover on French Polynesia.

"Everybody is concerned, largely because there's uncertainty about direction," said Jennifer Ackerman, a former staff member whose article on barrier islands is in the August issue. "It has been a very rapid change."

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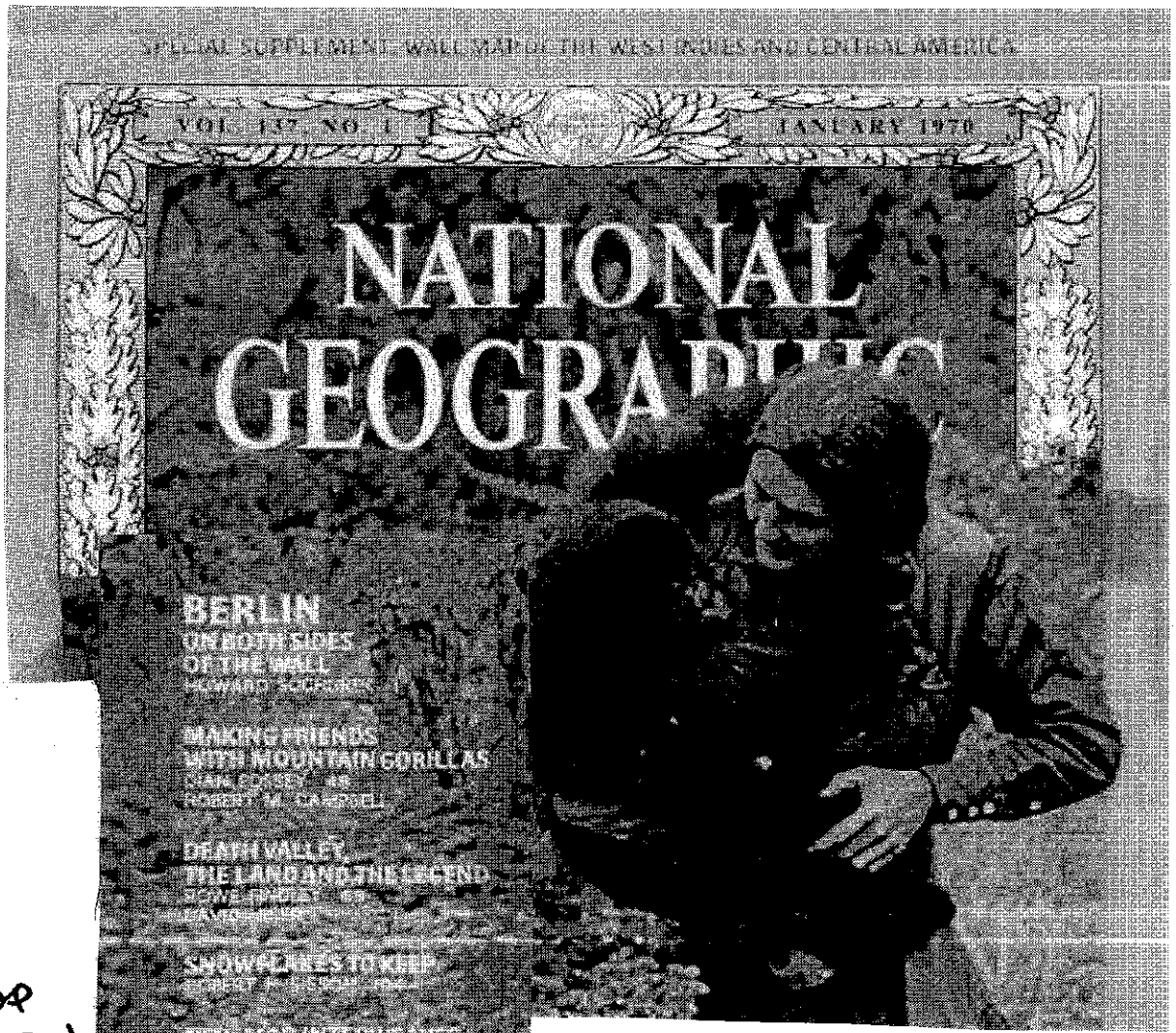
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BIG TIME MISTAKE by Sugarman - The new map is a supplement to the magazine listed twice on cover but not included in the CD ROM. The two page article describes the importance of the map! P. 112, 113

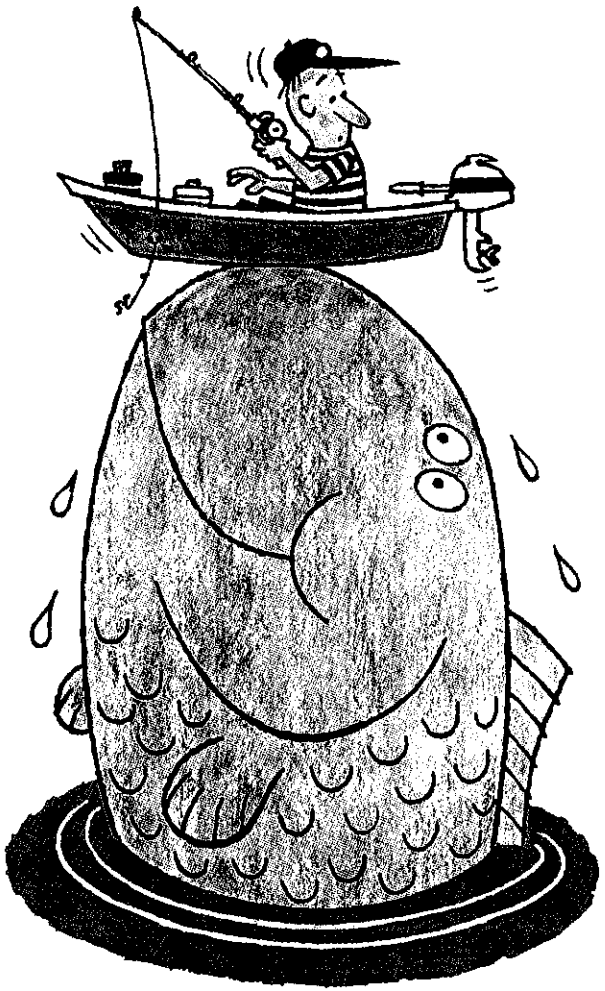


← special supplement wall map

New map →

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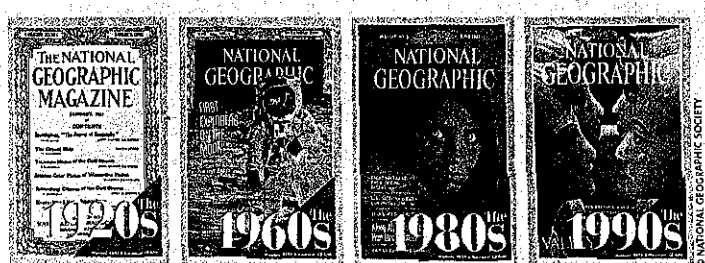
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Greenberg sued because the NGS used his images without permission on a 1997 CD compilation of the entire *National Geographic* magazine archive. The CD reproduces each back issue of the magazine page by page, but also includes search-and-retrieval software and an introductory montage. The Society said it didn't need permission to use Greenberg's images because the CD is simply a revision of its magazines in a different medium.

But the court rejected the publisher's claim. "In layman's terms, the [CD] is in no sense a revision," the court said. "The Society. . .has created a new product, in a new medium, for a new market." The NGS has sold hundreds of thousands of copies of the CD and generated millions of dollars in revenue from it.

The court's ruling was based upon its reading of Section 201 (c) of the U.S. Copyright statute, which grants publishers the privilege to produce and distribute revision of collective works without permission from contributors. Collective works, such as magazines and newspapers, contain separately copyrighted contributions such as photographs and articles. Examples of revisions include later editions of a magazine or newspaper.



The court ruled that the Geographic's CD-ROM set (above) is a "new work, in a new medium" and infringed photographer Jerry Greenberg's copyright.

In reaching its decision, the court weighed the right of contributors—namely, their copyright—against the "privilege" of publishers under

Supreme Court Hears Arguments in *Tasini*

WASHINGTON, D.C.–One week after the decision in *Greenberg v. National Geographic Society*, the Supreme Court heard oral arguments in another case that will determine whether publishers will have to share the economic benefits of electronic publishing with freelance creators. During arguments in *The New York Times v. Tasini* held March 28, nearly half of the Supreme Court justices asked tough questions and made leading statements that revealed some sympathy for authors' and creators' rights.

The case began seven years ago when Jonathan Tasini, the president of the National Writers Union, and five other freelancers, sued newspaper publishers for copyright infringement over the use of their articles in LEXIS/NEXIS, a *New York Times* CD and other electronic databases without the writers' permission. The 2nd Circuit Court found in 1998 that in the absence of written permission from freelancers, electronic uses infringe the authors' copyrights. The publishers appealed, and last year the Supreme Court agreed to hear the case.

The *Tasini* case rests on the interpretation of Section 201 (c) of the 1976 Copyright Act, which allows publishers to distribute revisions of newspapers, periodicals and other so-called collective works without permission from individual contributors, such as freelance writers and photographers. Arguing for the publishers, Harvard Law School professor Laurence Tribe began by saying that no interpretation of the section implies that copies of periodicals on microfilm aren't allowable revisions. Microfilm was the storage medium of choice for decades before the advent of electronic media.

But Justices Sandra Day O'Connor, David Souter and Antonin Scalia quickly disputed his analogy. While microfilm presents replicas of an entire newspaper, the articles in LEXIS/NEXIS are "disaggregated," said O'Connor. If you type in the name Smith, Souter said, you find only articles by Smith.

Scalia repeatedly hammered home the fact that each article in LEXIS/NEXIS is tagged separately to ease retrieval. The result is not a revision but a new work, comparable to what would be created if "an old fogey editor" who ignored "this new fangled technology" simply cut and pasted together a few articles to make a new publication, Scalia reasoned.

Tribe argued that "the technology should not obscure what's happening here." The electronic database version of the day's newspaper, he said, "is as close to" the original edition as it can be "given this [electronic] medium." The Copyright Act is "media neutral," he added, and at the time of the 1976 revision of the act, Congress was anticipating that emerging computer technology might change the way we use copyrighted works.

Justice Ruth Bader Ginsberg noted that in a letter filed with the court, the Register of Copyrights had argued that the 1976 Copyright Act gave authors "more muscle vis a vis the publishers." Tribe countered there is no "monstrous inequity" between freelancers and publishers. He

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Lawyers in both the *Greenberg* and *Tasini* cases have argued over the language of Section 201 (c) of the 1976 Copyright Act. This section establishes the ownership of the copyright of "collective works," such as newspapers and magazines:

(c) Contributions to Collective Works. —Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Section 201 (c). "This is an important distinction that militates in favor of narrowly construing the publisher's privilege when balancing it against the constitutionally secured rights of the author/contributor," the court said.

The court concluded the CD is a new collective work, and not merely a revision of existing works, because it contains an animated opening montage and search-and-retrieval software that enables users to quickly locate articles using keywords.

"In this case we do not need to consult dictionaries or colloquial meanings to understand what is permitted under Section 201 (c). Congress in its legislative commentary spelled it out," the court said. That commentary says explicitly that while publishers can reprint contributions for one issue or edition in later editions, "the publisher could not. . .include [a contribution] in a new anthology or an entirely different magazine or other collective work."

The court went on to say that its analysis "is totally consistent with the conduct of the Society when it registered its claim of copyright in the [CD]." A 1997 copyright notice on the CD packaging indicated a new work of authorship, the court noted. And the Society indicated on its copyright application for the CD that it had not noted that *The Times* issued new freelancer contracts demanding electronic usage rights in 1995, but royalty payments have not increased at all. That, Tribe claimed, shows that authors are not losing money from electronic publishing.

"These people seem to think so," Scalia retorted, referring to Tasini and the other plaintiffs.

Tribe claimed that the plaintiffs expect to earn statutory damages if the court finds there is infringement. So if the hundreds of thousands of freelancers' articles on LEXIS/NEXIS are deemed to be infringements by the Supreme Court, Tribe said, then publishers will have no choice but to make "defensive deletions" in order to avoid liability. Scalia said that such a remedy would not ordered "by court decree." Ginsberg noted that erasure would not benefit authors, "who want exposure for their work."

What authors want, in fact, is compensation, not erasure. Said Scalia, "We're only talking about money."

When Tribe's 30 minutes were up, Laurence Gold, a lawyer who has represented the United Auto Workers, with which the National Writers Union is affiliated, took the podium. Observers in the court were dismayed by his halting arguments and tongue-tied answers.

Gold began by stating that while Section 201 (c) allows publishers to copyright their collective works, it gives them no ownership in the individual works in the collection. By disaggregating the articles in a periodical, publishers transmitting stories to NEXIS are tampering with the underlying copyright to the individual articles, he said.

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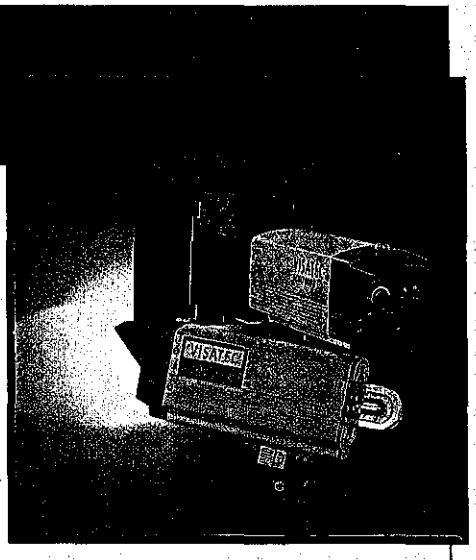
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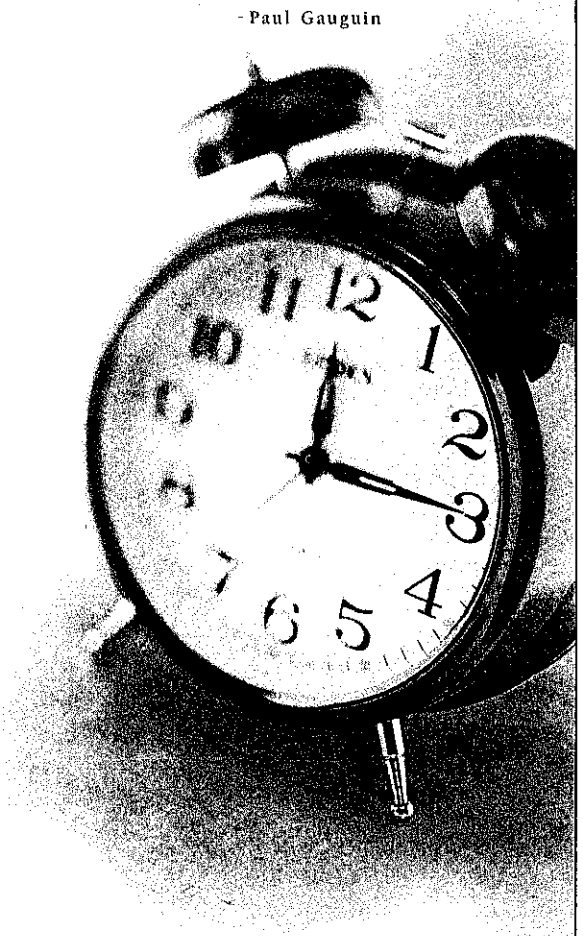
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Out on the courthouse steps, Tasini told reporters that payment of royalties could be accomplished through a rights clearinghouse or through a class-action suit, similar to those organized for product liability cases. Answering the question Gold was unable to answer, attorney Patricia Felch, who with Emily Bass was co-counsel for the freelancers, said that the first infringement takes place when a copyrighted work is first copied.

Among the observers in the courtroom were the six writer plaintiffs, members of the Authors Guild and the National Writers Union, ASMP executive director Dick Weisgrau and ASMP counsel Victor Perlman, who had filed a friend-of-the-court brief in support of the writers. Former special prosecutor Kenneth Starr, who had written a brief for the *National Geographic* in support of the publishers, was also present.

A decision is expected by the end of June.

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The appeals court said Greenberg is entitled to damages, court costs and attorney's fees, all of which will be determined by the lower court that originally rejected his claims. But the appeals court also warned the lower court against taking the CD off the market as part of any remedy. "We urge the [lower] court to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work," the appeals court said.

Asked for his reaction to the decision, Greenberg's attorney, Norman Davis of Miami, said, "We're just plain delighted." National Geographic Society's general counsel Terry Adamson says, "We were surprised and disappointed by the ruling." The NGS is waiting to hear the arguments before

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Felch is part of the legal team that argued the *New York Times v. Tasini* case before the Supreme Court the week after the *Greenberg* decision (see sidebar, "Supreme Court Hears Arguments in *Tasini*"). In the *Tasini* case, *The New York Times*, like the National Geographic Society, argued that an electronic database amounts to an allowable revision of its print publication.

The Supreme Court ruling on *Tasini* could affect any appeal of the *Greenberg* ruling significantly, especially if the high court interprets the definition of a revision more broadly than the 11th Circuit Court has in *Greenberg*. But Felch and other attorneys on the side of authors' rights say the facts of the *Greenberg* and *Tasini* cases are very different—which is their way of saying a Supreme Court decision unfavorable to creators in the *Tasini* case shouldn't affect the *Greenberg* decision. □

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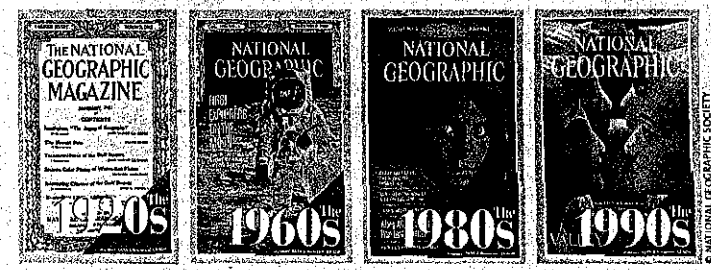
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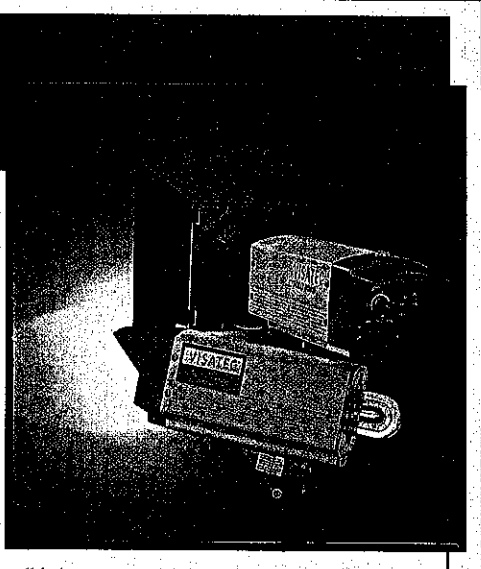
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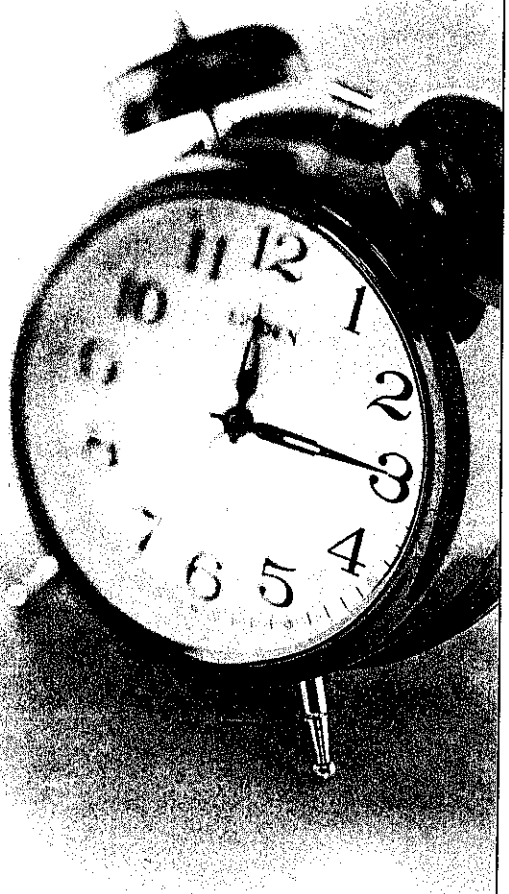
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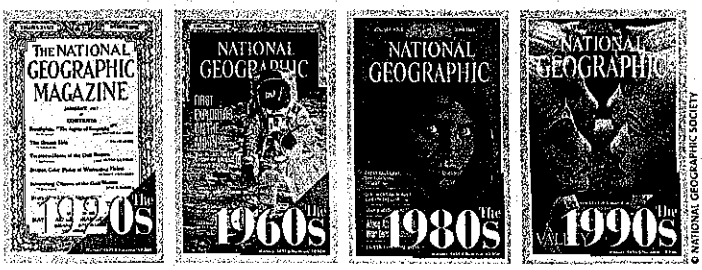
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WASHINGTON, D.C.–One week after the decision in *Greenberg v. National Geographic Society*, the Supreme Court heard oral arguments in another case that will determine whether publishers will have to share the economic benefits of electronic publishing with freelance creators. During arguments in *The New York Times v. Tasini* held March 28, nearly half of the Supreme Court justices asked tough questions and made leading statements that revealed some sympathy for authors' and creators' rights.

The case began seven years ago when Jonathan Tasini, the president of the National Writers Union, and five other freelancers, sued newspaper publishers for copyright infringement over the use of their articles in LEXIS/NEXIS, a *New York Times* CD and other electronic databases without the writers' permission. The 2nd Circuit Court found in 1998 that in the absence of written permission from freelancers, electronic uses infringe the authors' copyrights. The publishers appealed, and last year the Supreme Court agreed to hear the case.

The *Tasini* case rests on the interpretation of Section 201 (c) of the 1976 Copyright Act, which allows publishers to distribute revisions of newspapers, periodicals and other so-called collective works without permission from individual contributors, such as freelance writers and photographers. Arguing for the publishers, Harvard Law School professor Laurence Tribe began by saying that no interpretation of the section implies that copies of periodicals on microfilm aren't allowable revisions. Microfilm was the storage medium of choice for decades before the advent of electronic media.

But Justices Sandra Day O'Connor, David Souter and Antonin Scalia quickly disputed his analogy. While microfilm presents replicas of an entire newspaper, the articles in LEXIS/NEXIS are "disaggregated," said O'Connor. If you type in the name Smith, Souter said, you find only articles by Smith.

Scalia repeatedly hammered home the fact that each article in LEXIS/NEXIS is tagged separately to ease retrieval. The result is not a revision but a new work, comparable to what would be created if "an old fogey editor" who ignored "this new fangled technology" simply cut and pasted together a few articles to make a new publication, Scalia reasoned.

Tribe argued that "the technology should not obscure what's happening here." The electronic database version of the day's newspaper, he said, "is as close to" the original edition as it can be "given this [electronic] medium." The Copyright Act is "media neutral," he added, and at the time of the 1976 revision of the act, Congress was anticipating that emerging computer technology might change the way we use copyrighted works.

Justice Ruth Bader Ginsberg noted that in a letter filed with the court, the Register of Copyrights had argued that the 1976 Copyright Act gave authors "more muscle vis a vis the publishers." Tribe countered there is no "monstrous inequity" between freelancers and publishers. He

noted that *The Times* issued new freelancer contracts demanding electronic usage rights in 1995, but royalty payments have not increased at all. That, Tribe claimed, shows that authors are not losing money from electronic publishing.

"These people seem to think so," Scalia retorted, referring to Tasini and the other plaintiffs.

Tribe claimed that the plaintiffs expect to earn statutory damages if the court finds there is infringement. So if the hundreds of thousands of freelancers' articles on LEXIS/NEXIS are deemed to be infringements by the Supreme Court, Tribe said, then publishers will have no choice but to make "defensive deletions" in order to avoid liability. Scalia said that such a remedy would not ordered "by court decree." Ginsberg noted that erasure would not benefit authors, "who want exposure for their work."

What authors want, in fact, is compensation, not erasure. Said Scalia, "We're only talking about money."

When Tribe's 30 minutes were up, Laurence Gold, a lawyer who has represented the United Auto Workers, with which the National Writers Union is affiliated, took the podium. Observers in the court were dismayed by his halting arguments and tongue-tied answers.

Gold began by stating that while Section 201 (c) allows publishers to copyright their collective works, it gives them no ownership in the individual works in the collection. By disaggregating the articles in a periodical, publishers transmitting stories to NEXIS are tampering with the underlying copyright to the individual articles, he said.

Justice John Paul Stevens asked Gold when the first act of infringement takes place: Is it when the files are digitally copied, when the ads are stripped out, when someone at *The Times* presses "send"? Gold said that a series of infringing acts takes place.

At first, Gold said that sending an e-mail of an article would not be an infringement, but later he said that transferring the files to a digital medium is an infringement—one that is "part and parcel" with the process of producing a set of disaggregated articles. In a half dozen different ways, Stevens asked, "At what point can I say, 'Aha! There's the infringement?" After one question, Gold's response was silence.

Justice Stephen Breyer said that if infringement takes place only when a reader calls up one article, then matters of fair use come into play. He said he is "discouraged" by the "Chinese Cultural Revolution" argument of *The Times* and its allies that the history of the 20th century would simply be wiped out because publishers could not take the trouble

"Has anyone ever had a boring dream?"

- Paul Gauguin



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and expense to track down copyright holders and their heirs.

In his two-minute rebuttal, Tribe said, "If we read the law the way [freelancers] want us to read it, we'll have no remedy for kids. . . doing their homework."

Out on the courthouse steps, Tasini told reporters that payment of royalties could be accomplished through a rights clearinghouse or through a class-action suit, similar to those organized for product liability cases. Answering the question Gold was unable to answer, attorney Patricia Felch, who with Emily Bass was co-counsel for the freelancers, said that the first infringement takes place when a copyrighted work is first copied.

Among the observers in the courtroom were the six writer plaintiffs, members of the Authors Guild and the National Writers Union, ASMP executive director Dick Weisgrau and ASMP counsel Victor Perlman, who had filed a friend-of-the-court brief in support of the writers. Former special prosecutor Kenneth Starr, who had written a brief for the *National Geographic* in support of the publishers, was also present.

A decision is expected by the end of June.

—Holly Stuart Hughes

already registered the work, or any earlier versions of it. "Accordingly, this is a new work," the court reiterated.

The appeals court said Greenberg is entitled to damages, court costs and attorney's fees, all of which will be determined by the lower court that originally rejected his claims. But the appeals court also warned the lower court against taking the CD off the market as part of any remedy. "We urge the [lower] court to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work," the appeals court said.

Asked for his reaction to the decision, Greenberg's attorney, Norman Davis of Miami, said, "We're just plain delighted." National Geographic Society's general counsel Terry Adamson says, "We were surprised and disappointed by the ruling." The NGS is waiting to hear the arguments before

Attorney Patricia Felch, who wrote an amicus brief in support of Greenberg, made no effort to hide her glee with the decision: "Whooopeeee!"

the Supreme Court in the *Tasini* case—"which is obviously related to *Greenberg v. National Geographic*"—before deciding how to respond to the *Greenberg* ruling, Adamson says. Options include asking the 11th Circuit to reconsider, or appealing the *Greenberg* ruling to the Supreme Court. Chicago attorney Patricia Felch, who wrote an amicus brief on behalf of ASMP in support of Greenberg, made no effort to hide her glee with the decision. "Whooopeeee!" she said.

Felch is part of the legal team that argued the *New York Times v. Tasini* case before the Supreme Court the week after the *Greenberg* decision (see sidebar, "Supreme Court Hears Arguments in *Tasini*"). In the *Tasini* case, *The New York Times*, like the National Geographic Society, argued that an electronic database amounts to an allowable revision of its print publication.

The Supreme Court ruling on *Tasini* could affect any appeal of the *Greenberg* ruling significantly, especially if the high court interprets the definition of a revision more broadly than the 11th Circuit Court has in *Greenberg*. But Felch and other attorneys on the side of authors' rights say the facts of the *Greenberg* and *Tasini* cases are very different—which is their way of saying a Supreme Court decision unfavorable to creators in the *Tasini* case shouldn't affect the *Greenberg* decision. □

Court rules against magazine

BY CATHERINE WILSON
Associated Press

The suit against National Geographic raises questions about republication rights using new technology.

A federal appeals court has ruled that the National Geographic Society made unauthorized use of pictures copyrighted by a photographer from South Miami in a CD-ROM version of back issues of its flagship magazine.

The precedent-setting decision Thursday by the 11th U.S. District Court of Appeals in Atlanta pitted authors against the magazine, which had the support of Time Warner, The New York Times and the Magazine Publishers of America.

The lawsuit brought by freelance photographer Jerry Greenberg of South Miami raises questions that are debated in the industry about republication rights using new technology. It also parallels a copyright infringement case to be argued next week before the U.S. Supreme Court.

The appellate ruling "establishes brand new law that had not existed before," Norman Davis, Greenberg's attorney, said Friday. "It'll apply to any author who owns the copyright in his work."

Terrence Adamson, the National Geographic Society's executive vice president, said he was "surprised and disappointed" by the court's action. "This is an important decision that has a lot of implications for a lot of things quite apart from National Geographic."

In the Supreme Court case, justices will review a decision involving The New York Times that requires publishers to get permission from freelance writers before putting their work in electronic databases.

Most large publishers have made the purchase of electronic rights, including use on the Internet, a standard part of contracts with freelancers. Typically, they do not provide extra compensation for the electronic rights.

Davis expects media owners to tailor new contracts to carefully address republication rights, but "looking backward is the problem."

Greenberg's four photo assignments with the magazine date back to 1962, and the collection of 30 CD-ROMs called *The Complete National Geographic* includes every issue of the magazine from 1888 to 1996 in digital format.

A 25-second opening sequence in the series features 10 magazine covers that blend from one to the next. One image is a Greenberg picture of a diver taken in 1961.

"The society contended all along that the only thing it had done is just reprint a bunch of old magazines," said Davis. "If that's all they would have done, they would have prevailed. The 11th Circuit said it was much more than that."

The court found that a common sense analysis brought it to the conclusion that the CD collection is "a new product . . . in a new medium for a new market that far transcends any privilege" of revision or reproduction by publishers.

Davis described Greenberg as ecstatic and elated with the legal victory.

"He lives in very modest circumstances, and he and his wife have a small publishing business," Davis said. "They took this on their own as a matter of principle and took on a very, very large enterprise with very substantial resources."

The appeals court ordered U.S. District Judge Joan Lenard in Miami to enter a judgment in favor of Greenberg and assess damages and attorney's fees.

The panel suggested Greenberg be awarded "mandatory license fees" instead of "foreclosing the public's computer-aided access to this educational and entertaining work."

Adamson said the Society is considering appeal options, including asking the 11th Circuit to reconsider the case and going to the Supreme Court.

Businessmen convicted in Guatemala

CONVICTED, FROM 1C

A lawyer blamed international pressure by labor rights groups, which urged the U.S. Trade

ists and U.S. government observers who see the convictions as a sign that Guatemala's history of violence against

City said.

The government still has to make progress in its labor code, the official said.

Stephen Coats, executive director of the U.S./Labor Edu-

FLORIDA

IVAX

Expects to beat profit forecast

Shares of **Ivax Corp. (IVX)** jumped nearly Friday after the Miami pharmaceuticals compan profit expectations for the quarter ending Marc

Ivax said first-quarter results so far indicate return, led by an increase in sales of Onxol, the generic version of Bristol-Myers Squibb's cance Taxol. Wall Street analysts predict Ivax to post earnings per share of 25 cents.

Ivax shares closed Friday at $30.10, up $2.6 well below its 52-week high of $52.88.

MAYOR'S JEWELERS

Getz resigns as retail president

Samuel A. Getz resigned as president of Su **Mayor's Jewelers' (MYR)** retail operating

Getz, who couldn't be reached for commen serve as a consultant to the company. The com known as Jan Bell Marketing, acquired the Mayo 1998 from a group that included Getz's family. J changed its name to Mayor's.

Getz's resignation isn't surprising. Last mon longstanding deal to operate jewelry retail oper Club, Wal-Mart Stores warehouse-club chain, e Sunrise company with just the Mayor's busines upscale jewelry stores. Sam's accounted for th the company's revenue in 1999.

LAW FIRMS

Goldstein joins Akerman Senterf

Joseph D. Goldstein, one of South Florida's land-use and zoning lawyers, has joined **Akerr** in Miami as a shareholder. Goldstein had been

Statement of Terry Adamson, Executive Vice President, The National Geographic Society

The United States Supreme Court today clarified the respective rights of authors and publishers under the federal copyright laws in New York Times Co. v. Tasini. That clarification is important for the National Geographic Society, which is a defendant in several pending lawsuits alleging copyright infringement based on the reproduction of freelance articles and photographs in "The Complete National Geographic," a 30-disc CD-ROM set that reproduces every page of every issue of National Geographic Magazine exactly as it previously appeared in print.

The Tasini Court held that the media defendants in that case had infringed the copyrights of the plaintiff freelance authors by reproducing "articles standing alone and not in context, not 'as part of that particular collective work' to which the author contributed." Although the Court ruled in favor of the freelance plaintiffs in that case, its reasoning bolsters National Geographic's position in the pending litigation:

-- The three products at issue in Tasini "present articles to users clear of the context provided either by the original periodical editions or by any revision of those editions." In contrast, "The Complete National Geographic" reproduces all texts and photographs in the precise context in which they originally appeared in print.

-- Image-based reproductions of periodicals, like microfilm and microfiche as continuous photographic reproductions of a periodical," are permissible because, unlike the reproductions at issue in Tasini, "articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspapers." Although "the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on the article . . . the user first encounters the article in context." That is just what happens with "The Complete National Geographic," where multiple back issues of the magazine are reproduced together on a single disc, and like microfilm and microfiche, an image of every page of every issue is shown just as it was in the original print version.

-- The mere transfer of a work from one medium to another does not alter that work for copyright purposes. Unlike "The Complete National Geographic," the Tasini products do not merely transfer articles from paper to electronic format, but present those articles "individually, outside the collective work context, within the new media." "The Complete National Geographic" permits a user to retrieve an article only in the context in which it appeared originally.

The National Geographic Society filed an amicus brief in support of the publishers in Tasini, and now plans to petition the Supreme Court for certiorari in Greenberg v. National Geographic Society, one of the pending cases addressing "The Complete National Geographic on CD-ROM

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Freelancers win digital rights case

MEDIA, FROM 1C

version of a work is effectively a revision of the original magazine or newspaper in which it appeared. Copyright law allows publishers to revise original works without the permission of authors.

But the Supreme Court disagreed. Justice Ruth Bader Ginsburg wrote that databases are vast pools of information made up of thousands, if not millions of individual articles — all with little relationship to their original publication. The articles are no more a revision of an original work, wrote Ginsburg, than a "400-page novel quoting a sonnet in passing would represent a 'revision' of that poem."

Justices Stephen G. Breyer and John Paul Stevens dissented from the opinion. Stevens wrote that a digital copy of a print story should be allowed under copyright law much in the same way a newspaper or magazine is allowed to create Braille editions for blind readers or foreign language versions for non-English speakers. The digital versions of a newspaper story is "little more than a decision that reflects the different nature of the electronic medium," Stevens wrote.

Although the Supreme Court found that publishers were guilty of copyright infringement, it sent the case to a lower court to determine how writers should be paid.

Jonathan Tasini, a freelance writer who first brought the case against The New York Times in 1993, called on the publishers to begin negotiating with writers over fees for using material in digital form without permission.

"Now it's time for the media industry to pay creators their fair share, and let's sit down and negotiate over this today," Tasini said.

The Supreme Court's ruling specifically addresses claims brought by six freelance writers, including Tasini, the president of the National Writers Union. It also strengthens the hands of thousands of writers involved in three class-action lawsuits pending against publishers.

Electronic databases first began to be widely used for cataloging news articles in the early 1980s but it was not until about 1995 that most newspapers and magazines began including language in freelance contracts that specifically gave publishers the right to do so.

The New York Times said Monday that it will begin purging 115,000 articles written by 27,000 freelancers because of the decision. Times spokeswoman Catherine Mathis said most of the affected articles were originally published in the newspaper's book review, travel and magazine sections.

Tasini criticized The Times move. "It is unfortunate that we are holding out an olive branch and the New York Times is using scare tactics and threats," he said.

Peter Jaszi, a law professor at American University who specializes in copyright law, said Monday's ruling is among the first by the Supreme Court to directly address how copyright law should be applied to new media such as the Internet. He said the court generally seemed to endorse the notion that such rights must be explicited outlined in any contract.

"There is nothing in the digital world by its nature that means we need to torture these principles," Jaszi said.

Jaszi filed a legal brief in support of the writers on behalf of the American Library Association and the Association of Research Libraries.

Several historians had sided with publishers in the case out of the fear that freelance stories would be purged from electronic databases — creating holes in the historical record. But librarians pointed out that the material would only be deleted from electronic archives and that the original print editions would still exist.

In addition to The Times, the suit also names Newsday Inc., Time Inc. and other publishers as defendants. The Washington Post Co. was among several media companies that filed legal briefs in support of the publishers.

Writers triumph at high court

Media companies lose digital fight

BY CHRISTOPHER STERN
Washington Post Service

WASHINGTON — The Supreme Court ruled Monday that some of the nation's largest newspaper and magazine publishers broke copyright law when they failed to secure freelance writers' permission to include their works in digital databases.

The 7-2 decision not only affects hundreds of thousands of articles stored in electronic form but also covers photographs and illustrations that first appeared in print and later were published in CD-ROMs and other digital formats.

The publishers could be forced to pay sizable damages to the freelancers whose work they improperly reproduced as a result of the decision. Also potentially liable are the companies that maintain electronic databases, the court found.

The dispute is just one of several battles now being waged as traditional copyright law — written in an age of ink and paper — is applied to the possibilities created by the information age.

At the heart of the publishers' argument is the claim that an electronic

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MEDIA, FROM 1C

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You have been sent this message from fward@erols.com as a courtesy of the Washington Post (http://www.washingtonpost.com).

This is the frontpage Business article in Monday's Washington POST. Please note that the "non-profit" NGS corporation plans to take in $200 million a year licensing its logo, or brand.

Fred

To view the entire article, go to http://www.washingtonpost.com/wp-dyn/articles/A40742-2001Jun24.html

Mapping New Territory

By Martha McNeil Hamilton

National Geographic is venturing into new territory, exploring additional ways to turn its prestigious name and black-and-yellow trademark into green.

In the past four years the Washington-based nonprofit National Geographic Society has increased by nine times the money it raises by licensing companies to manufacture and sell products with the National Geographic brand name. This year it expects to sell more than $200 million worth of products through retail outlets, and not just maps and calendars.

Coming soon: rugged backpacks and luggage; casual and high-performance jackets designed by an Italian manufacturer; fanciful umbrellas designed to

withstand winds of up to 74 m.p.h.; and yellow-and-black hiking boots. The boots, by outdoor equipment manufacturer Rugged Shark and footwear manufacturer K-Swiss, are part of a line of National Geographic footwear that eventually will include 110 styles.

Linda Berkeley, president of the National Geographic licensing arm, and John Dumbacher, vice president for licensing, both worked for Walt Disney Co. and Universal Studios before they were recruited by National Geographic three years ago to help expand its business ventures.

National Geographic President John M. Fahey Jr. wanted to "build the brand and support the brand in the broadest way as the television channel was developing and the magazine was expanding," Berkeley said. The goals are to get the society's mission in front of more people, to extend the reach of the brand and to raise more money to support the organization's mission to increase and expand knowledge about geography.

National Geographic has annual revenue of more than $500 million, including membership fees and grants. It has 23 licensing partners, including the Museum Store and First USA Bank, which issues a National Geographic MasterCard.

National Geographic officials won't say how much licensing contributes to its operations. The society usually gets royalties of 10 percent to 15 percent of the wholesale price of licensed products. Rick Allen, president and chief executive of National Geographic Ventures, which oversees the licensing, said its contribution to the society's operations is "significant millions of dollars" but declined to be more specific.

"We don't work that way -- to say of our total revenue five years from now this unit is going to produce 20 percent," he said. The main question, he said, is whether a product will help advance the organization's cause. Many deals have been rejected because they wouldn't, he said.

Not driven by meeting investors expectations nor tax considerations, "we have the luxury of saying we'll do what we feel right about, what the market's interested in and what makes sense from the institution's perspective," Allen said.

The National Geographic Society has plenty of company from other nonprofits in turning to profit-making activities to increase revenue. It's not a new concept; museums have been profiting from museum stores for decades and National Geographic itself has long sold books and maps. It also has sold a wider range of products through its catalogue since the 1970s, although not the new crop of branded National Geographic products.

As nonprofits have ventured into money making enterprises, they have been criticized by competitors who don't enjoy their tax advantages. While the IRS has required that nonprofits create taxable subsidiaries for unrelated businesses, tax authorities have allowed other activities to operate tax-free. The basic tests are the size of those activities and whether they are related to the organization's exempt purpose. If they are related and don't get too big, they have been allowed to operate under the organization's nonprofit status, said Lisa LaMontagne, communications manager of the National Center for Nonprofit Boards.

Turning to business ventures is a growing trend within nonprofits, resulting from a combination of reduced government spending, economic uncertainty and the desire to raise funds outside of grant money that often is given only for specific programs, LaMontagne said.

In contrast to grants for specific purposes, unrestricted money from profit-making ventures can be used for overhead and administrative expenses or for new, experimental programs.

Dumbacher, who handles licensing negotiations, said the society's explorers and photographers are enthusiastic participants in developing products that will bear the National Geographic name. Photographers helped design travel bags in a series of brainstorming sessions, emphasizing the value of dry

compartments and of bags that don't shout "photographer," he said.

"I would have never guessed the photographers and explorers would be so supportive," Dumbacher said. "But it's a way to reach a new audience."

Products are packaged with what the National Geographic Society describes as educational materials. For instance, a $20 watch featuring a picture of a Siberian tiger is packed in a box that includes information about the history of the animal, its average weight, what it eats, and its habitat. Boots and other products are designed to encourage people to get out and explore and are packed with information about the society and its mission. "In addition, people are helping to fund additional research and exploration with the purchase of these products," Dumbacher said.

Although the Museum Company is the largest retailer and licensee for the National Geographic, National Geographic products are now sold at about 150 outlets, including national parks, zoos and J.C. Penney Co., which carries its T-shirts. Other popular items are puzzles and arts and crafts kits with themes such as dinosaurs. "Dinosaurs have the longest life for an extinct species," Berkeley said.

The Museum Company signed its four-year deal with National Geographic in December 1999. "This is our largest collection as far as a collection of merchandise that we are doing product development for," said Janee Ries, the Museum Company's executive vice president and chief merchandising officer. One best-seller has been wooden ballpoint pens topped with carvings of dinosaurs, dolphins, tigers and other creatures that sell for $3.95 each. "The pens are tremendous for us," Ries said.

At the same time National Geographic is expanding the number of items manufactured under its name and in retail stores, the society also has been increasing catalogue sales. Once aimed primarily at generating sales during the holidays, the catalogue now is published 11 times a year and goes to 15 million people -- more than twice as many as three years ago.

The catalogue is carrying an increasing number of National Geographic-branded products as the line expands. "The goal is to evolve over time to more and more licensed product," Berkeley said.

The profit-making ventures are part of a commitment by National Geographic -- one of the most venerable of Washington's institutions and best known for its magazine -- to remain relevant, Berkeley said. In addition to licensing products to sell, the organization is promoting the National Geographic Channel; promoting its Web site; launching a magazine for children to be distributed through schools with teaching guides; and providing National Geographic Expeditions for travelers.

"Very few nonprofits have the full-fledged media outlets and range" in terms of content that the National Geographic can offer, Berkeley said. "That kind of scale on a global basis would be hard for even an entertainment company to match."

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AN UPDATE ON MAJOR EVENTS

BY VICTOR S. PERLMAN

ASMP has been in the thick of numerous legal disputes and the following items provide an update on some of them.

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ASMP has been a major supporter of the photographer in this case, providing financial assistance to Greenberg, consultations with him and his attorney, and an amicus curiae ("friend of the court") brief on his behalf.

ASMP has also been deeply involved with the Tasini case, which was argued before the US Supreme Court on March 28 (see related item on this page.) Both cases stem from the use of copyrighted works by publishers in digital media without permission to do so from the creators of those works. With this win in the Greenberg case, ASMP's position has been upheld in the two federal Circuit Courts that have ruled on it so far. ASMP has just learned that *National Geographic* has appealed the decision and we will keep members posted on developments.

This is a big win for photographers, and both Jerry Greenberg and his attorney, Norman Davis, of Steel Hector & Davis in Miami, Florida, are to be congratulated. Greenberg also deserves thanks from all photographers for having the determination to keep going with this case in spite of all that it has cost him in terms of money, time and energy. Thanks are also due to Patricia Felch, of Banner Witcoff in Chicago, for writing ASMP's amicus curiae brief and to all those who have supported Jerry Greenberg and ASMP's other legal efforts through their contributions to the Legal Action Fund.

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ASMP had filed amicus curiae briefs, and otherwise supported the copyright creators, in both cases. In brief, here are their respective details.

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This case raises the following question: "Does the copyright registration of an issue of a magazine by its publisher serve as registration of the individual articles and photographs that appear in the magazine? Specifically, does the publisher's registration within three months after publication entitle the author of an article in the magazine to ask for statutory damages and counsel fees?" There is no question that Business Concepts blatantly copied articles from one of the Condé Nast publications. The only question is whether the author, in this case Lois Morris, can use Condé Nast's registration to allow her to sue and ask for statutory damages and attorneys' fees.

This issue, now before the US Court of Appeals for the Second Circuit, is being raised for the first time under the 1976 Copyright Act. Given the cost and difficulty, and sometimes impossibility, of registering our images, the court's answer to this question is very important to many, if not most, ASMP members. ASMP's amicus curiae brief was joined in by 13 other organizations, including APA, ASJA, The Authors Guild, EP, GAG, NPPA, and NWU.

The case was argued on behalf of the writer by David B. Wolf, of Cowan DeBaets et al in New York. He was extremely well-prepared and did an excellent job of presenting his case and answering questions from the three-judge panel. Given the fact that you cannot conclude anything worthwhile from the questions and comments of the judges, all we can do is wait and see what the judges decide to do. The Second Circuit is generally acknowledged as the one most respected in copyright matters, so its decision is likely to be followed in other federal courts.

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This case was argued before the US Supreme Court on March 28. In a nutshell, it deals with the question of whether publishers have the right to take their print

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Chicago's South Side, 1946-1948

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Foreword by Orville Schell
Commentaries by Gordon Parks
and Robert B. Stepto
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Wayne Miller, ASMP president 1954-1955, is one of the U.S.'s renowned photojournalists whose career includes being a member of Edward Steichen's Navy combat team of photographers and being one of the first Western photographers to document the destruction of Hiroshima and the survivors of the bombing. In 1946, at war's end, Miller received two concurrent Guggenheim fellowships to fund his project to chronicle black Chicago. The South Side community burgeoned as thousands of African Americans, almost exclusively from the South, settled in the city during the Great Migration of the World War II years. Miller's black and white images provide a visual history of Chicago at the height of its industrial order, when the stockyards, steel mills, and factories were booming. More important they capture the intimate moments in the daily lives of ordinary people. Miller was adept at becoming invisible and his photographs are full of naked, disarming emotion. A few celebrities appear in these images - Paul Robeson, Ella Fitzgerald, Lena Horne, Duke Ellington. But most of the images are of ordinary people in clubs and at church, sporting events and parades. Gordon Parks's memoir of poverty and hope in the freezing tenements of the South Side supplements the photographs, while Robert Stepto's essay puts the South Side in context in the history of postwar Chicago. The book is a superb testament to Miller's talent, to the spirit of the people he photographed, and to the moment in American history these photographs capture ∞

LEGAL ISSUES *cont. from p. 6*

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The publishers in Tasini were represented by Harvard Law School professor Laurence Tribe and the writers were represented by an experienced Supreme Court litigator, Larry Gold, a labor lawyer who has represented the United Auto Workers in the past. The author-plaintiffs are members of the National Writers Union, which is part of the UAW, the entity paying for the lawsuit. The court will rule some time before July.

CALIFORNIA ILLUSTRATOR WINS SALES TAX VICTORY

In a 4-3 decision, the California Supreme Court ruled in favor of illustrator, Heather Preston, in her case, Preston v. State Board of Equalization, which resulted from a random audit of Preston by the State Board of Equalization in 1993. Preston challenged California's right to require that sales tax be collected on the licenses of reproduction rights to her artwork, which were used by clients to produce rubber stamps and children's books.

The seven justices unanimously agreed with Preston's position that the copyright licenses had been wrongly taxed under California law.

Preston's attorney, Nicholas Blonder, commented in an announcement from the Graphic Artists Guild that, "all seven concluded that payments received by an artist for the licensing of a copyright interest are not subject to sales or use tax. This effectively ends the Board's long-standing practice of applying tax to all royalties received by an artist for a copyright transfer."

"The state got their head handed to them in a big way," said attorney Eric Miethke, counsel for the Graphic Artists Guild and a co-author of an amicus curiae brief filed in the case, in which ASMP joined. ASMP has been working with the Guild in pursuing sales tax reform for artists through the State Legislature and the Board of Equalization for several years.

The outcome is great news for photographers because it achieves the result that we have been seeking for years. ASMP has been working in the California Legislature and courts on this issue for quite some time, in concert with the GAG and other organizations. Since this is a state issue, our California representation has been through attorney Christine Valada, formerly a photographer, ASMP member, and ASMP national board member. We have been fighting to make it clear that California sales tax does not apply to licensing copyright usages. This case, finally, may have put this issue to rest. ∞

Writers triumph at high court

Media companies lose digital fight

BY CHRISTOPHER STERN
Washington Post Service

WASHINGTON — The Supreme Court ruled Monday that some of the nation's largest newspaper and magazine publishers broke copyright law when they failed to secure freelance writers' permission to include their works in digital databases.

The 7-2 decision not only affects hundreds of thousands of articles stored in electronic form but also covers photographs and illustrations that first appeared in print and later were published in CD-ROMs and other digital formats.

The publishers could be forced to pay sizable damages to the freelancers whose work they improperly reproduced as a result of the decision. Also potentially liable are the companies that maintain electronic databases, the court found.

The dispute is just one of several battles now being waged as traditional copyright law — written in an age of ink and paper — is applied to the possibilities created by the information age.

At the heart of the publishers' argument is the claim that an electronic

▶ PLEASE SEE MEDIA, 4C

Freelancers win digital rights case

MEDIA, FROM 1C

version of a work is effectively a revision of the original magazine or newspaper in which it appeared. Copyright law allows publishers to revise original works without the permission of authors.

But the Supreme Court disagreed. Justice Ruth Bader Ginsburg wrote that databases are vast pools of information made up of thousands, if not millions of individual articles — all with little relationship to their original publication. The articles are no more a revision of an original work, wrote Ginsburg, than a "400-page novel quoting a sonnet in passing would represent a 'revision' of that poem."

Justices Stephen G. Breyer and John Paul Stevens dissented from the opinion. Stevens wrote that a digital copy of a print story should be allowed under copyright law much in the same way a newspaper or magazine is allowed to create Braille editions for blind readers or foreign language versions for non-English speakers. The digital versions of a newspaper story is "little more than a decision that reflects the different nature of the electronic medium," Stevens wrote.

Although the Supreme Court found that publishers were guilty of copyright infringement, it sent the case to a lower court to determine how writers should be paid.

Jonathan Tasini, a freelance writer who first brought the case against The New York Times in 1993, called on the publishers to begin negotiating with writers over fees for using material in digital form without permission.

"Now it's time for the media industry to pay creators their fair share, and let's sit down and negotiate over this today," Tasini said.

The Supreme Court's ruling specifically addresses claims brought by six freelance writers, including Tasini, the president of the National Writers Union. It also strengthens the hands of thousands of writers involved in three class-action lawsuits pending against publishers.

Electronic databases first began to be widely used for cataloging news articles in the early 1980s but it was not until about 1995 that most newspapers and magazines began including language in freelance contracts that specifically gave publishers the right to do so.

The New York Times said Monday that it will begin purging 115,000 articles written by 27,000 freelancers because of the decision. Times spokeswoman Catherine Mathis said most of the affected articles were originally published in the newspaper's book review, travel and magazine sections.

Tasini criticized The Times move. "It is unfortunate that we are holding out an olive branch and the New York Times is using scare tactics and threats," he said.

Peter Jaszi, a law professor at American University who specializes in copyright law, said Monday's ruling is among the first by the Supreme Court to directly address how copyright law should be applied to new media such as the Internet. He said the court generally seemed to endorse the notion that such rights must be explicited outlined in any contract.

"There is nothing in the digital world by its nature that means we need to torture these principles," Jaszi said.

Jaszi filed a legal brief in support of the writers on behalf of the American Library Association and the Association of Research Libraries.

Several historians had sided with publishers in the case out of the fear that freelance stories would be purged from electronic databases — creating holes in the historical record. But librarians pointed out that the material would only be deleted from electronic archives and that the original print editions would still exist.

In addition to The Times, the suit also names Newsday Inc., Time Inc. and other publishers as defendants. The Washington Post Co. was among several media companies that filed legal briefs in support of the publishers.

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MORE GOOD LEGAL NEWS

JERRY GREENBERG AND NATIONAL GEOGRAPHIC

There is more good legal news for ASMP members and other photographers: The U.S. Court of Appeals for the 11th Circuit has just rejected Ken Starr's petition on behalf of *National Geographic* in the copyright infringement lawsuit by Jerry Greenberg against *National Geographic* for its unauthorized use of his photos on *Geographic*'s CD-ROM. This means that *Geographic*'s only hope for overturning the ruling that they infringed Jerry's copyrights is if they can convince the U.S. Supreme Court to take the case in the first place, and then to rule in *Geographic*'s favor and reverse the 11th Circuit. The chances of both of those things happening look slim. ASMP has been playing an active role in this case and in supporting Jerry since the beginning.

Any photographers who have published photographs in *National Geographic* should take a careful look at their contracts (of which there are many variations) and see if *Geographic* appears to have violated their rights when it reproduced and distributed every one of its issues on CD-ROM. You may have a valid infringement claim waiting to be made. ASMP will keep you posted.

PROGRESS IN INTERNET COPYRIGHT CASE WITH ARRIBA SOFT CORP

There is progress in the case of ASMP member Les Kelly v. Arriba Soft Corp. (now known as Ditto.com). After months of silence since ASMP filed briefs in the Ninth Circuit the better part of a year ago, the Court has now listed the case for oral argument on September 10, 2001. This case will help define the limits of copyright in the Internet world.

Ditto.com, formerly ArribaVista, provides a Web site that uses a robot to search the Internet for photographs and then displays those photos, literally millions of them, in searchable form on its Web site. It does this without any permission from the photographers or from the owners of the Web sites from where the photos came.

Kelly sued for copyright infringement. A U.S. District Court Judge in Southern California ruled against Kelly, saying that this was a case of fair use. ASMP was outraged at that decision and arranged for legal representation for Kelly to take and appeal. ASMP also filed an amicus curiae brief in his support. The decision in this case will affect all ASMP members and all the owners of Web sites such as Webshots, Alta Vista, and similar sites that give viewers access to photos without permission from the copyright owners. It should answer the question of whether every photo that photographers put up on the Internet automatically becomes fair game.

LEGAL DEVELOPMENTS

National Geographic Faces New Claim

BOSTON—A federal court has rejected *National Geographic*'s request to dismiss photographer Shawn Henry's claim for breach of contract, ruling that he is entitled to a trial because the contract is ambiguous.

Henry's claim stems from a 1995 *National Geographic* assignment, for which he was hired to shoot travel photos in New England. The pictures were intended for a book called *Driving Guide to New England*. Henry's contract transferred all copyrights to the photos to *National Geographic*. But the contract also said, "No secondary usage of the photographs unrelated to the Book is granted to *National Geographic*, and/or other parties."

Henry sued last year after the *Geographic* refuse to pay him a fee for re-using 43 of the *Driving Guide* pictures in another product called *Trip Planner*. "I was told their legal department had interpreted

[my original contract] as allowing the use without additional payment," Henry says. "But they've created a whole new product. By our reading of the contract, they didn't have permission to do that."

In court papers, the *Geographic* argued that it owns the copyright, so the use was legal. The *Geographic* went on to say that even if it doesn't own the copyright, the use was legal because the *Trip Planner* and *Driving Guide* are related products.

A trial has been scheduled for September.

Henry observes, "It's a career-altering exercise to butt heads with them," he says. "Their position is they can do questionable things and not suffer for it because most people aren't willing to give up their relationship with *National Geographic* to do that. But I found it kind of bullying."

In other legal news related to *National Geographic*, the 11th Circuit Court of Appeals has declined an appeal from Kenneth Starr, lawyer for the publisher, to reconsider its decision in *Greenberg v. National Geographic Society* (NGS). The court ruled in that case that the Society violated photographer Jerry Greenberg's copyrights by reproducing several of his images on a CD-ROM version of the NGS archives. The Society argued that the CD constituted a mere revision of the printed magazines, but the court said the CD was a separate product requiring permission from contributors.

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Tasini decision upholds artists' rights.
By Holly Stuart Hughes

SUPREME COURT RULES FOR CREATORS

IN ITS FIRST COPYRIGHT CASE INVOLVING DIGITAL publishing, *The New York Times v. Tasini* (Docket No. 00-201), the U.S. Supreme Court ruled on June 25 that newspapers infringe the copyrights of freelance authors by placing their works on electronic databases without permission. Though the case centers on written works, the decision marks a victory for all freelance creators—including photographers.

In a 7-2 decision (Justices Stephen Breyer and John Paul Stevens dissenting), the high court upheld a Second Circuit ruling that Lexis/Nexis, The New York Times On Disc and other searchable databases infringe the individually copyrighted articles stored in the database. The justices left the problem of how the plaintiffs—and other freelancers—will be compensated for the authorized usage to a lower court.

"It's gratifying to see a good and common-sense decision come out of the highest court in the land," says Victor Perlman, general counsel and managing director of the American Society of Media Photographers (ASMP), which filed a friend-of-the-court brief on behalf of the authors.

The case began in 1993 when National Writers Union (NWU) president Jonathan Tasini and five other freelance writers sued *The New York Times*, *Newsday* and Time Inc. for the unauthorized use of their articles in online and CD-ROM databases.

Publishers had argued that electronic archives and databases are a permissible "revision" of their publications. Under Section 201(c) of the copyright law, publishers of "collective works"—newspapers, magazines and other collections of copyrighted material—don't need the copyright holders' permissions to produce revisions, such as evening editions of a daily newspaper or microfilm reprints. A district court judge ruled for the publishers in 1994, but the Second Circuit Court overturned the decision in 1999, ruling that the databases constitute a wholly new work.

Writing for the majority, Supreme Court Justice Ruth Bader Ginsburg stated, "Section 201(c) does not authorize the copyright at issue here." A database user, Ginsburg noted, calls up separate articles "standing alone and not in context." Under the copyright law, contributors to collective works still hold and benefit from the copyright to their individual works. Ginsburg quoted a letter by the Register of Copyrights that said, "[freelancers] have experienced significant economic loss" due to a "digital revolution that has given publishers [new] opportunities to exploit authors' works."

Immediately after the decision, *The Times* and other publishers announced they would remove thousands of freelance articles from their databases. This action contradicts urgings from the court that publishers should pay the authors rather than destroy historical archives: "The publishers, and if necessary the courts and Congress, should draw on numerous models for. . .remunerating authors." These models include ASCAP-like licensing agencies.

The National Writers Union has already set up the Publication Rights Clearinghouse to collect licensing fees. Tasini also announced that the NWU is party to one of at least three class-action lawsuits against the publishers.

ASMP recently proposed a rights clearinghouse for photographers. However, Perlman said it was too early to speculate how the lower court would determine compensation.

The *Tasini* case applies only to freelancers whose contracts did not cover electronic usage. With this decision, publishers can no longer assume that they have the right to reproduce works electronically, but freelancers can still sign away their electronic rights if they choose. In his dissenting opinion, Justice Breyer noted that since 1995, *The New York Times* has demanded electronic rights from freelancers but paid them no additional royalties.

Breyer argued that the *Tasini* decision hurts the public who want access to the historical record, but will actually provide little help to authors. In a footnote, Breyer wrote, "Today's decision in favor of authors may have the perverse consequence of encouraging publishers to demand from freelancers a complete transfer of copyright." The question now is whether or not freelancers will give in to such demands.

The Supreme Court may soon be dealing with another question on digital copyrights. The National Geographic Society (NGS) has petitioned the high court to hear its case against photographer Jerry Greenberg. In March, the 11th Circuit Court of Appeals found that the NGS infringed Greenberg's copyright by using his photos in its Geographic CD-ROM series without permission. The circuit court also rejected the publisher's argument that the CD-ROM is a "revision" of the print magazine. Unlike the disputed databases in *Tasini*, however, the CD-ROMs reproduced every article and photo as they appeared in print, but added new elements, including an introductory montage featuring Greenberg's images. (See *PDN*, May, "National Geographic Society Ruling A Major Victory For Photographers.") If the high court agrees to hear *Greenberg*, the justices may revisit the question of "context" in defining an allowable revision. A decision on the NGS petition is expected when the court reconvenes in the fall. □

Tasini decision upholds artists' rights.
By Holly Stuart Hughes

SUPREME COURT RULES FOR CREATORS

IN ITS FIRST COPYRIGHT CASE INVOLVING DIGITAL publishing, *The New York Times v. Tasini* (Docket No. 00-201), the U.S. Supreme Court ruled on June 25 that newspapers infringe the copyrights of freelance authors by placing their works on electronic databases without permission. Though the case centers on written works, the decision marks a victory for all freelance creators—including photographers.

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A LANDMARK DECISION

But the battle is not over BY JONATHAN TASINI

The U.S. Supreme Court decision in the landmark electronic rights case is a huge victory for freelance writers, photographers and illustrators. But beyond its specific legal precedent, the ruling illuminates a wider, unrelenting war against creators of every stripe, a battle that is a threat to the survival of independent thought, our culture and freedom of expression. Everywhere one looks, creators are under assault by the media cartel. Take freelance writers. The Supreme Court, in a 7-2 decision joined by liberal and conservative justices, resoundingly ruled that publishers had been, effectively, stealing our work by selling to electronic media without our permission works we had sold them for print use. Nice racket if you can get away with it. Justice Ruth Bader Ginsburg wrote that the solution to deal with the widespread theft was for authors and publishers to agree to enter into agreements that allowed continued electronic usage of our works in return for royalty payments.

The reaction from the industry? So far, hard-ball recriminations. Thumbing their nose at the Supreme Court publishers are threatening to delete thousands of articles from electronic archives unless authors sign away their future rights in perpetuity and any claims to compensation for the past illegal use of our work. They didn't have to work too hard to come up with the unconscionable contracts; for the past five years, because we stood up for our rights, many of them have been bludgeoning freelance creators to sign away their rights in perpetuity, for no additional money, for all new works.

Our fellow artists in the music business fare no better. The ante for an artist to even get in the door with a major record company is to completely sign away her rights, which she can get back after 35 years (the so-called reversion right). And that's not good enough for the record companies. Last year, they slyly slipped through a piece of congressional legislation to take away even those reversion rights. They got caught red-handed and the bill was repealed. But the message is clear: record companies will assault their artists whenever possible.

And of course, the media cartel has taken after actors and screenwriters. Actors had to strike the advertising industry last year. Screenwriters struck a deal after harsh bargaining and a threatened strike; actors are still in negotiations with the motion picture industry. And their demands? To share more fairly in the billions of dollars in revenues they generate from the sale of their creations.

That is what has been forgotten. We create the value, not the industry executives who, by the way, are compensated quite handsomely. We are the people who are supposed to benefit from the sale of intellectual property, not AOL Time Warner and Disney. We are the energy behind the thoughts, ideas, pictures and words that flow through the minds of people in every community.

Indeed, the public should care about our struggle. If we cannot make a fair living, we cannot continue to create new works. If we do not control our works, the media cartel will decide what information the public has and at what price. So, the average person has a real, personal interest in supporting writers in a boycott or strike against a media company.

> "The trend is clear; the industry has united with a firm agenda to rob all creators by any means necessary."

Creators should celebrate the Supreme Court victory, but not for too long. If the lesson we draw is that a majority of judges always will protect our livelihoods from the power of the marketplace, we are fools. We got lucky because the industry acted illegally, brazenly so. But the true fight is not about the law but about power. The trend is clear; the industry has united with a firm agenda to rob all creators by any means necessary. In response, we—actors, screenwriters, photographers, artists, illustrators and writers—must band together and ignite a dynamic, co-ordinated movement that exerts power at the bargaining table, in the legislative corridors and if necessary, in the streets. If we do, they will not be able to stop us. ∞

Jonathan Tasini, *president of the United Auto Workers-affiliated National Writers Union, was the main plaintiff in the suit by freelance writers alleging copyright infringement against the New York Times and other media companies, including the Tribune Co. which now owns the Los Angeles Time. This article, published in the Los Angeles Times is reprinted with the author's permission.*

A VICTORY FOR CREATORS

Tasini et al. v. NY Times et al BY VICTOR S. PERLMAN

In a 7-2 decision, the U.S. Supreme Court has ruled that freelancers' work may not be used in electronic databases without permission. This gives creators a huge victory in a case that began in 1994 when National Writers Union president Jonathan Tasini and several other freelance writers sued *The New York Times, Newsday* and *Time Inc.* for unauthorized electronic use of their articles.

The publishers had claimed that the uses were revisions of the articles and thus permitted under Section 201(c) of the Copyright Act. A District Court judge found in favor of the publishers in 1993, but in 1999 the Second Circuit Court overturned that decision ruling that the electronic versions were new work and not revisions.

From the outset, ASMP has been in the writers' corner, weighing in with financial and legal support and it's gratifying to see the highest court in the land ruling in our favor. Still to be decided is how freelancers will be paid, and this decision is now in the hands of a lower court.

ASMP has contributed an estimated $100,000 of our resources to this case whose favorable outcome will benefit all creators. It cannot be stressed enough, just how important this court decision is to us.

Following is a summary of the opinion and dissent in this very important case and also included are some of my thoughts and comments.

BACKGROUND

As many of you will recall, the case involves articles to which freelance writers granted publishers limited rights to publish their articles in newspapers, magazines and other similar publications (collective works). The publishers later placed these articles into on-line and CD-ROM databases such as Lexis and Nexis. There were no written agreements or other licenses dealing with the issue of whether the initial publication rights granted by the authors included the rights to publish the articles electronically in digital databases. The authors sued for copyright infringement.

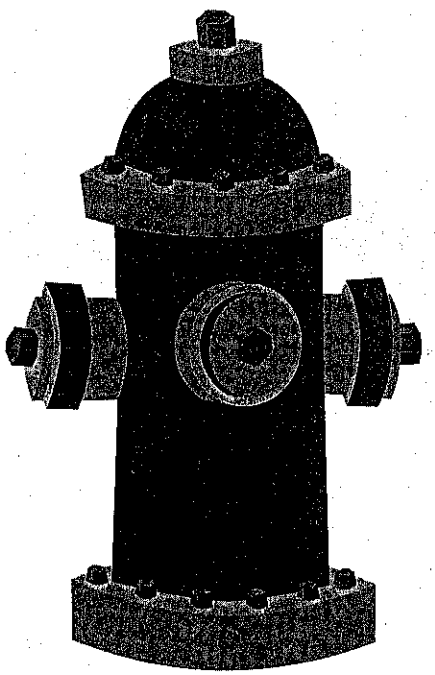
The publishers defended, claiming that the digital databases were covered by the privilege given to publishers of collective works under Section 201(c) of the Copyright Act, "..In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work (i.e. the publisher) is presumed to have acquired only the privilege of reproducing and distributing the contribution (i.e. the articles) as part of that particular collective work, any revision of that collective work, and any later collective work in the same series..."

So, the issue before the Court was whether the databases were merely revisions of the issues of the magazines and newspapers in which the articles were properly published, or were something else, something other than a revision.

THE DECISION

Justice Ginsburg delivered the decision for the seven justices who made up the majority. Justice Stevens wrote a dissenting opinion in which Justice Breyer joined. The majority adopted essentially the same reasoning as the Second Circuit did when it ruled in favor of the writers (and reversed the decision of the District Court which had ruled in favor of the publishers). In a nutshell, it found that the articles in databases were placed there out of the context of the collective works for which they had been licensed and that, whatever the databases were (they "... might fairly be

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described as containing new anthologies of innumerable editions of publications..."), they were not revisions of the particular collective works for which the writers had given permission to publish.

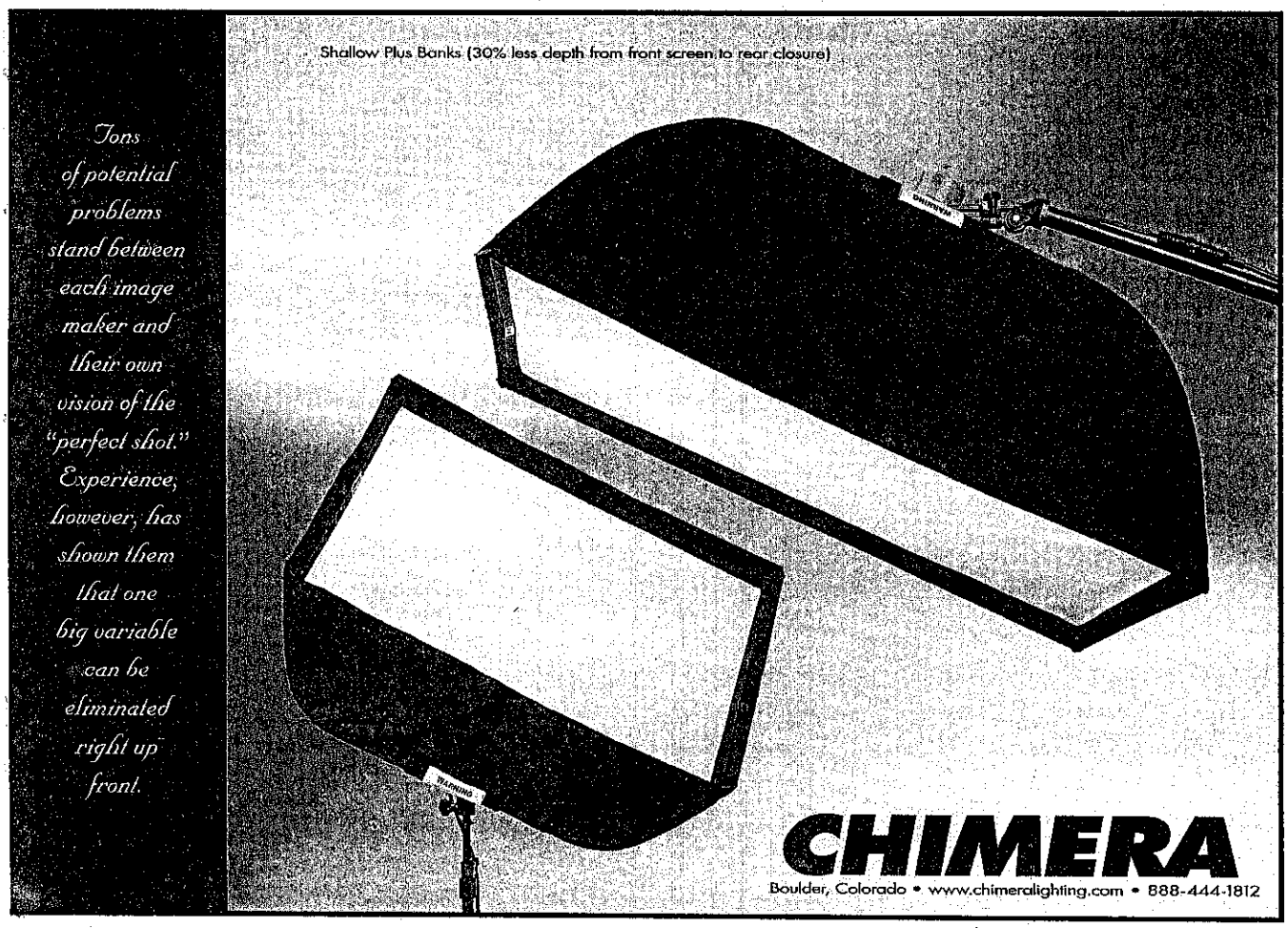
The majority decision tracks the briefs of the writers and the amicus brief of ASMP fairly closely. A good part of the opinion, like the briefs, examines the legislative history that led to the "revision" language being included in the legislation. I will not repeat the Court's analysis here. The full decision is at [http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=000&invol=00-201]. However, it is interesting to note that the Court dismissed the publishers' argument that the databases were just like converting the publications to microfilm or microfiche, pointing out that, unlike databases, microfilms contain the entire print publication, with the material appearing in the same sequence and context as in print.

The Court also rejected the "parade of horribles" argument that the publishers tried to use, in which they predicted devastating consequences if the Court ruled in favor of the writers. The "devastating consequences" would supposedly include gaping holes in the electronic record of published works. That is, works would be pulled from the electronic databases, thus making them "disappear" from the body of work available on computers. In response, the Court took an important step in giving instructions to the District Court for the Southern District of New York, to which the case now returns. It said, "... It hardly follows from today's decision that an injunction against the inclusion of these Articles in the Databases (much less any freelance articles in any databases) must issue." That is, it in effect suggested to the District Court that it should give a monetary award to the authors, but should not issue an injunction removing the articles in question from the databases. It has always been ASMP's position that this case is about money, it is not about removing materials from the public record, and the Court has now said the same thing.

COPYRIGHT OFFICE SUPPORT

In its decision, the majority also referred in several footnotes to the letter that Marybeth Peters wrote setting forth the Copyright Office's position in this case. That letter was instrumental. Jonathan Tasini and I worked long and hard to get it into the *Congressional Record* so that the Court could consider it, and we are greatly in Marybeth Peters' debt for writing it. We are equally appreciative of Rep. (D, Mass.) James McGovern's actions in requesting the letter, without which it would not have been written. Interestingly, the Court also referred in a footnote to another case in which ASMP had been actively involved, Community for Creative Non-Violence (CCNV) v. Reid. This serves as a vivid reminder to us of why the value of cases as legal precedent is such an important factor in ASMP's decisions concerning which cases to support.

cont. on p. 12



Just as the majority of the Court tracked the writers' briefs, the dissenters closely followed the publishers' briefs. Essentially, they seem to value the convenience to the public of digital databases over the rights of the individual authors, and that view seems to color how they see things, like those databases. Unlike the majority, Justices Stevens and Breyer did not seem to understand (or perhaps ignored) the fact that this case is about writers getting paid for the rights they grant, not about access to information.

The Court's decision finds that the publishers violated the copyrights of the authors and sends the case back to District Court to fashion appropriate relief. This will probably mean more hearings and considerable negotiation between the two sides, both under the supervision of the District Court and independently.

Whatever happens, the District Court cannot miss the clear message that its remedy should be in the form of money damages and not in an injunction to remove the articles from the databases. This decision will also put considerable pressure on the litigation in which we are involved over the *Boston Globe's* freelancer contract. It is also likely to put increased pressure on *National Geographic*, which had been planning to appeal Jerry Greenberg's victory in the 11th Circuit to the Supreme Court. *Geographic* may now see the Supreme Court as less likely to take the case and/or to rule in their favor as they may have thought just one day ago.

KUDOS

Congratulations and thanks go to everyone involved, particularly: Jonathan Tasini, for having the courage to devote years of his life to this case; to Patsy Felch in Chicago, the attorney who convinced the Second Circuit to reverse the dreadful decision of the District Court and who is, in our view, the most important part of the Tasini Supreme Court legal team; to Marybeth Peters and Rep. James McGovern for having the courage to take a stand on behalf of the creative community without regard to political fallout; and to Donald Prutzman and Andy Berger in New York for their help in the filing of our brief. ∞

MORE GOOD LEGAL NEWS

JERRY GREENBERG AND NATIONAL GEOGRAPHIC

There is more good legal news for ASMP members and other photographers: The U.S. Court of Appeals for the 11th Circuit has just rejected Ken Starr's petition on behalf of *National Geographic* in the copyright infringement lawsuit by Jerry Greenberg against *National Geographic* for its unauthorized use of his photos on *Geographic*'s CD-ROM. This means that *Geographic*'s only hope for overturning the ruling that they infringed Jerry's copyrights is if they can convince the U.S. Supreme Court to take the case in the first place, and then to rule in *Geographic*'s favor and reverse the 11th Circuit. The chances of both of those things happening look slim. ASMP has been playing an active role in this case and in supporting Jerry since the beginning.

Any photographers who have published photographs in *National Geographic* should take a careful look at their contracts (of which there are many variations) and see if *Geographic* appears to have violated their rights when it reproduced and distributed every one of its issues on CD-ROM. You may have a valid infringement claim waiting to be made. ASMP will keep you posted.

PROGRESS IN INTERNET COPYRIGHT CASE WITH ARRIBA SOFT CORP

There is progress in the case of ASMP member Les Kelly v. Arriba Soft Corp. (now known as Ditto.com). After months of silence since ASMP filed briefs in the Ninth Circuit the better part of a year ago, the Court has now listed the case for oral argument on September 10, 2001. This case will help define the limits of copyright in the Internet world.

Ditto.com, formerly ArribaVista, provides a Web site that uses a robot to search the Internet for photographs and then displays those photos, literally millions of them, in searchable form on its Web site. It does this without any permission from the photographers or from the owners of the Web sites from where the photos came.

Kelly sued for copyright infringement. A U.S. District Court Judge in Southern California ruled against Kelly, saying that this was a case of fair use. ASMP was outraged at that decision and arranged for legal representation for Kelly to take and appeal. ASMP also filed an amicus curiae brief in his support. The decision in this case will affect all ASMP members and all the owners of Web sites such as Webshots, Alta Vista, and similar sites that give viewers access to photos without permission from the copyright owners. It should answer the question of whether every photo that photographers put up on the Internet automatically becomes fair game.

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From The Courts

Third time's a charm?

Photographer's suit over National Geographic copyrights goes before entire 11th Circuit this time

by **R. Robin McDonald**
rmcdonald@alm.com

After separate three-judge panels in the 11th U.S. Circuit Court of Appeals ruled for — and then against — a freelance photographer suing the National Geographic Society over copyright claims, the full court has agreed to consider the case.

The Aug. 30 decision to vacate the latest ruling in *Greenberg v. The National Geographic Society* means the 11th Circuit could reinstitute a conflict between the 11th and the 2nd Circuits about whether publishers, specifically National Geographic, may reproduce publications in digital CD-ROM format without paying more royalties to freelance photographers for additional use of their work. The U.S. Supreme Court tends to favor consideration of cases on issues in which circuit courts disagree.

The copyright litigation was first addressed by the 11th Circuit in 2001 in a decision penned by Judge Stanley F. Birch Jr., the court's resident intellectual property expert. That opinion found in favor of freelance photographer Jerry Greenberg, whose photos had been published by National Geographic and then reproduced in its digital library. In similar cases in New York against National Geographic, the 2nd Circuit has taken the opposite stance, ruling that reproducing the magazine's library on CD-ROM does not violate freelancer copyrights.

Two months ago a new 11th Circuit panel overruled Birch's 2001 decision in the *Greenberg* case, saying instead that National Geographic should prevail. The latest decision was written by U.S. District Judge David G. Trager, a visiting senior judge from New York, which is part of the 2nd Circuit. He was joined by 11th Circuit Judge Rosemary Barkett and Senior Judge Phyllis A. Kravitch.

Trager's ruling also sidestepped a precedent that generally binds appellate panels to earlier circuit decisions addressing the same issue of law unless it has been overturned either by the entire 11th Circuit or by the U.S. Supreme Court.

But Greenberg asked the full court for an en banc review, and a majority of the active judges voted to rehear the case. En banc orders do not identify how the judges voted, but this one noted that Judge Frank M. Hull recused and that Kravitch, who joined Birch's 2001 decision with Judge Gerald B. Tjoflat, would participate.



RICK KOPSTEIN

U.S. District Judge David G. Trager's ruling sidestepped a precedent that usually binds appellate panels to earlier circuit decisions.

"You can imagine how gratified we were to hear about that," Greenberg's attorney, Norman Davis of the Miami firm Squire Sanders & Dempsey, said last week of the en banc order. "It doesn't happen very often."

"Had the prior decision stayed in place, the case would essentially have been done," Davis said. "Now, it's not. I look forward to learning what issues they [the circuit judges] want briefed and to engaging in responding to those issues."

In response to the 11th Circuit action, the National Geographic Society released a statement saying the organization and its attorneys "now look forward to presenting our arguments in this important case to the full U.S. Court of Appeals for the 11th Circuit and believe that the full court will agree with the three-judge panel and the U.S. Court of Appeals for the 2nd Circuit that the National Geographic Society is entitled to make past issues of its magazine available in CD-ROM format without violating the copyright laws."

The *Greenberg* case raises on behalf of freelance photographers many of the same issues raised by freelance writers in another landmark copyright suit decided by the Supreme Court in 2001. That case, *New York Times v. Tasini*, favored freelance writers and came three months after the 11th Circuit panel ruled in favor of freelance photographer Greenberg.

In the closely watched *Tasini* case, freelance writers of articles previously published in newspapers and magazines brought copyright infringement claims against publishers and owners of electronic databases that had made the articles widely available via the Internet and services such as Lexis-Nexis. In a 7-2 opinion issued June 25, 2001, the Supreme Court ruled in favor of the writers.

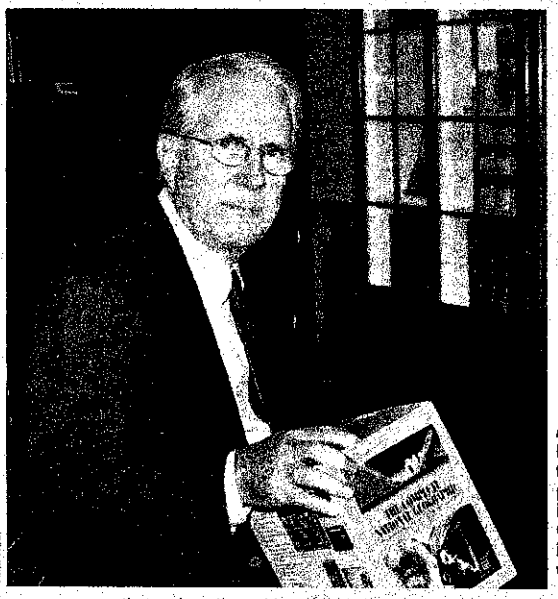
For a decade, the *Greenberg* and *Tasini* cases have pitted publishers against freelance photographers and writers — all of them seeking to define copyright law in a digital age. At stake are royalties and fees that publishers could be forced to share with freelancers whenever they reproduce and sell those freelancers' previously published works in merchandise designed for computer access.

In 2001 in the 11th Circuit, the Birch panel found for the photographers, specifically dismissing arguments offered by National Geographic that a 30-disc CD-ROM set containing reproductions of every National Geographic magazine was not a new product but was merely a reprint of a previously published work.

"The critical difference, from a copyright perspective, is that the computer, as opposed to the machines used for viewing microfilm and microfiche, requires the interaction of a computer program in order to accomplish the useful reproduction involved with the new medium," Birch wrote in what is now called *Greenberg I*. "These computer

See Copyrights, Page A11

COPYRIGHTS From Page A10



A.M. HOLT

Attorney Norman Davis' client, a freelance photographer, is suing National Geographic over its inclusion of his work on CD-ROMs.

programs are themselves the subject matter of copyright, and may constitute original works of authorship, and thus present an additional dimension in copyright analysis."

Birch emphasized his point by attaching to 2001 opinion a copy of National Geographic's copyright application for the CD-ROM library.

On remand, a district judge in Florida, using *Greenberg I* as a guide, awarded Greenberg damages of $400,000. That ruling came in 2004, three years after *Tasini*. National Geographic appealed, resulting in the June opinion by Trager in what is called *Greenberg II*.

The *Greenberg* case raises on behalf of freelance photographers many of the same issues raised by freelance writers in another landmark copyright suit decided by the Supreme Court in 2001.

His panel sided with Trager's home circuit — which since *Tasini*, has rejected claims against National Geographic by other freelance writers and photographers — and bluntly labeled the earlier Birch opinion as "wrong."

The 2nd Circuit in those cases has interpreted *Tasini* as "an intervening (post-*Greenberg I*) change in the law" even though Trager acknowledged in his opinion that *Tasini* was decided on different facts than either *Greenberg* or the other National Geographic cases in New York.

After the en banc order was issued last week, Greenberg lawyer Davis said that an opinion issued by another 11th Circuit panel on Aug. 23 in an unrelated case has given him hope that the full court may restore *Greenberg I*.

In the case, which deals with maritime law, the panel showed the court clearly frowns on reversing its own previous rulings, even in cases where a Supreme Court ruling has intervened.

The central question in *Atlantic Sounding Co. Inc, v. Townsend* is whether the 11th Circuit can, or should, depart from a prior circuit ruling based on the Supreme Court's intervening decision in a similar case.

"We conclude that we may not," wrote Chief Judge J.L. Edmondson, joined by Edward E. Carnes and Senior Judge Peter T. Fay. "Under our prior panel precedent rule, a later panel may depart from an earlier panel's decision only when the intervening Supreme Court decision is "clearly on point.' "

Edmondson added that the 11th Circuit had concluded in a 2003 case that "an intervening Supreme Court decision did not 'implicitly overrule' a prior circuit decision because the cases dealt with different issues and were not 'clearly consistent.' "

"The Supreme Court reminds us that '[t]here is, of course, an important difference between the holding in a case and the reasoning that supports that holding,' " Edmondson continued. "So, that the reasoning of an intervening high court decision is at odds with that of our prior decision is no basis for a panel to depart from our prior decision. As we have stated, [o]bedience to a Supreme Court decision is one thing, extrapolating from its implications a holding on an issue that was not before that Court in order to upend settled circuit law is another thing." ■

R. Robin McDonald reports for the Fulton County Daily Report in Atlanta, an ALM Media Affiliate of the Daily Business Review.

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From The Courts

Third time's a charm?

Photographer's suit over National Geographic copyrights goes before entire 11th Circuit this time

by **R. Robin McDonald**
rmcdonald@alm.com

After separate three-judge panels in the 11th U.S. Circuit Court of Appeals ruled for — and then against — a freelance photographer suing the National Geographic Society over copyright claims, the full court has agreed to consider the case.

The Aug. 30 decision to vacate the latest ruling in *Greenberg v. The National Geographic Society* means the 11th Circuit could reinstitute a conflict between the 11th and the 2nd Circuits about whether publishers, specifically National Geographic, may reproduce publications in digital CD-ROM format without paying more royalties to freelance photographers for additional use of their work. The U.S. Supreme Court tends to favor consideration of cases on issues in which circuit courts disagree.

The copyright litigation was first addressed by the 11th Circuit in 2001 in a decision penned by Judge Stanley F. Birch Jr., the court's resident intellectual property expert. That opinion found in favor of freelance photographer Jerry Greenberg, whose photos had been published by National Geographic and then reproduced in its digital library. In similar cases in New York against National Geographic, the 2nd Circuit has taken the opposite stance, ruling that reproducing the magazine's library on CD-ROM does not violate freelancer copyrights.

Two months ago a new 11th Circuit panel overruled Birch's 2001 decision in the *Greenberg* case, saying instead that National Geographic should prevail. The latest decision was written by U.S. District Judge David G. Trager, a visiting senior judge from New York, which is part of the 2nd Circuit. He was joined by 11th Circuit Judge Rosemary Barkett and Senior Judge Phyllis A. Kravitch.

Trager's ruling also sidestepped a precedent that generally binds appellate panels to earlier circuit decisions addressing the same issue of law unless it has been overturned either by the entire 11th Circuit or by the U.S. Supreme Court.

But Greenberg asked the full court for an en banc review, and a majority of the active judges voted to rehear the case. En banc orders do not identify how the judges voted, but this one noted that Judge Frank M. Hull recused and that Kravitch, who joined Birch's 2001 decision with Judge Gerald B. Tjoflat, would participate.



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"Had the prior decision stayed in place, the case would essentially have been done," Davis said. "Now, it's not. I look forward to learning what issues they [the circuit judges] want briefed and to engaging in responding to those issues."

In response to the 11th Circuit action, the National Geographic Society released a statement saying the organization and its attorneys "now look forward to presenting our arguments in this important case to the full U.S. Court of Appeals for the 11th Circuit and believe that the full court will agree with the three-judge panel and the U.S. Court of Appeals for the 2nd Circuit that the National Geographic Society is entitled to make past issues of its magazine available in CD-ROM format without violating the copyright laws."

The *Greenberg* case raises on behalf of freelance photographers many of the same issues raised by freelance writers in another landmark copyright suit decided by the Supreme Court in 2001. That case, *New York Times v. Tasini*, favored freelance writers and came three months after the 11th Circuit panel ruled in favor of freelance photographer Greenberg.

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For a decade, the *Greenberg* and *Tasini* cases have pitted publishers against freelance photographers and writers — all of them seeking to define copyright law in a digital age. At stake are royalties and fees that publishers could be forced to share with freelancers whenever they reproduce and sell those freelancers' previously published works in merchandise designed for computer access.

In 2001 in the 11th Circuit, the Birch panel found for the photographers, specifically dismissing arguments offered by National Geographic that a 30-disc CD-ROM set containing reproductions of every National Geographic magazine was not a new product but was merely a reprint of a previously published work.

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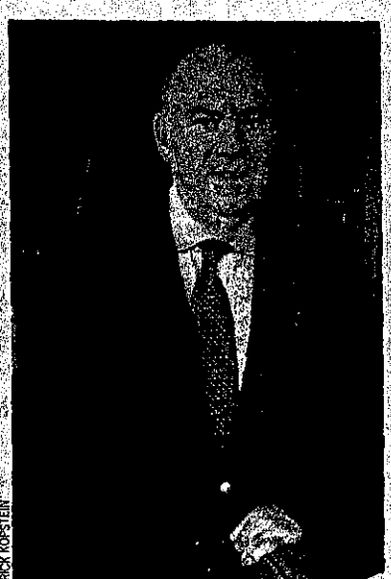
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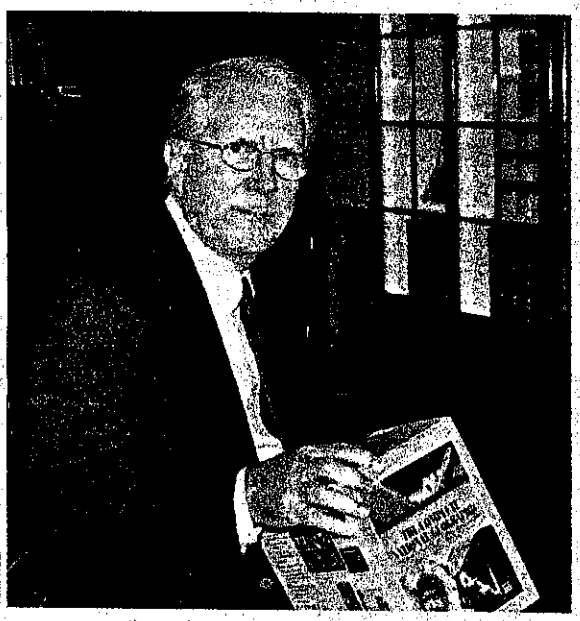
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Q&A: ATTORNEY NANCY E. WOLFF

Nancy Wolff specializes in intellectual property and new media law at the entertainment law firm Cowan, DeBaets, Abrahams & Sheppard in New York. Her book, *The Professional Photographer's Legal Handbook*, was co-published by Allworth Press and the Picture Archive Council of America and released in June.

PDN: What court ruling in the last decade has had the most impact on photographers?

Nancy Wolff: The ones that relate to payment for electronic rights. What comes to mind is *Tasini*, a Supreme Court decision, and the line of cases that deal with the reproduction of a print work in electronic form and whether that is a new work for which a photographer is entitled to be paid.



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PDN: You're talking about the *National Geographic* cases?

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The other area where everything has affected photography is the Internet. The Digital Millennium Copyright Act has shielded service providers from any liability for infringing material which may be posted to Web sites [they host]—as long as they remove the material immediately when they get notice of infringement. That has allowed companies such as YouTube, MySpace and Google to grow.

And it places the burden on copyright owners [rather than service providers] to police copyright online.

PDN: Photographers spent a lot of time and money pursuing *National Geographic* for infringement, but ultimately lost. Do you think the courts got it right with the *National Geographic* cases?

NW: The question was whether the CD was a new product, or something akin to microfiche [a permitted revision]. Microfiche is a research and preservation tool for libraries. Consumers don't purchase microfiche, [and] publishers and contributors didn't see any threat from microfiche. When you put 100 years' worth of magazines together, package it, and sell it to the public, to me it really is a different product from a consumer perspective than a magazine that comes out every month or every quarter. What the courts were looking at was the question of whether the change of medium triggers a requirement that you re-license everything. Maybe it was a practical issue: these products might not exist [if they were considered new works rather than revisions] because of the burden of going back and re-licensing material.

PDN: Many photographers object to the fair use exemptions of copyright law. Have the courts gone too far with fair use in recent years?

NW: Some courts get it right, and some don't. Fair use is where First Amendment rights are taken into consideration, along with uses that are educational, encourage commentary and criticism and contribute to the public good. There are a lot of nuances and complexities to fair use. The problem for photographers is that you have to educate people [about fair use] and it's not that easy for a layperson to understand. People often think it is much broader than it actually is. For instance, universities often assume it's fair use if they take a stock photograph without permission for their Web site, even if the image is there just to make the Web site look better, and isn't for educational use. Then there are bloggers who have a disdain for paying for anything, and think that anything they use is fair use. They don't understand that just because a photo is of the news or illustrates something newsworthy, that doesn't mean it's fair use. Otherwise *Time* would never pay for pictures.

PDN: How do you enforce your copyright on the Internet?

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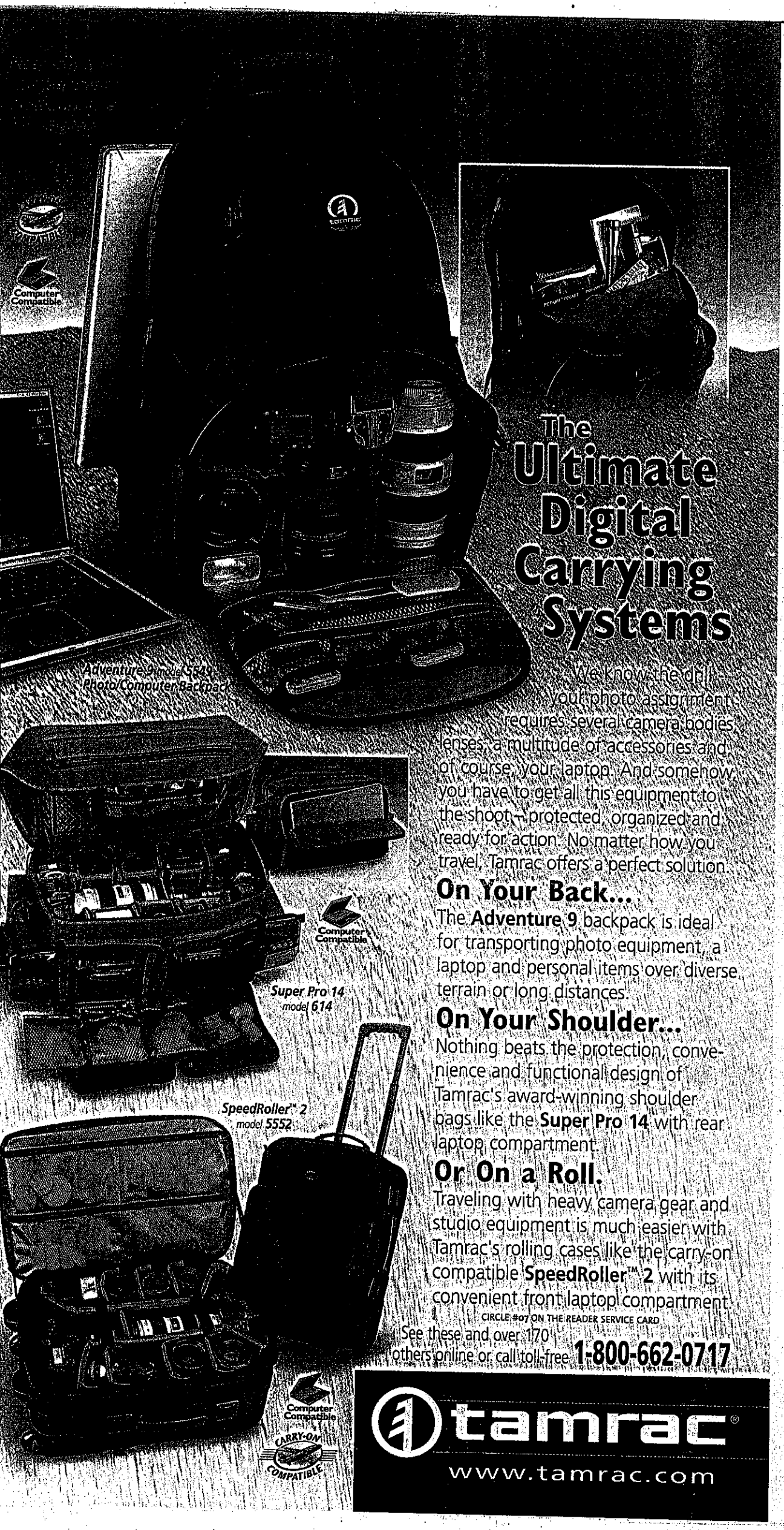
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On Assignme

A newspaper photographer returns from California Democratic convention with a multimedia show covering the coverag

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PDNEWS

BY DARYL LANG AND DAVID WALKER

Appeals Court Reverses Greenberg Decision

AFTER YEARS OF LITIGATION, JERRY GREENBERG'S $400,000 judgment for willful copyright infringement against National Geographic Society has been vacated.

The U.S. Court of Appeals for the Eleventh Circuit reversed its own infringement verdict and vacated the jury award on June 13, explaining that the Supreme Court's 2001 ruling in *Tasini v. New York Times* put the case in a new light that required the reversal.

Greenberg sued NGS in 1997 for infringement because the publisher used his images without permission in a CD-ROM compilation of all back issues of *National Geographic* magazine. NGS argued all along that the compilation, called *The Complete National Geographic*, was a revision of its magazines. Under copyright law, publishers aren't required to get permission from contributors for revisions of existing works.

Greenberg argued that the CD-ROM is not a revision, but a new product because it was in an electronic format, with a search engine and opening montage that made it different from the original magazines.

The 11th Circuit court, which is in Atlanta, agreed with Greenberg in a March 2001 ruling. It called the CD "a new product, in a new medium, for a new market" and therefore not a revision. The appeals court then remanded the case to a trial court for a hearing on damages. A jury concluded the infringement was willful and awarded Greenberg $400,000.

NGS CONTINUALLY ARGUED THAT THE *TASINI* RULING SUPPORTS ITS DEFENSE THAT THE COMPLETE NATIONAL GEOGRAPHIC IS A REVISION OF ITS ORIGINAL WORK, RATHER THAN A SEPARATE WORK.

PDNewswire Digest

The following are excerpted from breaking news stories posted recently on PDNOn To read the complete stories and to find more news, posted daily, check out www.pdnonline.com/pdn/newswire/index.jsp



© ROGER LEMOYNE/REDUX PICTURES

Above: An image from award-winner Roger Lemoyne, of a group of women known as the "Mothers of Srebrenica."

Lange-Taylor Prize Goes To Lemoyne And Pitzer
Canadian photographer Roger Lemoyne and U.S. writer Kurt Pitzer have won the 2007 Dorothea Lange-Paul Taylor Prize, by the Center for Documentary Studies at Duke University. The annual $20,000 prize supports a collaborative documentary project. Lemoyne and Pitzer are working on "After War," a project about civilian life in the former Yugoslavia.

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Photographers Fred Ward and David Hiser file two additional infringement claims against NGS in U.S. District Court in New York City.

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U.S. Supreme Court refuses *National Geographic*'s request to review the March 2001 ruling in Greenberg's favor by the 11th Circuit U.S. Court of Appeals.

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On the basis of Tasini, the U.S. District Court in New York City concludes that the NGS CD is a revision rather than a new work, and rejects infringement claims by Faulkner, Ward, Hiser and Psihoyos. Photographers appeal.

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A federal jury in Miami finds NGS infringement of Greenberg's copyrights "willful" and awards him $400,000 in damages. NGS seeks to have the award vacated or reduced on the grounds that it is "excessive."

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SEPTEMBER, 2006
U.S. District Court in New York City rejects state law claims of Faulkner, Ward and others against NGS for breach of contract.

PDNEWS

BY DARYL LANG AND DAVID WALKER

Appeals Court Reverses Greenberg Decision

AFTER YEARS OF LITIGATION, JERRY GREENBERG'S $400,000 judgment for willful copyright infringement against National Geographic Society has been vacated.

The U.S. Court of Appeals for the Eleventh Circuit reversed its own infringement verdict and vacated the jury award on June 13, explaining that the Supreme Court's 2001 ruling in *Tasini v. New York Times* put the case in a new light that required the reversal.

Greenberg sued NGS in 1997 for infringement because the publisher used his images without permission in a CD-ROM compilation of all back issues of *National Geographic* magazine. NGS argued all along that the compilation, called *The Complete National Geographic*, was a revision of its magazines. Under copyright law, publishers aren't required to get permission from contributors for revisions of existing works.

Greenberg argued that the CD-ROM is not a revision, but a new product because it was in an electronic format, with a search engine and opening montage that made it different from the original magazines.

The 11th Circuit court, which is in Atlanta, agreed with Greenberg in a March 2001 ruling. It called the CD "a new product, in a new medium, for a new market" and therefore not a revision. The appeals court then remanded the case to a trial court for a hearing on damages. A jury concluded the infringement was willful and awarded Greenberg $400,000.

NGS CONTINUALLY ARGUED THAT THE *TASINI* RULING SUPPORTS ITS DEFENSE THAT THE COMPLETE NATIONAL GEOGRAPHIC IS A REVISION OF ITS ORIGINAL WORK, RATHER THAN A SEPARATE WORK.

PDNewswire Digest

The following are excerpted from breaking news stories posted recently on
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www.pdnonline.com/pdn/newswire/index.jsp



© ROGER LEMOYNE/REDUX PICTURES

Above: An image from award-winner Roger Lemoyne, of a group of women known as the "Mothers of Srebrenica."

Lange-Taylor Prize Goes To Lemoyne And Pitzer

Canadian photographer Roger Lemoyne and U.S. writer Kurt Pitzer have won the 2007 Dorothea Lange-Paul Taylor Prize, by the Center for Documentary Studies at Duke University. The annual $20,000 prize supports a collaborative documentary project. Lemoyne and Pitzer are working on "After War," a project about civilian life in the former Yugoslavia.

Influential Photo Curator John Szarkowski Dies

John Szarkowski, director of the Museum of Modern Art's photography department from 1962 to 1991, died July 7 at age 81. Szarkowski helped elevate the status of photography both at the MoMA and in the art world in general. He greatly expanded the MoMA's photo collections and oversaw more than 100 exhibitions, championing photographers like Diane Arbus, Lee Friedlander and Garry Winogrand.



© LEE FRIEDLANDER/COURTESY MOMA

John Szarkowski in 1992.

Corbis Finally Enters Microstock Business

Corbis pulled the wraps off its new micropayment stock imagery site at the end of June. Called SnapVillage, the site will compete with at least ten other sites that appeal to budget-minded customers by licensing royalty-free photos submitted by amateur and professional photographers.

Photographe Strike At Bal Bears Little
Management *Sun* succeede clause from i contract that reporters and from doing e Photographe four-day byli protesting th ment said it to assign rep ally take basi meet reader images and v

Getty Divers
Dissatisfied v image sales growing dem multimedia c acquired mus service Pump $42 million. C Klein told inv company als launch an ur consumer bu summer or e

Photograph Becher Dies
Bernd Beche wife Hilla, sh large-format trial building exhibited arc died June 22 teachers at t Academy, the enced such p as Andreas G Struth and T

Three months after the 11th Circuit decided in Greenberg's favor, however, the U.S. Supreme Court ruled on *Tasini v. New York Times*. That case involved the use of freelance contributors' work in electronic databases that removed articles from the original context of the collective work.

In *Tasini*, the Supreme Court ruled in favor of the freelancers, but implied (without explicitly stating) that publishers could reissue collections of freelance works without permission as long as those works appeared in their original context.

NGS has argued ever since then that the *Tasini* ruling supports its defense that *The Complete National Geographic* is a revision of its original works, rather than a separate work. In 2005, the U.S. Court of Appeals for the Second Circuit, which is in New York, agreed with NGS in the case of *Faulkner v. National Geographic*. That case was nearly identical to Greenberg's.

After Greenberg won the $400,000 jury award, NGS appealed to the 11th Circuit to reconsider its pre-*Tasini* ruling, which the court finally did.

> "I WOULD BE LYING IF I SAID I WASN'T DISAPPOINTED," SAYS GREENBERG. "I BELIEVE IN THE [LEGAL] SYSTEM. I HAVE NO ANIMOSITY *TOWARD NATIONAL GEOGRAPHIC* AT ALL."

"We conclude that the Supreme Court's decision in *Tasini* established a new framework for applying [the law pertaining to revisions] that effectively overrules [our] earlier decision in this case," the appeals court wrote in its June 13 decision.

"*National Geographic* is delighted with the decision," said *National Geographic* spokesperson MJ Jacobsen.

The court left open the question of whether the opening montage, which includes one of Greenberg's images, is by itself infringing. Greenberg can still pursue an infringement claim for that, but says he hasn't decided whether or not he will.

"I would be lying if I said I wasn't disappointed," Greenberg said. "I believe in the [legal] system. There's winners and losers in everything, and I have no animosity toward *National Geographic* at all."

—David Walker

TEN YEARS OF WRANGLING OVER A *NATIONAL GEOGRAPHIC* CD

In September 1997, the National Geographic Society released a CD called *The Complete National Geographic*, which reproduced every back issue of *National Geographic* magazine page by page. Several photographers sued alleging copyright infringement because NGS reproduced their images on the CD without permission. NGS countered that no permission was required because the CD was a revision of existing collected works, rather than a new work. After nearly a decade of legal battles, NGS finally prevailed over all the claimants in June. The timeline below highlights the major developments of the various court cases.

1997

DECEMBER 1997
Photographer Jerry Greenberg sues NGS for infringement in U.S. District Court in Miami. Photographer Douglas Faulkner files a separate infringement claim against NGS in U.S. District Court in New York City.

1998

MAY 1998
The U.S. District Court in Miami rejects Greenberg's claim on the grounds that the NGS CD is a revision. Greenberg appeals.

1999

2000

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Lawsuit pits Viacom against rival YouTube

Viacom filed suit against YouTube, putting the spotlight again on copyright and piracy issues for digital media.

BY SETH SUTEL
Associated Press

Viacom's $1 billion lawsuit against YouTube on Tuesday marks the biggest confrontation to date between a player in major media and the hugely popular video-sharing site that is making inroads into their turf.

The lawsuit marks a sharp escalation of contention between Viacom — the owner of MTV, VH1, Comedy Central and other cable networks — and YouTube, which Google bought in November for $1.76 billion. If Viacom prevails, some of the most popular programming on YouTube could disappear.

Last month Viacom demanded that YouTube remove more than 100,000 unauthorized clips from its site. Since that time the company has uncovered more than 50,000 additional unauthorized clips, Viacom spokesman Jeremy Zweig said.

A quick search of YouTube's site Tuesday turned up numerous clips from Viacom programs, including segments from Comedy Central's *The Daily Show with Jon Stewart* and Nickelodeon's *SpongeBob SquarePants*.

In the lawsuit, filed in U.S. District Court in New York, Viacom says YouTube "harnessed technology to willfully infringe copyrights on a huge scale" and had "brazen disregard" of intellectual property laws.

YouTube's soaring popularity has been a cause of fascination but also fear among the owners of traditional media outlets. They worry that YouTube's displaying of user-uploaded clips from their programs — without compensation — will lure away viewers and ad dollars from cable and broadcast TV.

Viacom is especially at risk because many of its shows are aimed at younger audiences who also are heavy Internet users. At the same time, Viacom is trying to find other, legal ways to distribute its shows digitally, such as by selling episodes of *The Daily Show* and *South Park* for $1.99 each through Apple's iTunes service. Those shows can then be viewed on a computer or video iPod.

In a statement, Google said it believed the courts will agree "that YouTube has respected the legal rights of copyright holders."

"We will certainly not let this suit become a distraction to the continuing growth and strong performance of YouTube and its ability to attract more users, more traffic," Google said.

YouTube says it cooperates with all copyright holders and removes programming as soon as it is notified. But Viacom argues that approach lets YouTube avoid taking the initiative to curtail copyright infringement, instead shifting the burden and costs of monitoring the site onto copyright holders.

Other media companies have also clashed with YouTube, but some, including CBS, have agreed to provide some clips to the site. CBS used to be part of Viacom but has since split off into a separate company.

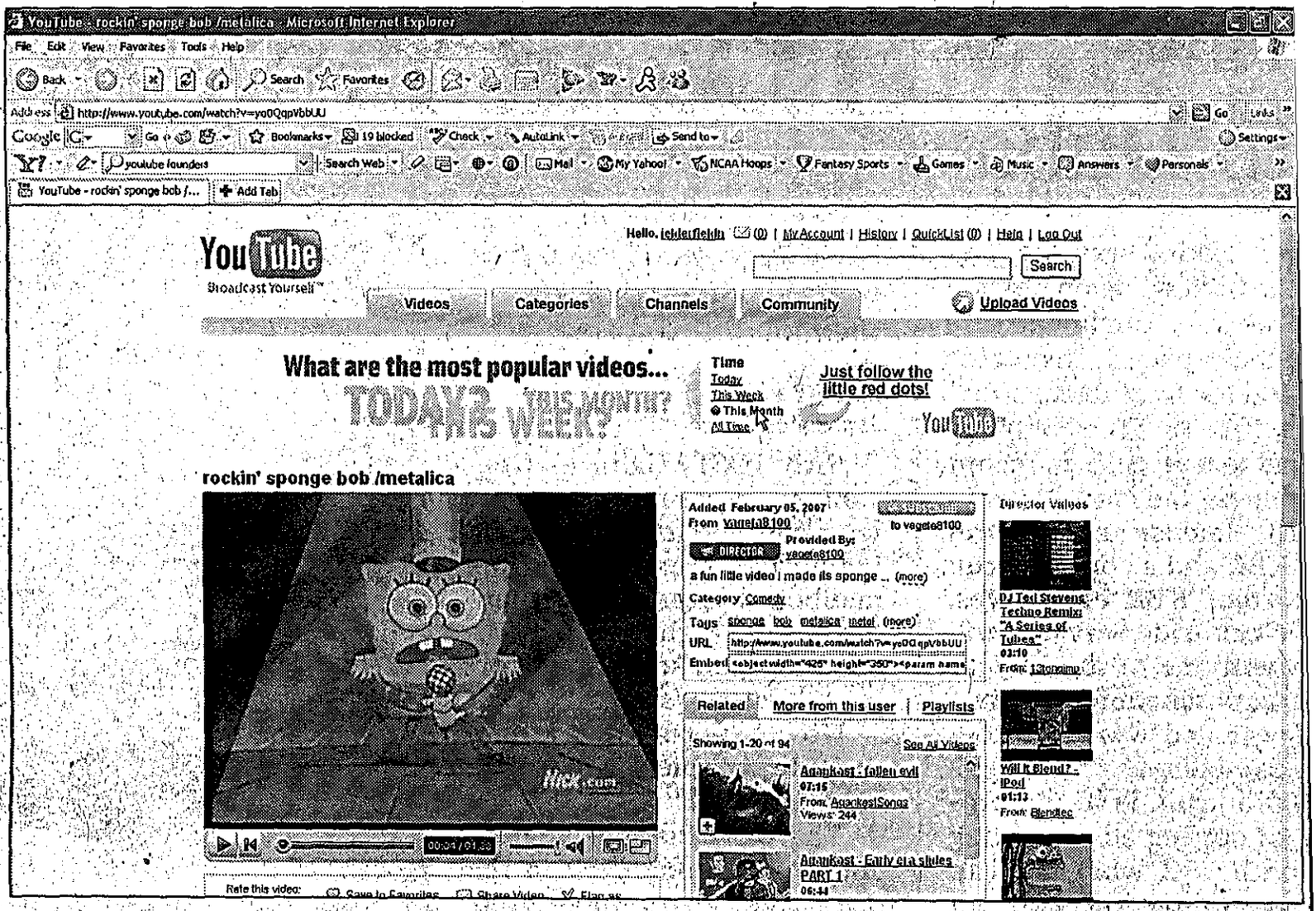
Universal Music Group, a unit of France's Vivendi, had threatened to sue YouTube, saying it was a hub for pirated music videos but later reached a licensing deal with them.

Now that Viacom has thrown the first punch, other media companies may join the fray, warned Standard & Poor's analyst Scott Kessler in a research note.

American Technology Research analyst Rob Sanderson believes Viacom filed the suit to pressure Google into setting clear ground rules and fees for the usage of copyrighted content.

"This is all about a media company trying to protect its future," Sanderson said. "It's not about them trying to get damages for the past sins of YouTube."

THE INTERNET



YOUTUBE/AP

SQUARING OFF: Viacom has filed for copyright infringement against YouTube, which offers video clips like 'SpongeBob SquarePants,' among others, for free.

Lawsuit pits Viacom against rival YouTube

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HOME BUILDERS

Create/Edit Folders

Options

Address Book
POP Mail
Manage SPAM
Preferences
E-Mail Help

See Your Credit Score: $0

Comparison shop with AT&T & save money

Try AT&T Webtunes today

Get a FREE Multi-Room DIRECTV® System

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Thursday, September 06, 2007

New Development in NGS Infringement Case

The story continues for *Greenberg v. NGS*. The U.S. Court of Appeals for the 11th Circuit will reconsider its decision to vacate a $400,000 award for Greenberg for copyright infringement by National Geographic Society. Greenberg requested that the court hear the matter "*en banc*," where all of the judges of the 11th Circuit (instead of the original panel of 3 judges) weigh in on the ultimate decision, and the court agreed. This happens usually because the case concerns a matter of exceptional public importance or the panel's decision appears to conflict with a prior decision of the court. Review my June 16, 2007, and June 25, 2005, blogs for background of the case.

posted by PhotoAttorney at 6:48 AM

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For Jerry and Norman —
You may find this to be useful — Fred Ward

DIGITAL COPYRIGHT

WHO OWNS WHAT?

Marcel Duchamp would have a hard time if he were reincarnated as a multimedia artist. After purchasing a digitized image of the *Mona Lisa* from Corbis Media, Bill Gates' digital image service, it would be easy for Duchamp to import it into Photoshop and add a mustache. His problems would start with trying to sell his creation as part of a CD-ROM gallery of his works. If Corbis found out, the artist could receive a letter asking him to cease and desist or he could find himself hauled off to court for breach of contract and copyright violation.

Painting a digital mustache on the work of a 20th century artist or photographer could get the digital Dadaist into even deeper trouble. Duchamp could be liable for violating three of the five exclusive rights protected by copyright law: reproduction, modification and distribution. He may also have violated the "moral rights" of the artist not to have a work misrepresented. If his CD went gold, Duchamp could very well run afoul of some company claiming to have the patent on putting mustaches on digital images, and it could ask him for royalties.

Sound far-fetched? Not outrageously so. Last year, a stock photography agency won damages against the *Newsday* newspaper for scanning one of the agency's photographs and using elements of it in an illustration. And while the *Mona Lisa* is in the public domain, Corbis does have a copyright on its digital image, albeit a thin one. Corbis and other multimedia content providers license only certain rights when you purchase their digital clips, and the right to alter fine art works is not usually one of them. Claiming you are an artist (or even an educator) may be no defense. Copyright law does provide for the "fair use" of copyrighted material, but it leaves the definition of fair use largely up to the courts.

Interactive publishing faces touchy issues on the copyright question. Do we want more free-market haggling or a universal system for tracking and paying royalties?

BY JIRI WEISS

COPYRIGHT: A GROWTH INDUSTRY

After paying off his lawyers (while grumbling about the lack of controversy surrounding his masterpiece in the art community), developer Duchamp might find it incredible that some new-media gurus have pronounced copyright dead. In some ways it couldn't be healthier.

A little over a decade ago, copyright law was the province of a few boutique firms in New York and Hollywood, says Mark Radcliffe, a partner with the 270-attorney firm of Gray, Cary, Ware & Freidenrich and co-author of *The Multimedia Law Handbook*. "I remember writing a memo in 1982 asking if software was copyrightable," he says. "Then the computer and software industry happened."

Over roughly the same period, the membership of the American Intellectual Property Law Association almost tripled, from 3,500 lawyers to 9,500. Today, intellectual property law accounts for a growing portion of general business practice law firms.

The sheer size of the intellectual property-based economy, which employs some 5.7 million people in the United States and accounts for nearly 6 percent of the gross national product, has heightened everyone's awareness of the legal issues involved. Content creators, including artists, musicians, photographers and writers, are increasingly exercising their legal rights.

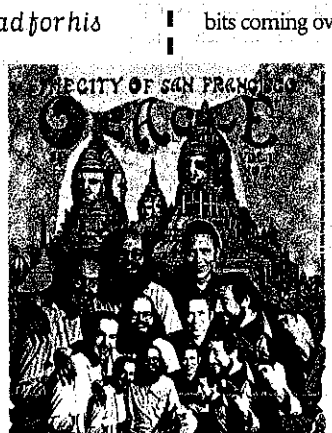
So why is everybody screaming about copyright? One problem is that for CD-ROM developers and online publishers, the clearances required for hundreds if not thousands of images, text excerpts, video clips and music samples eat up way too much time and money. Just tracking down the owner of a photograph or a song may actually cost more than a developer would end up paying the artist in royalties. As a result, many hire one of the growing number of firms that specialize in copyright clearances.

Then there are the larger questions, growing more prevalent as media moves online, of how to split up licensing fees in a world where everything can be downloaded, altered, hyperlinked, excerpted and combined. What makes multimedia intellectual property rights

JANET WOOLEY

DEALS WITH THE DEAD

Sometimes small developers get lucky going after big-name property, and usually it's due to personal connections. Tony Bové, CEO of a multimedia titles startup called Rockument Inc. and ***New Media*** *contributing editor, scored a major coup when he negotiated a license with the Grateful Dead for his* ***Haight-Ashbury in the Sixties*** *CD-ROM.*



The obstacles were daunting. The Grateful Dead had been offered millions by the likes of Broderbund and Microsoft, and though Bové is a Deadhead, he had no personal connection to the band. Bové made a demo disc and, with co-author Allen Cohen, who had chronicled the '60s peace-and-love movement as the editor of the ***San Francisco Oracle****, he approached the band. The intervention of mutual friends, including the poet Lawrence Ferlinghetti, helped.*

After the Dead saw the demo they agreed to the project—against the advice of their agent. "The old-boy network is the only way to do business," says Bové. —J.W.

harder to deal with than, say, clearing the rights for a documentary film? There are actually multiple copyright laws, and Philip Dodds, president of the Interactive Multimedia Association (IMA), says that the print, music, broadcast and film industries have all evolved different practices. "In multimedia, these come together in ways that make one's head hurt."

For Excedrin headache No. 1, take the debate in the music industry over whether the transmission of music across online services constitutes a copy, a performance or both. For decades, composers, music publishers and lyricists have licensed their works to the record and movie industries separately from the performance licenses they grant for radio broadcast, restaurants, clubs, trade shows and corporate presentations. The creators get more revenue from performance rights than from record sales, so they want to extend performance licensing to cover online distribution as well. Sending a piece of music over the Internet, they argue, is the same as broadcasting it over TV or radio.

In early April, Broadcast Music Inc. (BMI), one of the two major agencies offering performance licenses, announced its first online license with OnRamp, a company that plans to let music lovers sample snippets of music over the Internet and purchase recordings. The other major agency, ASCAP (American Society of Composers, Authors and Publishers), wants to follow suit.

Fair enough, if it wasn't for the fact that music creators are aggressively asserting that online transmission also constitutes a copy. Complicating the debate are arguments over whether a MIDI file is a musical score or an actual composition, and whether anything recorded only in a computer's RAM constitutes a copy. U.S. courts have ruled that it does. Some have speculated that we might even reach the bizarre state of affairs where one set of bits coming over the information highway is treated as a performance, another as a copy and a third as both.

Uncle Sam, however, prefers to think that existing copyright statutes are holding up just fine, thank you. In recommendations published last summer in its "Green Paper," the government proposed to resolve the copy vs. performance question on a case-by-case basis by examining the primary purpose of a transmission and its effect. If the transmitter intended the stream of bits to be a performance and the receiver heard, rather than received, a copy, then the bits should be considered only a performance. The Information Infrastructure Task Force's primary finding was that current copyright law can handle the new technologies with few revisions. The government did recognize that current licensing practices may result in transaction fees dwarfing royalties, but failed to recommend any mandatory licensing scheme.

TIPS FOR TAMING COPYRIGHT

While many multimedia observers are calling for much greater changes in copyright law, not to mention its complete abolition, the question of "Whither copyright?" is not going to help developers figure out how to avoid being sucked dry by licensing costs or destroyed by a lawsuit. Here are seven tips, culled from conversations with a number of developers and multimedia copyright lawyers:

1) Avoid licensing altogether. If developer Duchamp decided to stay on the right side of the law, his lawyers would advise him to develop original content. Paying an artist to create a cartoon character or a musical score is often cheaper than using other people's work.

This is easier said than done in the cutthroat commercial CD-ROM marketplace, where experts say celebrities and proven content offer a competitive edge. And reference publishers simply can't make do with original content alone.

However, Radcliffe pointed to successful and completely original multimedia titles such as *Doom* and *Carmen Sandiego*, which have spawned their own derivative products. "Developers get caught in a bind," he says. "From the marketing point of view they want recognizable music and characters, but by getting them they are boosting someone else's property, someone else's franchise. If you are using pre-existing material, what are you getting for that? You limit your ability to build a business around your product."

2) Use stock houses and music libraries. Another alternative is to purchase public, royalty-free content on CD-ROM or from any number of stock houses and music libraries. When Peter Maresca, vice president and



creative director of developer Zenda Studios in San Francisco, needs a piece of music for a CD-ROM title, he goes to Robert Berke Sound, a local recording studio that also represents a half-dozen music libraries. You're not likely to recognize these tunes, but the price is right. Standard charges are $250 to $275 per selection for all the rights, including synchronization and performance for up to 10,000 copies, and double that amount for unlimited usage.

For images, video and film, multimedia producers can turn to dozens of CD-ROMs or agencies that offer royalty-free material. You can do anything you want with the hundreds of images on HSC Software's KPT Power Photo discs, for example, except repackage and sell them as stock photos. Archive Films, one of the major stock footage houses, offers some 14,000 hours of oldies, newsreels, historical documentaries, industrial and early silent film clips, and animation.

Lawyers warn that stock customers shouldn't assume that they are in the clear. The stock houses may own the main copyright, but not the rights of actors, stunt performers and others involved. On January 1, 1996, hundreds of thousands, if not millions, of improperly registered (mostly foreign) public domain stock images and footage will revert to copyright, says Radcliffe. The parties who claim back their copyright "won't be able to come after you with an injunction, but they will be able to demand royalties."

For example, Archive Film owns the copyright or has the right to license footage to multimedia producers, but it can't guarantee that the person who sold them that copyright has cleared the electronic rights from all the other parties. Still, Patrick Montgomery, Archive's president, argues that the chances that someone will come after a multimedia producer over a stock license are minimal. "If you get too caught up in this and you start wondering about every possibility of people suing you, you'll never get anything done," he says. "You have to let common sense prevail."

3) Avoid "must-have" media. If you must license, the best strategy is to plan ahead, says Chip Canty, chairman and CEO of Pilgrim New Media of Cambridge, Massachusetts, which last year published an encyclopedia of 100,000 biographies of famous American women called *Her Heritage*. "Flexibility is important. If you don't plan your project carefully and you lock yourself into a particular song or picture, you have no bargaining power."

Canty wanted to include a recording of Judy Garland singing *Over the Rainbow*, but changed his mind because the copyright owner wanted 15 cents per CD. Since many copyright holders in the music industry demand to be paid the same as the highest-priced song ("the most-favored nations" clause), that one song would have tripled Canty's music budget. "With 1,000 biographies it didn't matter whether we had *Over the Rainbow* or not," says Canty. "People would not walk away from it just because of that."

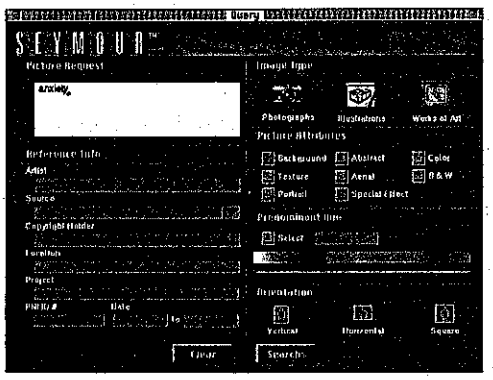
4) Look into hiring a rights-clearance agency. Another sticking point for Canty was that music copyright holders demanded to be paid the same amount per CD no matter how much money Pilgrim made on it. Canty calculated that he would lose money on those CDs sold bundled with other products and bring in only a few dollars apiece.

Getting someone on your side who knows both the music industry and multimedia development is important to handle intricacies such as these, Canty says. With the help of BZ/Rights & Permissions Inc., one of the growing number of clearance agencies that help multimedia developers clear rights and negotiate contracts, Canty negotiated an agreement to lock out much of the music from the bundled version. His customers must now call in to upgrade to the full version.

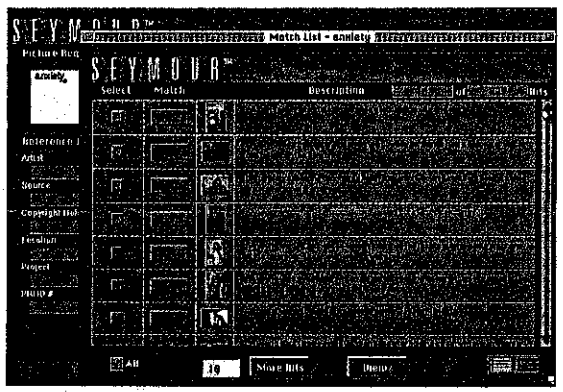
5) Limit the number of sources. Do not underestimate the cost of hunting down copyright holders and negotiating with them. One way to reduce costs is to license as much of the material as you can from a single source, such as a film or music library.

In Canty's case, this was the New York-based Archive Films and Archive Photos, but he was still in for a few surprises. One clip from a movie he had digitized sent him and Barbara Zimmerman, BZ's president, on a wild-goose chase all the way to a London performing society. Licensing just that one song took BZ 10 to 20 hours at about $100 an hour.

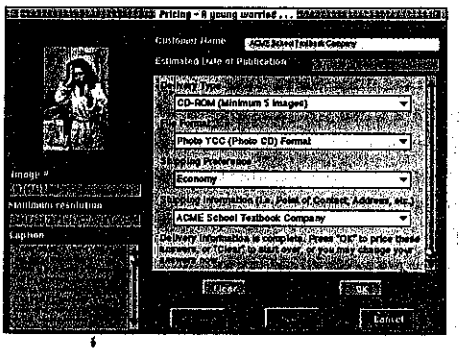
Zimmerman estimates that a typical CD-ROM project with some



PNI's Seymour online service lets you fill out a form to filter its database of over 300,000 images.



A search for the word "anxiety" presents a matching list of possibilities.



Once you've made a selection, Seymour asks for information on image size, use and distribution to determine the appropriate license.

STAR TREK: THE LAST OF THE BIG-TIME DEALS?

Spectrum Holobyte, which released its ***Star Trek: The Next Generation Final Unity*** *game this summer, licensed the story line and the rights to the actors' likenesses from Paramount a few years ago. But times have changed, says company chairman Gilman Louie. He doubts that small developers setting out to negotiate with Hollywood will stand much of a chance convincing movie studios to license their crown jewels.*

"Hollywood wants to be in our business," he says. "If they do want to license, they will want to do a joint venture or buy a small company outright."

Sometimes an equity investment will do the trick. After providing Spectrum with separate non-transferable licenses to develop games for various platforms, Paramount decided to protect its property by taking a minority investment in Spectrum.

Louie kept other licenses to a minimum on the ***Star Trek*** *project. Everything else, including the music, set design and special effects, was done from scratch. "Movie companies just did not spell out interactive rights in their contracts," he says. "We would have had to know who performed the music, which extras and stunt men were in it. It was too much of a hassle."—J.W.*

500 items to clear may cost $150,000 to $200,000 in licensing fees plus $50,000 to $70,000 in agency fees. Ultimately, the costs of finding, licensing, digitizing and editing still images and video for *Her Heritage* accounted for 73 percent of the total development expenses.

6) **In negotiations, clarify usage patterns.** Because the multimedia world is such new terrain, negotiations often drag on and on, and unreasonable offers are often presented in total sincerity. One bargaining tactic is to make the copyright owners understand that their particular picture or piece of music adds only a small amount of value to the whole, says Tom Corddry, Microsoft's creative director. "In a book with 100 pictures, each picture is very important," says Corddry, "but in an encyclopedia, 90 percent of the pictures are never actually looked up."

7) **Be prepared to educate your negotiating opponent.** Potential content licensers sometimes need to see a completed product before they agree to a project. Microsoft, which is now the largest CD-ROM publisher, according to Dataquest, licenses works directly from its offices worldwide. The company tracks all intellectual property agreements in a massive database that is fast approaching 100,000 items.

Negotiations are often fairly routine, but it didn't used to be that way. In 1991, when Microsoft approached studios to license film clips for its *Cinemania* CD-ROM movie guide, only two agreed, says Ed Kelly, Microsoft's acquisition manager. "But once it came out, everybody started calling us, asking, 'Why isn't our stuff in here?'" Microsoft hasn't had any problems since.

AUTOMATING COPYRIGHT LICENSING

Content owners are responding quickly to the increased demand for media from the multimedia industry. The Harry Fox Agency, which acts as a copyright clearing house on behalf of some 500 music publishers, now provides a multimedia form for CD-ROM development. Prices, too, have started to come down.

The stock house Archive Films charges about $20 per second and less for a five-year CD-ROM license in one language, about half the rate it charges its broadcast customers. About 15 percent of its business now comes from multimedia developers.

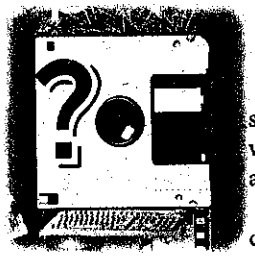
The stock photo agency Picture Network International (PNI) is offering images at less than half-price to multimedia producers, and $40 buys you a one-time license for a screen-quality file ready to put into a corporate presentation or a run of up to 20,000 CDs. By comparison, the high-resolution images that ad agencies purchase go for $100 or more.

Dropping prices are a welcome change, but if the multimedia industry is planning to transform itself into a mass market, it also has to reduce the difficulty and cost of tracking down copyright holders and obtaining clearances. "The current system isn't workable," author Mark Radcliffe states bluntly. "It's like making clothing before the invention of the power loom, before there was mass production."

Several technological solutions may make it easier. The Library of Congress, with the Corporation for National Research Initiatives (CNRI), a nonprofit research institute, is about to test a system that will allow content creators to apply for copyright registration and deposit works with the library electronically. Next year CNRI plans to test an electronic-rights management system that will let multimedia developers license works online, eventually via hundreds of interconnected content databases. The rights for personal or educational use could be negotiated automatically; others would require personal contact.

Some electronic-rights management systems are already in use. For a year now, PNI's Seymour online service has been letting users search a database of more than 300,000 images from more than 30 agencies and photo collections, including Magnum, Sovfoto/Eastphoto and Culver Pictures. Users type English phrases and the system displays thumbnails conjured up by the search results. Enter the word "anxiety," for example, and Seymour will retrieve more than 800 images ranging from facial expres-

sions to people in anxious situations. Typing "workers experiencing anxiety" narrowed the search to 250 images (see screen captures, page 41).



If you are interested in purchasing an image, Seymour asks a series of questions on image size, use and distribution to determine which license is appropriate. If a particular license—for altering a picture, for example—doesn't exist, users can connect live to a PNI staff member who will pass on the request to the copyright holder. Images can either be received or by mail on CD or cartridge. Seymour is available for $49 per month with two hours of free connect time.

Also getting into the act is the Copyright Clearance Center (CCC), an organization representing some 9,000 publishers and 1.7 million titles. CCC collects licensing fees from the vast photocopying industry that has sprung up around college campuses and from corporations that wish to copy and distribute copyrighted material internally.

Royalty Meters for the Net

This summer, CCC and Folio Corp. are releasing software for distributing copyrighted articles over internal corporate networks. Instead of having to purchase multiple subscriptions to magazines and reference titles, companies will place electronic versions on their servers in an extension of Folio's Views and pay royalties based on frequency of use.

Next year CCC plans to offer the same metered database on the Internet and to expand into photography. "CCC hopes to do online what it did for photocopying: bring the cost of obtaining permission to copy down to the same level of the royalty payment due to the rights holder," says Kelly Frey, director of new-business development.

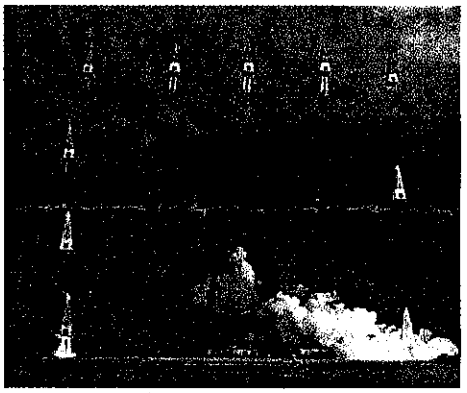
With overlapping copyright clearance technologies springing up like mushrooms, there will be confusion in the marketplace for quite some time, says Lance Rose, a lawyer in the firm Lance Rose & Associates and author of *NetLaw: Your Rights in the Online World*. "The question is, can we achieve a small number of comprehensive, efficient, productive rights clearance groups that can actually help us all get on with the business of creating interesting multimedia products?"

Some people believe that will take a long time. "Don't look for that kind of electronic licensing anytime soon for music," says Bennett Lincoff, director of legal affairs at ASCAP. "When you take a picture, you are the sole owner of all the rights. In music there are writers and composers that have existing relationships with music companies. There are synchronization rights, rights that are exploited in various ways that make it more difficult to license the entire bundle at once."

Others say the developments may actually hurt multimedia producers' interests. "If there is more of a standardized structure, there won't be much room for creative negotiation," says Jill Alofs, who runs Total Clearance, a Mill Valley, California, clearance firm that specializes in multimedia.

Two Paths

The new-media industry is at a fork in the road. Down one path, content creators make their own contractual arrangements. This way seemingly preserves the most freedom, but it also lets the courts determine industry norms of conduct on a case-by-case basis. It winds through a legal jungle requiring travelers to clear away vines blocking the path before each new step.



Roger Ressmeyer's digital composite of a rocket launch will soon be available online from Corbis Archives. It is part of his Starlight photo collection, purchased recently by Corbis Corp.

Here, the strong will arm themselves to the teeth against the uncertainties of the jungle and may be tempted to prey on those without similar means. It's a path that puts private contract over public practice and enriches the pockets of lawyers.

The other fork, creating a system of automated rights-clearance mechanisms, runs straight through a clearing. It binds the hands of negotiators, but it's built upon the need for clarity and simplicity. Our nation's history and our legal system favor the former path, but if the new media becomes a mass phenomenon, the second path may make the most sense.

Jiri Weiss is a Berkeley, California-based technology writer. He can be reached at JiriWeiss@aol.com.

CONTACTS:

American Intellectual Property Law Association: (703) 415-0780
American Society of Composers, Authors and Publishers (ASCAP): (212) 621-6000
Archive Films: (212) 620-3955
Association of American Publishers: (202) 232-3335
Broadcast Music Inc. (BMI): (212) 586-2000
BZ/Rights & Permissions Inc.: (212) 580-0615
Consortium of College and University Media Centers (CCUMC): (212) 650-6708
Copyright Clearance Center: (508) 750-8400
Corbis Media: (206) 641-4505
Corporation for National Research Initiatives (CNRI): (617) 631-0947
Folio Corp.: (801) 229-6700
Gray, Cary, Ware & Freidenrich: (415) 328-6561
Harry Fox Agency: (212) 922-3266
HSC Software: (805) 566-6200
Interactive Multimedia Association (IMA): (410) 626-1380
Lance Rose & Associates: (201) 509-1700
Microsoft Corp.: (206) 882-8080
Picture Network International: (703) 807-2789
Pilgrim New Media: (617) 491-7660
Robert Berke Sound: (415) 285-8800
Rockument: (707) 884-4413
Software Patent Institute: (313) 769-4606
Software Publishers Association: (202) 452-1600
Spectrum Holobyte: (510) 522-3584
Total Clearance: (415) 389-1531
U.S. Patent and Trademark Office: (703) 305-9300
Zenda Studio: (415) 777-9896

RESOURCES:

Copyright's Highway: The Law and Lore of Copyright from Gutenberg to the Celestial Jukebox by Paul Goldstein; Hill & Wang/Farrar, Straus and Giroux, 1995; $21.

Multimedia: Law & Practice by Michael Scott with James N. Talbott; Prentice-Hall Law & Business, 1993; $85.

Multimedia Law Handbook by J. Dianne Brinson and Mark F. Radcliffe; Ladera Press, 1994; $74.95.

Multimedia Legal Handbook: A Guide From the Software Publishers Association by Thomas J. Smedinghoff; John Wiley & Sons Inc., 1994; $195.

NetLaw: Your Rights in the Online World by Lance Rose; Osborne-McGraw Hill, $19.95.

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BUSINESS

NATIONAL GEOGRAPHIC.COM

The Geographic goes exploring

Organization leaps into new media ventures, which include a cable channel, radio series

BY BETH SUTEL
Associated Press

WASHINGTON — Change has never come easily for National Geographic. But, when readership began tumbling in the 1990s and Discovery Communications took the lead in adventure and wildlife programming over cable TV and the Internet, National Geographic found it had to change.

Today, the Geographic, as it is known to people who work there, is going through another metamorphosis, its second since being established in 1888.

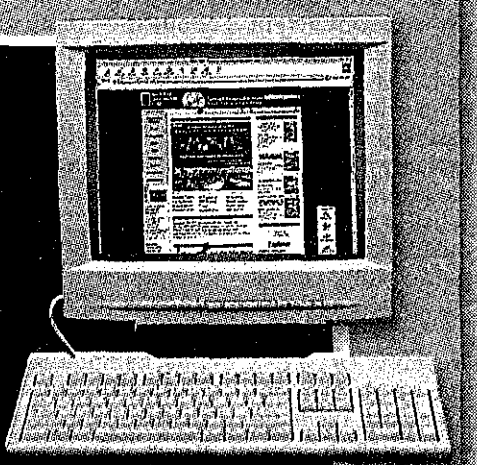
"This organization has changed more in the past 10 years than in the past 100," said Bob Sims, senior vice president for magazine publishing.

Eager to expand its boundaries, the National Geographic Society — legally a nonprofit institution — is leaping into new media ventures:

- A cable channel already being shown over-seas is scheduled to launch in the United States next January.
- A new book series is coming out this summer.
- Imax movies are hitting theaters.
- A radio series started on National Public Radio.
- Ten foreign language magazine editions have started up, and a new adventure magazine went on the stands last year.

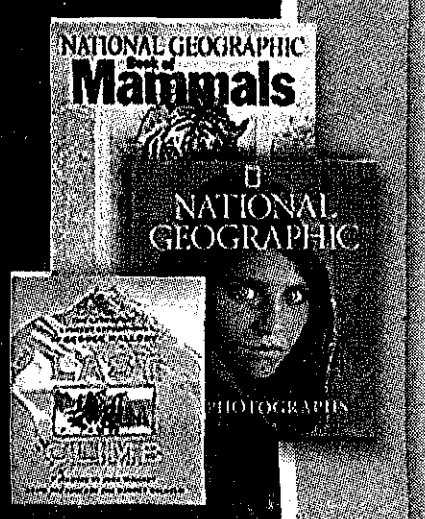
It's a radical and rapid make-over for such a staid institution, but there's a lot of catch-

PLEASE SEE GEOGRAPHIC, 10C

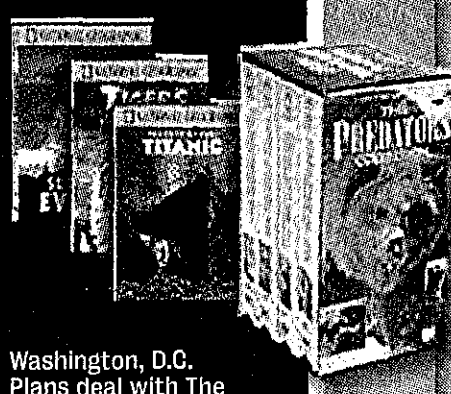


Consumers can buy many products from National Geographic via the Internet, including:

BOOKS

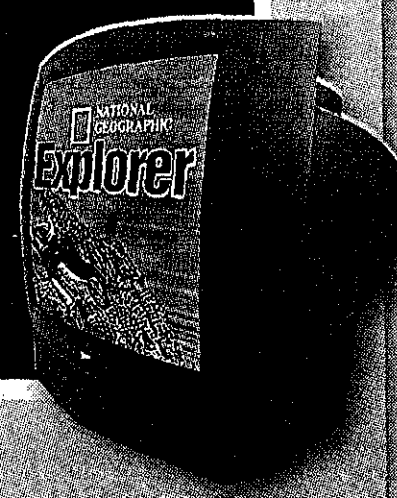


DVDs and VIDEOS

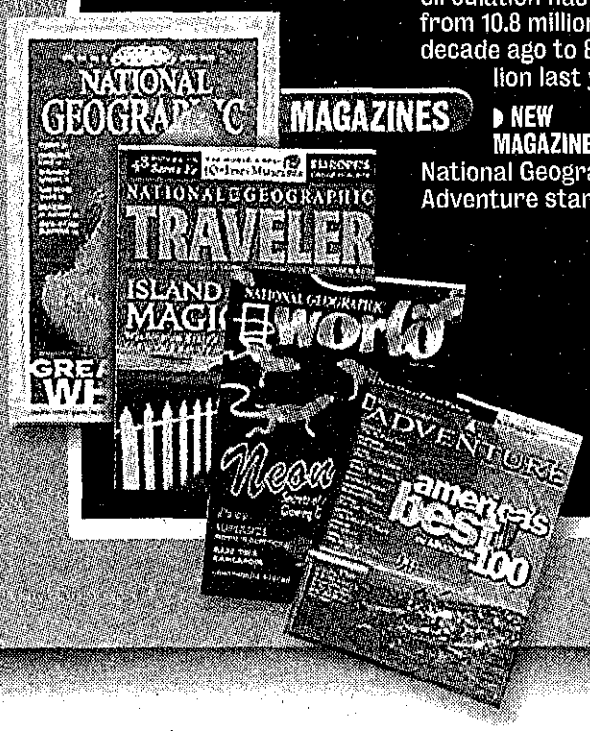


Washington, D.C. Plans deal with The Museum Company to carry branded goods throughout the chain's 100 stores.

TELEVISION



MAGAZINES



GIFTS and GEAR

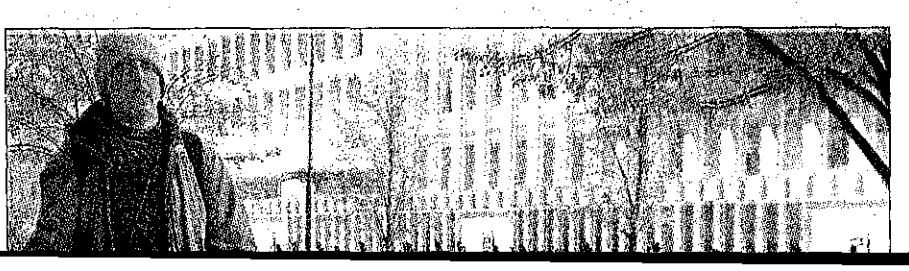


SOME OF NATIONAL GEOGRAPHIC'S NEW VENTURES

- **THE NATIONAL GEOGRAPHIC CHANNEL:** Launched in 1997 overseas. Reaches 52 million households in 63 countries. Will launch in United States next year.
- **IMAX MOVIES:** First film, Mysteries of Egypt, grossed $55 million. Plans film on voyage of Lewis & Clark.
- **FOREIGN LANGUAGE EDITIONS:** Society puts out editions in 10 foreign languages — 11 when Portuguese version launches next month in Brazil. U.S. circulation has slipped from 10.8 million a decade ago to 8.5 million last year.
- **NEW MAGAZINES:** National Geographic Adventure started last April as a quarterly and is increasing its frequency to six times a year.
- **INTERNET:** Rapidly expanding Internet division sells CD-ROMS, online reference materials, magazine subscriptions and offers chats with writers.
- **BOOKS:** Publishing division puts out books, travel guides. A new book venture, Adventure Press, will focus on the personal memoirs of travelers.
- **RADIO:** National Geographic produces a regular radio program for National Public Radio titled Radio Expeditions, narrated by Alex Chadwick. It started in 1997.
- **TRAVEL:** Revamped Expeditions program, which offers trips to historic locales with affiliated writers, photographers and researchers.
- **RETAIL:** Operates online store and two retail stores in

Photo illustration by HIRAM HENRIQUEZ / HERALD STAFF

Protesters to move fight to Wall Street



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BY ELAINE WALKER

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ests.

The protesters' goal this time is more difficult than getting a retailer to drop one product: They want to kill World Bank bonds, one of the stalwarts of the post-World War II financial system.

"They're not the biggest player [in World Bank bonds] by any means," Brownstein said. "But because they're the

Reading is good for you.

So is recycling.

groups are also organizing a boycott of the estimated $25 billion in bonds the World Bank plans to issue each year. Last year, the World Bank sold $29 billion in bonds.

"We want to take away their money," said Kevin Danaher, a founder of Global Exchange. The group, one of the IMF boycott organizers, supports human rights in developing

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Magazine explores new-media world

GEOGRAPHIC, FROM 1C

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By the early 1990s, the National Geographic Society had become a stodgy and inward-looking place even as the media world evolved around it. Circulation of its magazine had dropped from a high of 10.8 million a decade ago to 8.5 million last year.

Eventually, something had to break. National Geographic went through a major restructuring in the mid-1990s, slashing staff and hiring veteran media executives to sharpen the organization's business focus.

One of those executives, John Fahey, rose through the ranks at Time Warner for 20 years before being named in 1996 as the first head of National Geographic's for-profit business arm, which includes television, maps and online ventures. Two years later, he became president of the entire organization.

"We were very insular," Fahey acknowledges. "We couldn't compete without becoming more savvy. The entire focus had been the magazine, which was successful without having to be promoted."

With Fahey at the top and several other senior executives brought in from outside, some of them poached from rival Discovery, National Geographic now seems to have the pieces in place.

While it may be years behind Discovery in building out its cable TV, Internet and retail businesses, National Geographic does possess one of the most valuable assets a media company could ever hope for: a prestigious and well-established brand name.

Having overcome a reluctance to expand and leverage that brand, National Geographic is applying it to logical but previously untried business areas, such as travel books, exotic trips accompanied by experts, goods in stores, even a credit card.

"We're doing more outside the rectangle," says Rick Allen, president of National Geographic Ventures, the for-profit subsidiary.

As part of its coming of age, National Geographic has also latched onto the idea of synergy, leveraging media content across platforms and using those platforms to promote one another.

The current magazine cover story on sharks, for example, also spawned an *Explorer* program to air on CNBC April 9 and 15, a Web chat with the writer, *Jaws* author Peter Benchley, and an expanded online presentation with photos from the trip.

All this may appear to be the behavior of a media company, and in a way it is. In building the cable channel, National Geographic partnered with real-world media heavyweights NBC and Fox.

But legally, National Geographic is still an educational, nonprofit institution, although it does pay taxes on its commercial ventures such as television and mapmaking.

National Geographic had suffered from institutional bloat. Knowing that a major restructuring was long overdue, it named a new president in 1993 with the mandate to shake things up.

Reg Murphy, who had been publisher of The Baltimore Sun, succeeded Gilbert M. Grosvenor, whose family has been leading the National Geographic Society for most of the past century.

Murphy saw the Society through a painful downsizing, closing down a magazine logistics center and eventually slashing its staff by more than half to 1,200 people in 1997.

There have been some bumps on the road of change.

A group of writers and photographers has sued National Geographic, claiming it improperly reused their magazine stories and pictures on a CD-ROM.

The flagship magazine, eager to compete for scoops, also found itself in hot water after doubts were raised about the authenticity of a fossil featured in a story. The fossil from China, which appeared to show feathers on a dinosaur, was unveiled last October as an important discovery, but a panel of scientists determined this week that it was really a composite of at least two different animals.

National Geographic editor Bill Allen said the magazine has a writer looking into the sequence of events involving the fossil. He expects to publish the story this fall.

"It's one of those things you wish would never happen," Allen said. "God knows the lengths we go to to be accurate. But if we make a mistake, it makes news, and I think that's a tribute to our reputation" for accuracy.

There may be more challenges ahead for National Geographic as it reshapes itself. But, in the words of President John Fahey, the alternative of being left behind is not acceptable.

"We need to make sure this organization is as relevant, highly regarded and influential over the next 100 years as it has been over the past 100 years," Fahey said. "Our great challenge is the balancing act: How do we modernize ourselves while preserving our tradition?"

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With Fahey at the top and several other senior executives brought in from outside, some of them poached from rival Discovery, National Geographic now seems to have the pieces in place.

While it may be years behind Discovery in building out its cable TV, Internet and retail businesses, National Geographic does possess one of the most valuable assets a media company could ever hope for: a prestigious and well-established brand name.

Having overcome a reluctance to expand and leverage that brand, National Geographic is applying it to logical but previously untried business areas, such as travel books, exotic trips accompanied by experts, goods in stores, even a credit card.

"We're doing more outside the rectangle," says Rick Allen, president of National Geographic Ventures, the for-profit subsidiary.

As part of its coming of age, National Geographic has also latched onto the idea of synergy, leveraging media content across platforms and using those platforms to promote one another.

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All this may appear to be the behavior of a media company, and in a way it is. In building the cable channel, National Geographic partnered with real-world media heavyweights NBC and Fox.

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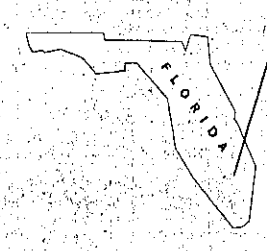
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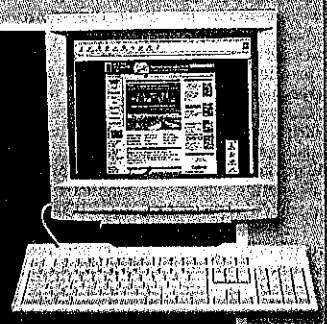
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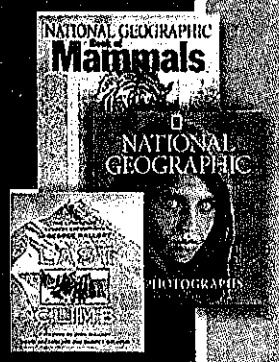
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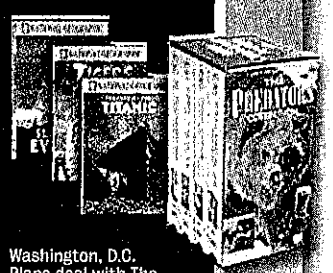


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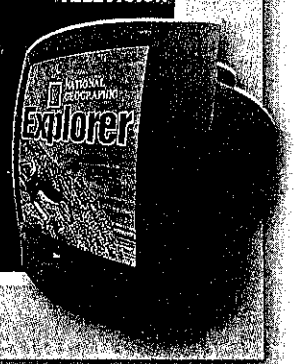


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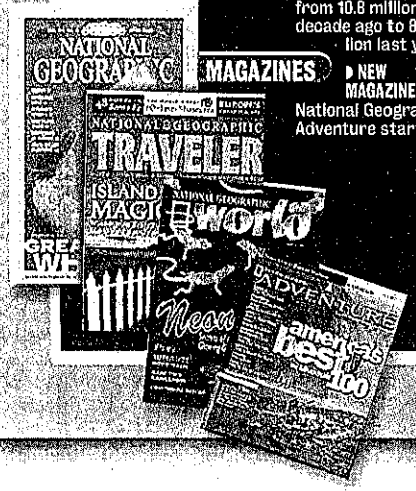
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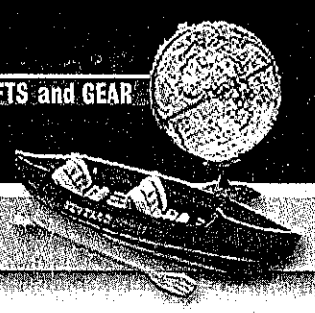


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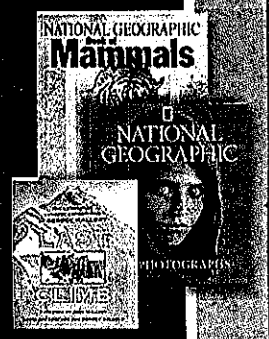
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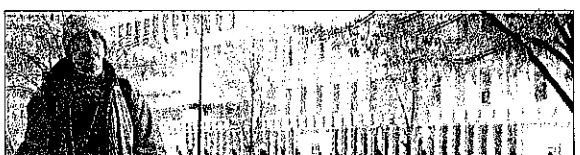


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Photo illustration by HIRAM HENRIQUEZ / HERALD STAFF

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BY ELAINE WALKER

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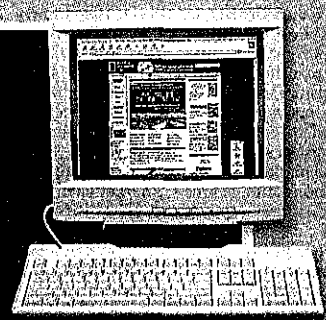
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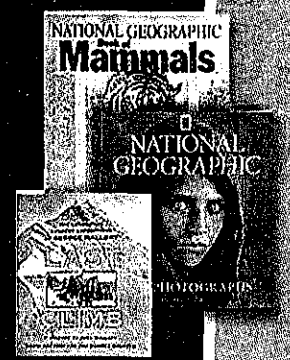
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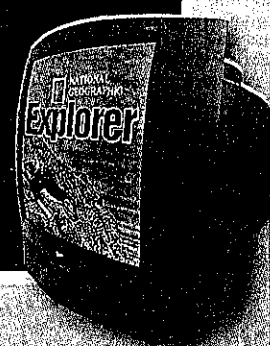


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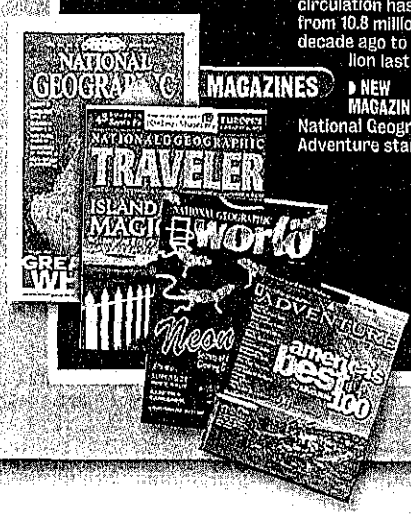
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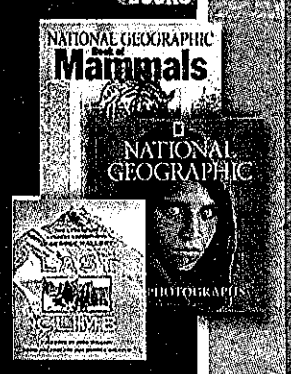
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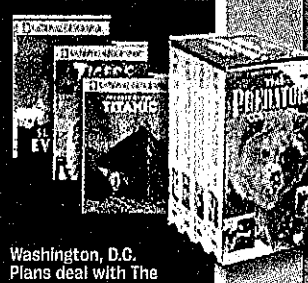


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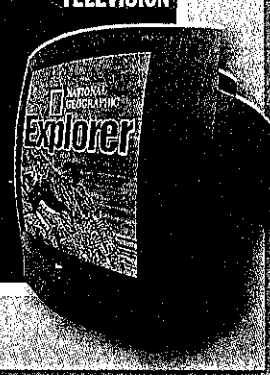


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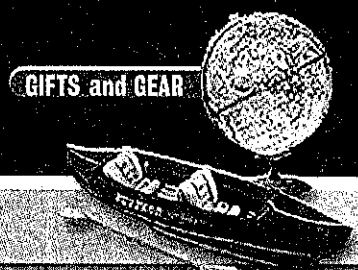


Photo illustration by HIRAM HENRIQUEZ / HERALD STAFF

Magazine explores new-media world

▶ GEOGRAPHIC, FROM 1C

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Eventually, something had to break. National Geographic went through a major restructuring in the mid-1990s, slashing staff and hiring veteran media executives to sharpen the organization's business focus.

One of those executives, John Fahey, rose through the ranks at Time Warner for 20 years before being named in 1996 as the first head of National Geographic's for-profit business arm, which includes television, maps and online ventures. Two years later, he became president of the entire organization.

"We were very insular," Fahey acknowledges. "We couldn't compete without becoming more savvy. The entire focus had been the magazine, which was successful without having to be promoted."

With Fahey at the top and several other senior executives brought in from outside, some of them poached from rival Discovery, National Geographic now seems to have the pieces in place.

While it may be years behind Discovery in building out its cable TV, Internet and retail businesses, National Geographic does possess one of the most valuable assets a media company could ever hope for: a prestigious and well-established brand name.

Having overcome a reluctance to expand and leverage that brand, National Geographic is applying it to logical but previously untried business areas, such as travel books, exotic trips accompanied by experts, goods in stores, even a credit card.

"We're doing more outside the rectangle," says Rick Allen, president of National Geographic Ventures, the for-profit subsidiary.

As part of its coming of age, National Geographic has also latched onto the idea of synergy, leveraging media content across platforms and using those platforms to promote one another.

The current magazine cover story on sharks, for example, also spawned an *Explorer* program to air on CNBC April 9 and 15, a Web chat with the writer, *Jaws* author Peter Benchley, and an expanded online presentation with photos from the trip.

All this may appear to be the behavior of a media company, and in a way it is. In building the cable channel, National Geographic partnered with real-world media heavyweights NBC and Fox.

But legally, National Geographic is still an educational, nonprofit institution, although it does pay taxes on its commercial ventures such as television and mapmaking.

National Geographic had suffered from institutional bloat. Knowing that a major restructuring was long overdue, it named a new president in 1993 with the mandate to shake things up.

Reg Murphy, who had been publisher of The Baltimore Sun, succeeded Gilbert M. Grosvenor, whose family has been leading the National Geographic Society for most of the past century.

Murphy saw the Society through a painful downsizing, closing down a magazine logistics center and eventually slashing its staff by more than half to 1,200 people in 1997.

There have been some bumps on the road of change.

A group of writers and photographers has sued National Geographic, claiming it improperly reused their magazine stories and pictures on a CD-ROM.

The flagship magazine, eager to compete for scoops, also found itself in hot water after doubts were raised about the authenticity of a fossil featured in a story. The fossil from China, which appeared to show feathers on a dinosaur, was unveiled last October as an important discovery, but a panel of scientists determined this week that it was really a composite of at least two different animals.

National Geographic editor Bill Allen said the magazine has a writer looking into the sequence of events involving the fossil. He expects to publish the story this fall.

"It's one of those things you wish would never happen," Allen said. "God knows the lengths we go to to be accurate. But if we make a mistake, it makes news, and I think that's a tribute to our reputation" for accuracy.

There may be more challenges ahead for National Geographic as it reshapes itself. But, in the words of President John Fahey, the alternative of being left behind is not acceptable.

"We need to make sure this organization is as relevant, highly regarded and influential over the next 100 years as it has been over the past 100 years," Fahey said. "Our great challenge is the balancing act: How do we modernize ourselves while preserving our tradition?"

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Here is an almost instant report on LAW.COM about Jerry Greenberg's Appeals Court hearing in Atlanta on Tuesday, Oct. 3, 2000.-

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Case Could Alter Copyright Law for Internet, CD Use
R. Robin McDonald
Fulton County Daily Report

October 5, 2000

In a case that pits a freelance photographer against a publisher, an 11th U.S. Circuit Court of Appeals panel could redefine copyright law to

fit today's high-tech era.

A three-judge panel of Atlanta's 11th U.S. Circuit Court of Appeals on Tuesday heard oral arguments on whether the National Geographic Society violated copyright law when it reproduced on CD-ROM disks a series of magazines containing freelance photographer Jerry Greenberg's photos without his permission. Greenberg v. National Geographic Society, No. 00-10510-C (11th Circ. Oct. 3, 2000).

The case is being watched closely by publishers. Kilpatrick Stockton partner Joseph M. Beck has filed a "friend of the court" brief on behalf

of Gannett Co., The New York Times Co., Time Inc., the Times Mirror Co., Hatchette Filipacchi Magazines, the Tribune Co., the Magazine Publishers of America and the Newspaper Association of America. In that brief, Beck claims a ruling favoring Greenberg "would seriously diminish public access to a substantial portion of the historical record

compiled by this nation's magazines and newspapers."

The American Society of Photographers has countered with a brief on Greenberg's behalf.

A district court judge in Florida last year ruled that the National Geographic Society's CD-ROM set had not infringed on Greenberg's photo copyrights.

In oral arguments that lasted a nearly unprecedented 90 minutes Tuesday, the judicial panel aggressively questioned opposing counsel and laid out in often blunt language issues that are surfacing in Internet

and computer copyright suits across the country.

SIMILAR CASE BEFORE HIGH COURT

The Greenberg case is similar to a New York case pending before the U.S. Supreme Court. In Tasini v. The New York Times, 206 F.3d 161, (2nd Circ., Sept. 24,1999, amended Feb. 25, 2000) a 2nd Circuit panel ruled last year that newspaper and magazine publishers must obtain

reprint permission from freelancers and other independent contractors for works published on the Internet through electronic archives such as Nexis.

The Atlanta panel included Judge Gerald B. Tjoflat, Chief Judge R. Lanier Anderson III, and Judge Stanley F. Birch Jr. Anderson was one of two appeals court judges last year who revived a copyright infringement suit against CBS by the family of Martin Luther King Jr. A federal district court judge had ruled that King's "I Have A Dream" speech was in the public domain. But Anderson penned the appeals court opinion that King's copyright had not been forfeited. Birch is a scholar of intellectual property law whose courthouse portrait depicts him holding "Nimmer on Copyright," the definitive legal text on copyright law.

Among the legal issues raised by the judges:

• Who owns publication rights—the freelancer or the publisher?—for a medium that was not expressly included in a licensing agreement because the medium did not exist at the time of the agreement.

• Is a publisher's reproduction, without alteration, of back magazine issues on CD-ROM a simple compilation, equivalent to microfilm or microfiche reproduction, which is allowed by copyright law?

• Does translating the published material to a new computer medium and adding a separately copyrighted search engine that functions as an index sufficiently alter the freelancer's work so that it is derivative
and,
thus, subject to copyright protection?

At stake are royalties that publishers could be forced to share with freelancers whenever they reproduce and sell the freelancers' published works in merchandise designed for computer access.

Said Birch: "All this is about who gets the money, whether you [publishers] can get the money or have to share it with some author."

PHOTOGRAPHER'S CONTRACTS

Greenberg has been selling photos for publication in The National Geographic since 1961. According to Greenberg's attorney, Norman Davis of the Miami firm Steel Hector & Davis, the photographer's contracts generally included a copyright clause stating that, after publication, all rights to his photos reverted to him. In addition, in 1985, Greenberg wrote to the magazine, asking for a letter clarifying his ownership of the rights to his published photos. The magazine's attorney complied in a notarized letter reassigning the rights to Greenberg's published photos to the photographer, Davis said.

But in 1997, the National Geographic Society began selling a set of 30 CD-ROM disks containing 108 years of The National Geographic, which included Greenberg's photos. Greenberg contended the society had no right to republish his photos because they had reassigned the photo rights to him and because the CD-ROM set was "a new derivative work" protected by federal copyright law.

The CD-ROM set, in addition to containing reprints of each magazine cover and contents, also included a video sequence of moving covers, including one shot by Greenberg.

'A NEW ANTHOLOGY'

Greenberg's attorney argued in his appellate brief that the CD-ROM set was "a new anthology" rather than a simple reprint. National Geographic, Davis argued, retained the rights to reprint only copies of the original magazine.

"Congress," he wrote, "did not intend to permit the inclusion of previously published freelance contributions —? such as the Greenberg photographs --in a completely new anthology or in later collective works not in the same series. The society cannot contend that The Complete Geographic is a collective work in the same series as each issue of the monthly magazine."

But defense attorney Robert Sugarman of the New York law firm Weil, Gotshal & Manges argued that the reproduction, including revisions, of the original publication are not a copyright infringement. In his appellate brief, he argued that the CD-ROM library was no different from bound volumes of The National Geographic or reproductions on microfilm and microfiche.

"The difference in the medium is immaterial," he wrote. "The fact that multiple issues of the magazine are included on one CD-ROM disk is immaterial, just as the inclusion of more than one issue of the magazine in a bound volume or on a roll of microfilm or microfiche is immaterial.

The addition of tables of contents, introductions and advertisements is immaterial, just as the addition of tables of contents and indices in bound volumes, microfilm and microfiche is immaterial."

IS CD SET A REPRINT?

From the bench, Judge Anderson searched for a distinction between selling the CD-ROM set of National Geographics and simply selling bound volumes of back issues, which Davis acknowledged did not infringe Greenberg's copyright. And he pondered whether binding a decade's worth of issues in a single volume was truly the same as "binding" them on a computer disk.

"The question in my mind is whether reproduction in a computer format constitutes a sufficient transformation," he said. "You say the medium makes no difference. But here, the medium creates a new market." Does the legal privilege that grants publishers certain reprint rights extend to that new market, he asked.

Anderson also questioned whether a collective work refers to a single

published issue or to the entire, historical body of the publication. The
difference is key, he noted. If the entire back list of a publication is

considered a single "collective work" to which a freelance author, illustrator or photographer contributed, copyright law may permit reprints or revisions of multiple issues in a single volume without infringement.

Said Davis: "Each magazine is a collective work. The combined product is

a different collective work."

Anderson also asked at what point a revised edition of a collective work

might metamorphose into a new, derivative publication. Greenberg's lawyer, the judge noted, argued that the National Geographic's CD-ROM "is so changed it is more than a revision, it is a derivative work. If you're wrong in that, you lose." But, Anderson added, "I think you may be right on that."

Birch and Tjoflat zeroed in on the details of the contracts between Greenberg and The National Geographic and how clearly those contracts spelled out the disposition of the photo copyrights.

"I don't see how anybody can decide this case without knowing what the contract arrangements were," Tjoflat complained. "They told us nothing in the record that sets out the agreements."

And Birch noted that copyright law only comes into play "if there's a void, if the contract doesn't speak to it." If the licensing agreements between a freelancer and a publisher do not include reproducing a purchased work in a new medium or as a new product, "You lose," he told Sugarman, the National Geographic's attorney. "If the licensing agreement doesn't contemplate it, you lose."

BIRCH: MEDIUM MATTERS

Birch also took issue with Sugarman's argument that the medium in which a work was reproduced is irrelevant.

"If an author of a novel gives a license ... to a publisher to publish a

novel in hardback or in softback, we're saying the medium doesn't matter. A publisher can make a movie of it, too. Of course not. The medium matters in copyrights. One of the exclusive rights of the author is to make a derivative work. If a CD-ROM constitutes a derivative work, they [the National Geographic Society] are in violation of an exclusive right of the author."

Like Anderson, Birch questioned whether the National Geographic's CD-ROM set is really a compilation or whether the National Geographic Society and Mindscape, which produced the CD-ROM set, are being disingenuous in making that claim. Birch noted that both the society and Mindscape secured new copyrights for the set.

"What a CD-ROM set is really not analogous to is bound volumes," he

said. "What you've got is a brand new work for a new medium for a new market that was never contemplated by the parties or in the licensing agreement. ... I suggest the author has exclusive right to make derivative works. It is as plain as day to me this is a derivative work, and the society has exercised a right it doesn't have."

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