COURT OVERTURNS TASINI RULING

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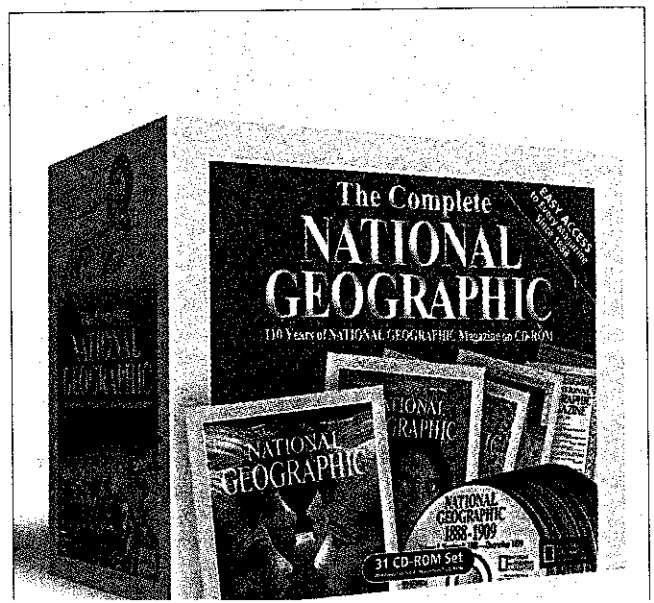
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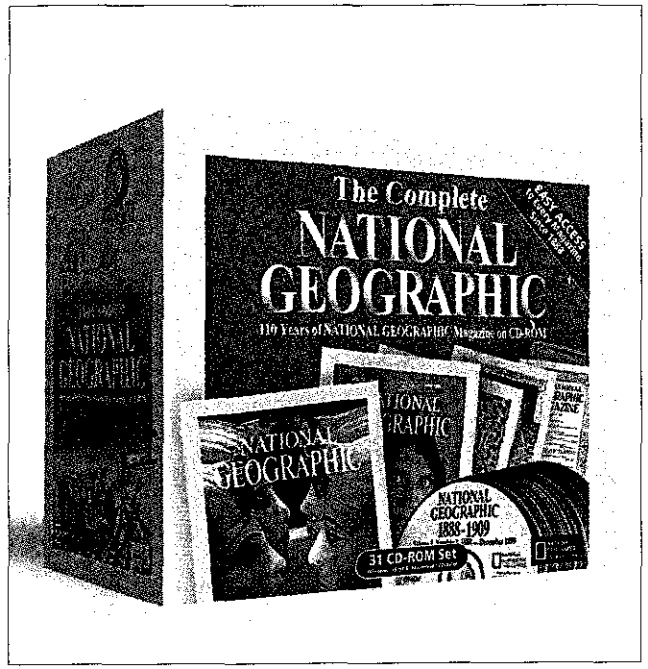
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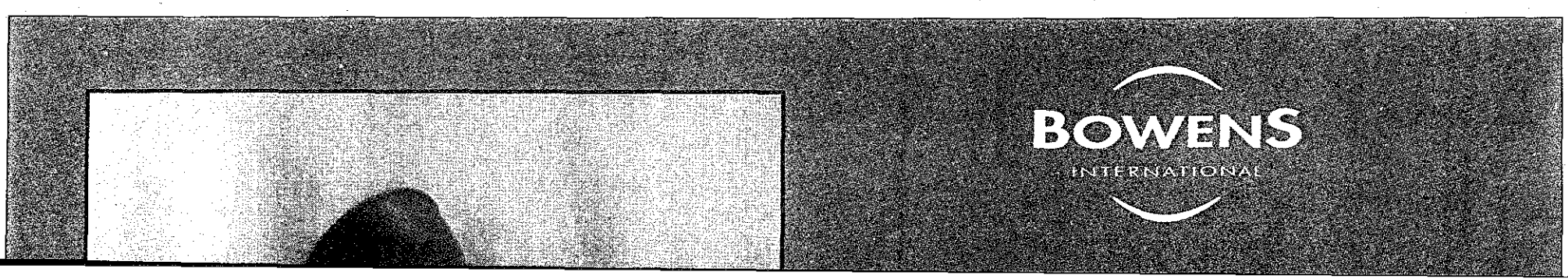
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What does this landmark case mean for other photographers? Importantly, they will now have the opportunity to collect fees for previous unauthorized electronic uses, particularly in databases. Across the industry, such uses may number in the thousands.

In the future, though, publishers will no doubt put pressure on writers and photographers to sign "all-rights" or "work-for-hire" contracts or, at the very least, to sign over electronic reproduction rights, attorneys predict. "The question is how much they'll pay for those additional rights," says Hecker. His advice: "Make sure you understand what rights you are transferring, and make sure you agree to the compensation." □



The new ruling declares that electronic databases are not a "revision" under copyright law, but leaves unanswered questions about other electronic publishing projects. "The Complete National Geographic" CD-ROM, for example, reproduces every page of every issue of the magazine for the last 108 years. If it is a revision, the National Geographic Society owes no licensing fees to freelance photographers whose work appears on the CD-ROM. If the CD-ROM is a new work, the publisher may owe photographers hundreds of thousands of dollars in usage fees.



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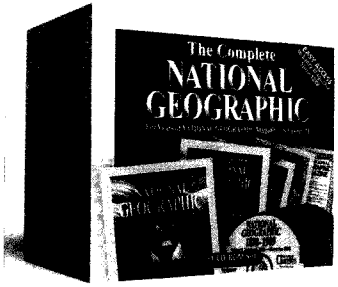
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Photogs Ask Supreme Court To Hear NGS Case

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"[The Supreme Court's] review is urgently needed to resolve the conflict between the Second and Eleventh Circuits," Ward's lawyers argued in their petition to the high court. "Unless NGS is held accountable for the engine of infringement it has created, copyright will soon mean nothing in the digital world and the incentives on which our copyright system rests will be severely diminished."

NGS spokesperson M.J. Jacobsen says the publisher will not oppose the requests for a Supreme Court hearing, in order to get the conflict between the appellate court rulings resolved.

"It is a virtually impossible position for any [publisher] to know that one federal appellate court holds a single product perfectly appropriate and lawful under federal law in three states and another federal appellate court to hold precisely the same product an improper infringement of federal copyright law in three other states," Jacobsen says.

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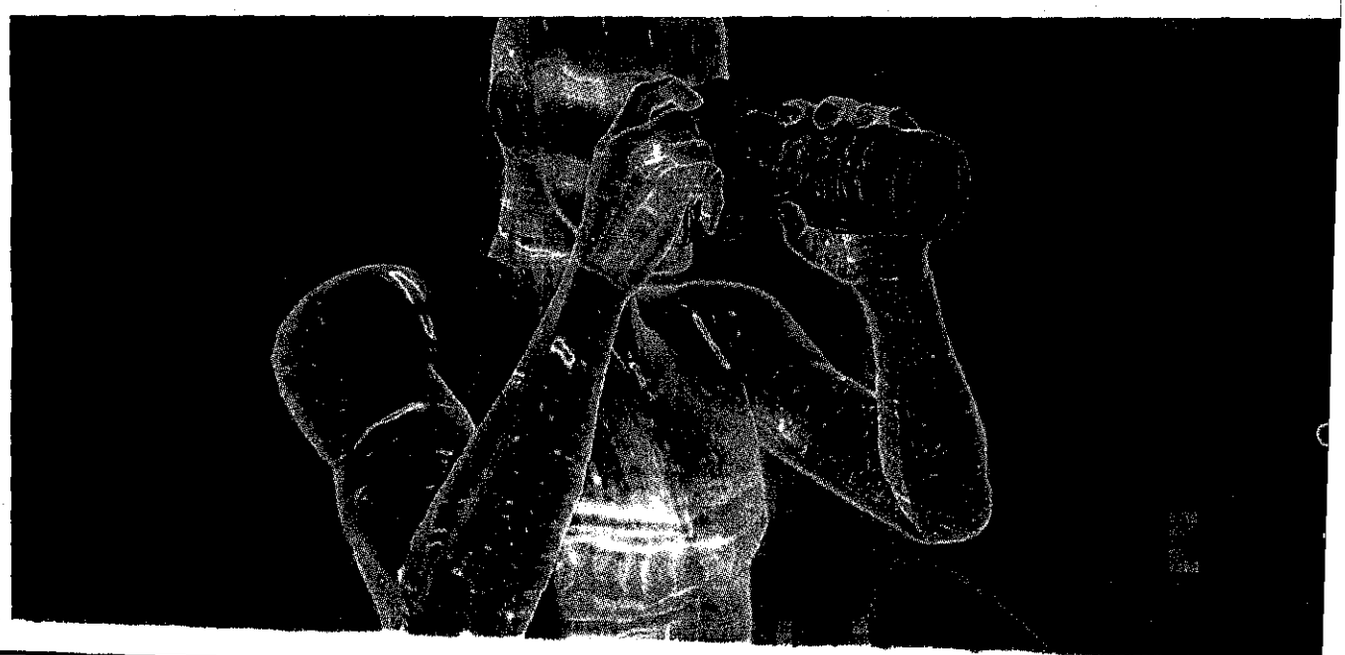
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PDNEWS

Supreme Court Refuses to Hear NGS Case

The U.S. Supreme Court has declined to review an appeals court ruling in favor of the National Geographic Society over the publisher's unauthorized use of images on a CD-ROM. The high court gave no explanation for its decision.

Photographers Fred Ward, Douglas Faulkner and Louis Psihoyos all sued NGS for copyright infringement over the use of their images on The Complete National Geographic, a CD compilation that reproduces all past issues of NGS in electronic form.

The U.S. Court of Appeals for the 2nd Circuit ruled earlier this year that the NGS CD did not infringe the photographers' copyrights because the CD is a revision of existing works, rather than a new work. Copyright law allows publishers to revise existing works without permission from owners of articles or photos included in the original works.

The photographers believe the 2nd Circuit Court erred by concluding that the CD compilation is a revision. Moreover, the 2nd Circuit ruling contradicted an earlier ruling by the U.S. Court of Appeals for the 11th Circuit, located in Atlanta, which concluded that the CD was, in fact, a new work.

The 11th Circuit Court reached its conclusion in the case of *Jerry Greenberg v. The National Geographic Society*. Greenberg has won a $400,000 jury award in that case, although National Geographic continues to file motions to reverse the verdict.

Lawyers for the photographers who lost their claims in the 2nd Circuit Court had argued to the Supreme Court that its involvement in the case "is urgently needed to resolve the conflict between the 2nd and 11th Circuits."

After the Supreme Court declined to hear the case, Ward wrote in a "dear friends and colleagues" e-mail, "Today was a black day...this puts the entire publishing industry in a quandary."

Although he has exhausted avenues for appeal on his copyright claims, Ward has vowed to pursue various state law claims against NGS.

National Geographic also wanted the conflicting appeals court rulings resolved, so it had also asked the Supreme Court court for a review of the 2nd Circuit ruling.

National Geographic spokesperson M.J. Jacobsen says "one can only infer" that the Supreme Court declined to take the case because it agreed with the 2nd Circuit's ruling. On that basis, National Geographic intends to appeal the Greenberg ruling to the 11th Circuit again, Jacobsen says. She hinted that if the 11th Circuit doesn't reverse itself and rule in the publisher's favor as the 2nd Circuit has, NGS will take the Greenberg case to the Supreme Court.

Back in 2001, however, the Supreme Court declined a request from NGS to hear the Greenberg case after NGS lost that case in the 11th Circuit.

Review

PHOTO DISTRICT NEWS MAY, 2006

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Jupitermedia's acquisitions were part of its strategy to focus resources on its stock photography business, with intent to challenge industry leader Getty Images head-on in the royalty free sector. Getty had distributed Jupiter's brands, but the two agencies had a falling out over revenue sharing. Jupiter CEO Alan Meckler later suggested Getty was using "storm trooper tactics to prevent competition in the marketplace."

In another sign of the dog-eat-dog competition, Meckler took Getty to task for buying Google rights to several of Jupiter's trademarked brands —at least briefly—so that Getty ads would pop up when Google users searched for the Jupiter brands.

The battlegrounds in the stock business, meanwhile, have been expanding to include new market segments. One of those segments is stock photo subscription services, which provide customers with access to thousands of images for a flat monthly or annual fee.

Getty entered the subscription services business in August with a collection of 50,000 images. At the time of the launch, customers were allowed use of up to 50 print-quality images per day for $499 per month, or $1,999 per year.

Two weeks later, Jupiter made most of its collection available on a subscription basis for prices ranging from $2,500 to $10,000 per year, depending upon resolution.

So-called micropayment sites represent another new and growing category of the stock photo business. Sites such as iStockPhoto.com and ShutterStock solicit contributions from amateur and semi-professional photographers, maintain forums for those photographers to exchange information and feedback, and license images to users for as little $1 (in iStockPhoto's case) or for low monthly subscriptions (ShutterStock).

Jupiter bought into the segment earlier this year by purchasing a minority interest in HAAP media, a Hungarian company that owns micro sites Stock.xchng and Stockxpert.com.

"It's something of an insurance policy" says Meckler, who doesn't want to miss an opportunity or expose his business to a threat if the micropayment model takes off.

About two weeks later, Getty staked its claim in the micropayment business by purchasing iStockPhoto.com for $50 million.

Amid the jockeying and squabbling, though, was at least one random act of generosity and kindness: the former owners of Picture Arts shared with their employees $7 million of the proceeds from the sale of their company to Jupitermedia. "We got where we are because we've hired smart, hard-working people," says Jeffrey Burke, who co-owned Picture Arts with his wife, Lorraine Triolo. "We felt obligated to share."

LEGAL DEVELOPMENTS

Photographers continued to grapple in 2005 with post-9/11 security measures that infringe on their First Amendment rights to take pictures of public buildings, bridges and other infrastructure visible from public places.

Their most successful battle was the defeat last May of a proposed ban on photography and video in the New York City subway system. The New York Civil Liberties Union (NYCLU) took up the fight on behalf of photographers, and the National Press Photographers Association (NPPA) came out strongly against the proposed restrictions, saying they were "truly ineffective and [would] hinder working photographers everywhere." The City of New York dropped the proposal after police determined that they could not enforce such a ban.

But such battles are never quite over. Transit police on the Long Island Railroad, which is under the same authority as the subway system, continued to enforce the non-existent ban well into 2006. Transit authorities vowed to stop those enforcement actions after the NYCLU lodged a formal complaint.

On the copyright front, the infringement claims of photographers against National Geographic Society reached an impasse after nearly a decade in the courts. The fight is over whether NGS needs permission to reuse photographers' images on its CD-ROM compilation of all back issues of *National Geographic* magazine.

Last year, a federal appeals court in New York City ruled that NGS was within its rights to publish the CD without permission from the photographers. But that ruling contradicted an earlier ruling by a federal appeals court in Atlanta, which said NGS had violated Florida photographer Jerry Greenberg's copyrights by publishing his images on the CD without permission.

The Supreme Court refused to review the ruling by the New York appeals court, leaving photographers and NGS in a state of uncertainty about whether or not the CD violates copyright. So the fight goes on, with photographers in the New York case vowing to pursue contract claims against NGS in state courts. Meanwhile, NGS has taken the Supreme Court's refusal to review the New York appeals decision as affirmation that their CD is legal, and redoubled efforts to get the appeals ruling from Atlanta reversed. NGS is doing that not only to avoid paying a $400,000 damage award to Jerry Greenberg, but to ensure it can safely sell the CDs in states under the jurisdiction of the Atlanta court.

Review

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PHOTO DISTRICT NEWS
MAY, 2006. PG. 29

Review

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November 10, 2005

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New Yorker on DVD
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their works electronically. For an online archive of selected articles from the Atlantic Monthly spanning 148 years, Atlantic Media Co. says its editors asked individual authors for permission, and in most cases the authors obliged without asking for additional payment. The archive, now available to subscribers on the Web site theatlantic.com1, contains regular Web pages with text that can be searched, copied and pasted.

A major difficulty for publishers is that court cases have moved more slowly than technology, says Lawrence Lessig, a professor of law at Stanford University. And the recent court rulings' emphasis on original context may have missed the point, as more powerful search tools become common in personal computing. "There is no such thing as context, or relevant context, as you move off into a digital form," Prof. Lessig says.

Write to Jessica Mintz at jessica.mintz@wsj.com2

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November 10, 2005

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When editors at Harper's Magazine decided to launch an online archive spanning their magazine's 150-year history, "the first thing we did was talk to our lawyer," says Paul Ford, an associate editor. The magazine's archive, which is expected to be up soon, will use a combination of text and page images, depending on copyright requirements of the articles.

Some magazines have picked their way through the copyright minefield by simply getting permission from individual writers to republish

their works electronically. For an online archive of selected articles from the Atlantic Monthly spanning 148 years, Atlantic Media Co. says its editors asked individual authors for permission, and in most cases the authors obliged without asking for additional payment. The archive, now available to subscribers on the Web site theatlantic.com1, contains regular Web pages with text that can be searched, copied and pasted.

A major difficulty for publishers is that court cases have moved more slowly than technology, says Lawrence Lessig, a professor of law at Stanford University. And the recent court rulings' emphasis on original context may have missed the point, as more powerful search tools become common in personal computing. "There is no such thing as context, or relevant context, as you move off into a digital form," Prof. Lessig says.

Write to Jessica Mintz at jessica.mintz@wsj.com2

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(1) JAVASCRIPT:OpenWin('http://theatlantic.com','','','na+me+lo+sc+re+st+',true,0,0,true);void('')
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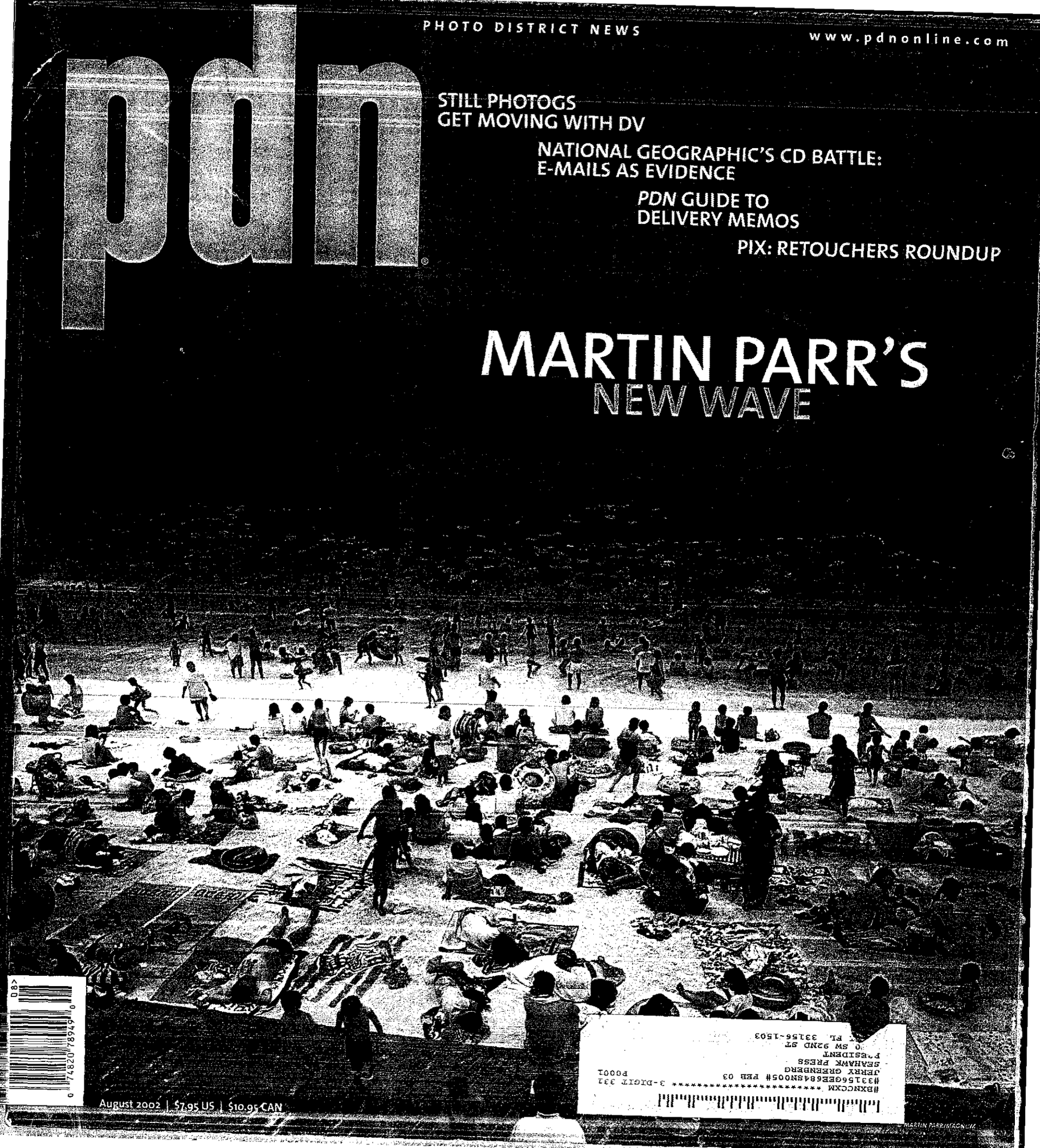
STILL PHOTOGS GET MOVING WITH DV

NATIONAL GEOGRAPHIC'S CD BATTLE: E-MAILS AS EVIDENCE

PDN GUIDE TO DELIVERY MEMOS

PIX: RETOUCHERS ROUNDUP

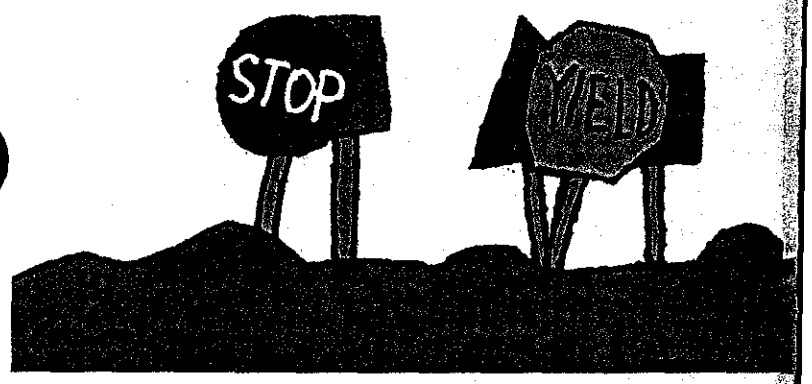
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NGS'S INCRIMINATING MEMOS



In the latest battles over the National Geographic Society's CD, photographers are using the publisher's own internal memos and e-mails as evidence NGS willfully infringed copyrights.

By David Walker

The National Geographic Society (NGS) was warned repeatedly in advance by outside attorneys and its own editorial staff that its archival CD product would infringe the copyrights of photographers and expose the publisher to legal liability, according to court documents filed in May by two photographers.

NGS now faces a barrage of lawsuits over *The Complete National Geographic* CD, which reproduces its complete magazine archive page by page. And despite contradiction by its own internal documents, the publisher has steadfastly maintained in its public statements and in court proceedings that its CD doesn't infringe copyright.

Photographers suing the publisher are now using the internal memos to bolster their claims that NGS not only infringed their copyrights, but did so willfully. If they succeed, NGS is likely to face much higher penalties than it would if found guilty of so-called innocent infringement.

So far, the memos appear in court papers filed by photographers Douglas Faulkner and Fred Ward in a New York federal court.

According to Faulkner's papers, NGS consulted several outside attorneys—prior to publishing the first edition of the CD in 1997—for advice on whether it had the rights it needed to re-use images on the CD. One of the attorneys responded that the publisher's legal liability could be as high as $16 million for unauthorized use of images provided by stock photo agencies. And that estimate was only for stock photos published in the magazine between 1992 and 1996, according to Faulkner's court papers.

A second outside counsel told NGS that he did not believe any of the photo licenses from stock houses would permit re-use of the photos in an archival CD, Faulkner asserts. The third attorney apparently didn't give NGS a direct warning against publishing the CD, but according to Faulkner, that attorney told NGS "there is equitable appeal to [the] argument that a publisher should not be able to profit from exploitation of an author's work in a different medium without additional compensation. . .especially if exploitation in the later medium was not contemplated at the time of the contract."

Author Jonathan Tasini was making just such an argument against *The New York Times* at that time, and he eventually prevailed in the Supreme Court's *New York Times* v. *Tasini* ruling last summer.

Faulkner's papers also cite a letter from NGS staff attorney Suzanne Dupre, who told one of the publisher's outside lawyers that reviewing contributor contracts for "print use only" restrictions on photo licenses would take too much time and effort. "We are not clearing rights to images in these situations," Dupre wrote, according to Faulkner's filing.

NGS went ahead and published the images on the CD anyway. Only in its third and latest version of the CD—released late last year—did NGS begin removing stock images provided for use in the magazine with licenses that specified "no electronic use." In all, about 60 images have been removed.

In its response to charges that it infringed Faulkner's images willfully, NGS blasts the photographer for "outright distortion of the record" regarding the legal advice obtained by the publisher. "Two of the NGS's three outside attorneys as well as its in-house counsel, opined that the Society had the right to publish *The Complete National Geographic*," NGS says.

One attorney, alleged by Faulkner to have advised against the CD, is quoted by NGS as having written, "[NGS] has a persuasive argument that [publication of the CD] does not create any obligation to make additional payments to writers and photographers. . . ."

NGS also says opinions about the legality of re-using stock photos "is irrelevant" in Faulkner's case because his images were shot on assignment.

Besides quoting NGS lawyers, Faulkner's motion also quotes various NGS staff members who allegedly warned NGS executives during the production phase of the CD that they were making an ethical and legal mistake.

In March 1997, for instance, assistant director of photography Kent Kobersteen sent an e-mail to director of photography Tom Kennedy and NGS editor Bill Allen warning against publishing the CD without permission from photographers.

". . .It seems to be these two situations [that CD product is marketed to the general public and is more interactive than microfiche] invite any judge—and most certainly any jury—to conclude that the CD-ROM and microfiche are considerably different

> ACCORDING TO FAULKNER'S COURT PAPERS, AN ATTORNEY WARNED NGS ITS LEGAL LIABILITY COULD REACH $16 MILLION FOR UNAUTHORIZED USE OF STOCK PHOTOS.

products," Kobersteen wrote. (Kobersteen is now the magazine's director of photography.)

Around the same time, *National Geographic* illustrations editor Dennis Dimick sent an e-mail to Allen. "I attempted to point out the moral issues of not making good faith efforts to find [and] compensate all copyright holders," he said in his e-mail. "I was essentially told by counsel this was a business decision, and thank you for your emotional arguments."

In April, then executive editor Robert Poole also appealed to Allen on both legal and moral grounds in another written memo. "Since we expressly returned copyright to many authors," he wrote, "I do not see how we can take the position that it's ours not theirs. We are republishing it in another form, for profit. Even if our legal position is sound (and I don't think it is), our ethical position is not. Does anyone care about that?"

NGS says those messages are also taken out of context. For instance, Kobersteen and Poole weren't making legal judgments. Instead, their concerns related to whether "as a matter of sound business judgment, it would be prudent to embark upon a course that was likely to upset contributors to the magazine."

NGS says it is confident that if the evidence is "fairly presented and considered, the jury will find that [NGS] did not willfully infringe [the photographers'] copyrights."

But if NGS has its way, the case won't get to trial. The publisher has asked for summary dismissal on the grounds that the CD and its magazines are different versions of the same product, and, so, as a matter of law, no copyright infringement occurred.

An Atlanta appeals court already rejected that argument last year, however. That court ruled that the NGS CD infringed photographer Jerry Greenberg's copyright by reproducing several of his photos without permission. NGS had argued that the CD was a reproduction of its magazines in a different medium, like microfiche, so no permission was required. The court disagreed with NGS, concluding that the CD was a completely different product from the magazine. The Supreme Court later affirmed the ruling by refusing to review it. Greenberg's case is now in the penalty phase, and the photographer is also using the internal memos to prove willful infringement—and boost the publisher's penalty.

"EVEN IF OUR LEGAL POSITION IS SOUND (AND I DON'T THINK IT IS), OUR ETHICAL POSITION IS NOT."
—ROBERT POOLE, APRIL '97

Meanwhile, the saga of the CD has taken another bizarre twist. Late last year, NGS released the latest version of the CD (*The Complete National Geographic: 112 Years on CD-ROM*) with a license that permits buyers to re-use the images in any digital or print product, commercial or personal. In other words, the images were released as clip art.

NGS says it was a mistake that nobody noticed until a photographer's agent brought it to the publisher's attention on May 6—about six months after the release.

"Since that date, we have aggressively pursued a recall and remedies to fix the mistake," says NGS spokesperson Mary Jeanne Jacobsen. She declined to say how many of the CDs were sold, but adds, "We know of no misuse by anyone who has purchased the CD-ROM with the erroneous end-user agreement."

Ward says he's skeptical about the ability of NGS to recall the CDs. "I don't see how it's possible for NGS to contact buyers of the product because there's no mandatory registration," he says.

Jacobsen says, "We have the names and addresses of nearly all the people who bought the product from the vendor because of the sales channels used; for example, many were sold online. We are in the process of contacting all purchasers by letter."

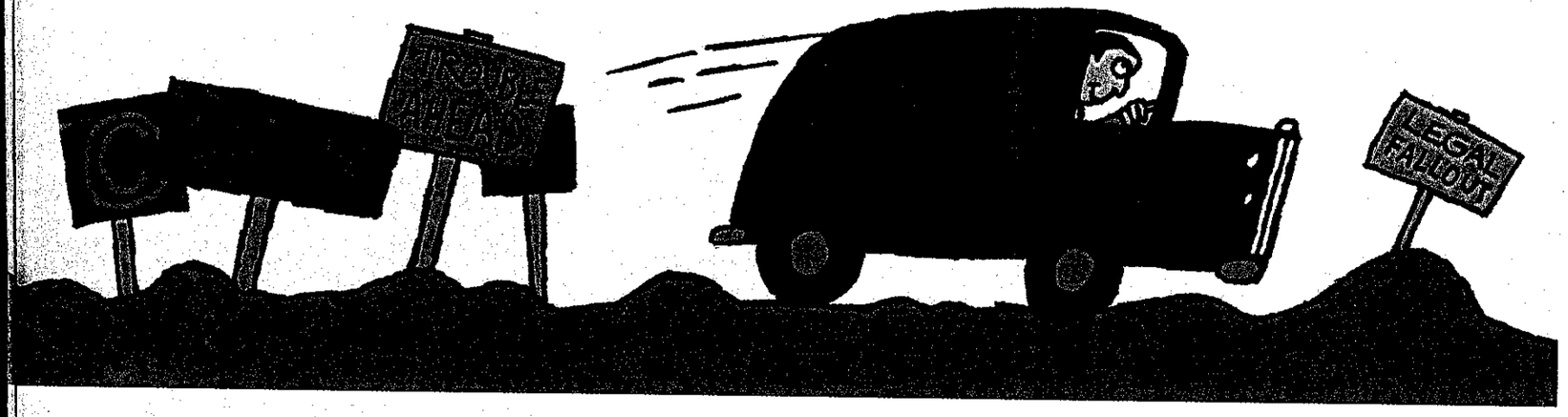


ILLUSTRATION © SCOTT MENCHIN

Allen was certainly concerned, according to Faulkner's court papers. In March 1997, Allen wrote to his boss, NGS CEO and president John Fahey, "We are so far down the road at this point that we probably just have to keep smoothing as many bumps as possible and drive like hell with our fingers crossed."

"WE ARE SO FAR DOWN THE ROAD AT THIS POINT, WE PROBABLY JUST HAVE TO... DRIVE LIKE HELL WITH OUR FINGERS CROSSED."
—BILL ALLEN, MARCH '97

Fred Ward and Douglas Faulkner's court papers quoting the NGS's memos are now online at <www.pdnonline.com/features/lawsuit/>.

The Washington Post

BUSINESS

TUESDAY, NOVEMBER 26, 2002

Geographic Gets in the E-Picture

Society to Sell Its Images Online

By YURI NOGUCHI
Washington Post Staff Writer

Sinewy cheetahs leap across the savannah in pursuit of prey. Grizzly bears swipe greedily at homeward-bound salmon. Dusk casts orange light over a vivid panorama of the Grand Canyon.

Since its founding in 1888, the National Geographic Society has documented the world's natural marvels through 10.5 million images like these, culled mostly from photographs, but also from sketches, paintings, glass plates and daguerreotypes.

"This is a repository for the 20th century," says Maura Mulvihill with a grand gesture, as if encompassing the sweep of history, from cave drawings to images of laser eye surgery.



BY MICHAEL WILLIAMSON—THE WASHINGTON POST

Maura Mulvihill heads National Geographic's online effort to sell the society's images to businesses.

Mulvihill's mission is to make art work for commerce. As vice president of the society's image collection, her job is to sell those images to businesses, which in turn use them to sell their own products. Today, National

See PICTURES, *E5, Col. 1*

Society to Unveil Archive Online Today

PICTURES, From E1

Geographic is officially unveiling its big new online commercial digital archive in an attempt to triple its revenue in the next three to five years.

The task of choosing, scanning, cataloging and marketing the initial 10,000 pictures was a business necessity. Competitors Getty Images Inc. and Corbis have been selling their images digitally for about four years, and the nonprofit National Geographic was falling behind the times. Since 1995, it had been selling its images commercially, but it was done the old-fashioned way, through a glossy print catalogue. Putting those high-resolution images online makes sales to ad agencies, magazines, corporations, textbook firms and billboard makers faster and easier. Right now, the archive fills a large cellar in the basement of the society's headquarters at the corner of 17th and M Streets in Northwest Washington, as well as a smaller refrigerated room that preserves original film of more famous works. Mulvihill's division is charged with selling the works of 140 full-time and freelance photographers that work for National Geographic. The society currently sells 600 to 1,500 images a month, said Mulvihill, who declined to disclose specific revenue figures.

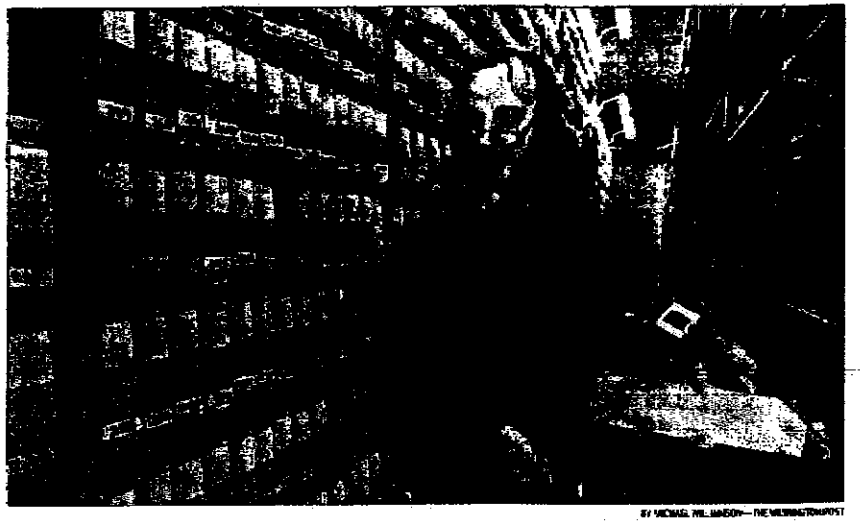
The potential profit is high for images with corporate value. Microsoft Corp., for example, reportedly bought the image of clouds for its new international ad campaign from Corbis, an image database owned by Microsoft founder Bill Gates, for a couple hundred thousand dollars. It's hard to put a price on commercial art, because what sells as art is not necessarily effective as a corporate message. But National Geographic's prices are based primarily on the number of times the image will appear.

If an image appears on a quarter page in an English-language textbook that circulates only in North America, that is likely to cost the publisher about $200. But if the same image is used as a two-year, worldwide campaign for a pharmaceutical company on billboards, magazines and newspapers, it might cost $20,000 to $50,000. In addition, if the company wants the exclusive rights to an image, they pay a premium.

Others are more expensive simply because they are harder to obtain, such as shots of the sunken Titanic, which required a boat crew, lighting equipment and divers.

Most of the images in National Geographic's massive archives are those commissioned by the magazine for certain projects such as living with arctic wolves or expeditions to the Congo. But because Mulvihill acts as an agent to those photographers, they may land assignments to shoot a series intended for a United Airlines advertisement campaign or for Ralph Lauren clothing.

One of the bigger challenges in categorizing the image database is being able to allow businesses to search for certain images by a concept. So they request images that convey "first to market," or "stability," or "competitive edge." A search under "power" would yield them pictures of actual power lines, an electric generator, a bald eagle, and a picture of a kayaker's strong-looking hands grasping a paddle.



BY MICHAEL WILLIAMSON—THE WASHINGTON POST

Bill Bonner, archivist of the National Geographic's image collection, looks over files in a temperature-controlled room that houses 10 million images, including some paintings and photographic prints.

When they can't find something to suit their message, businesses can also doctor most of the images they buy. The sun can be altered to look more purple, or a boat may be digitally removed from the original.

Purists may ask: Does a commercial sale corrupt the artistic value of an image?

"Nothing we do ever drives the production of what we do for the magazine," said William D. Perry Jr., sales manager for National Geographic. "We're just repositioning existing photography, and the journalistic process is insulated from our process."

"We really feel that our efforts go to the goals of the society," of increasing and diffusing geographic knowledge, because the revenue generated from the sales goes back into preservation of the images, Perry said.

Photographer Joel Sartore is comfortable with the re-use. "The more ways the Geographic can think of to get my photos of endangered species and vanishing habitats out there, the chance that they will survive is that much greater," said Sartore, who has been photographing in North and South America for the society for a dozen years.

"From a commercial point of view, [National Geographic is] entitled to sell those photographs, provided they own the copyrights" or have made arrangements with the photographers' consent, said Peter Skinner, a spokesman for the American Society of Media Photographers, which represents about 5,500 magazine and advertisement photographers, including some freelance photographers that work for National Geographic. "In these times of economic crunch, you try to generate revenue any way you can."

Besides, the sale of photos as stock art is also potentially lucrative for the photographers themselves. A star photographer like William A. Allard may make between $60,000 and $80,000 a year in stock photo sales, while a newcomer might make $7,000 to $15,000, Mulvihill said.

National Geographic started installing the images on their new system in mid-summer this year, and is scanning them in at a rate of about 500 a week. It plans to have the initial crop of 10,000 in the system by Thanksgiving.

NOV-26-02 12:55 PM P.02

Jerry:

A friend of mine from New York sent me this. I thought you would be interested.

Feb. 18, 2004

National Geographic Society - Contradictory Decisions by Joel Hacker, Esq.

As I previously reported, Jerry Greenberg won a $400,000 verdict in Miami against National Geographic Society for copyright infringement arising out of the reproduction of National Geographic Society's back issues in its complete National Geographic Society CD. That decision was confirmed on appeal to the 11th Circuit Court of Appeals in Atlanta, which upheld the determination that such use was not a revision of the original issues but rather a new product in a new medium for a new market.

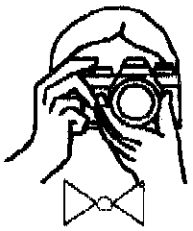
In additional litigation against National Geographic Society concerning the same National Geographic Society CD products, Judge Lewis Kaplan of the Southern District of New York has just decided that, in his opinion, the 11th Circuit was wrong and as a result he rejected similar arguments presented by Douglas Faulkner, David Hiser, Fred Ward and other photographers.

A Unites States District Court Judge is only required to follow a decision rendered by its own Circuit Court of Appeals (New York is the Second Circuit). However, since the 11th Circuit decision involved the exact same
usage in the same CD product, normally National Geographic Society would not be permitted to re-litigate the issue already decided by another federal court even though the plaintiffs were not the same parties.

Nevertheless, Judge Kaplan, on procedural grounds, determined that the intervening New York Times v. Tasini decision by the United States Supreme Court raised questions as to the continued validity of the reasoning behind the Greenberg decision. Accordingly, the Judge ruled that he had the authority to consider the merits of the cases before him even though the same issues had already been determined adversely to National Geographic Society.

The Judge then reached a different result from the 11th Circuit on the merits, concluding that the National Geographic Society search engine was just a technological improvement, similar to a compilation of back issues in a stiff-bound volume with a searchable index, and therefore a permissible use of the photographs at issue.

Want to read more of this article? Go to:http://www.photoaim.com/legal107.html



FAX

RAY FISHER
PHOTOGRAPHER
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FAX (305) 665-8668

To: Jerry & Idaz
Fax #: (305) 667-3572
Date: March 7, 2003
Pages: 1

Idaz & Jerry:

I got this E-Mail from a friend of mine in New York, he received it on his E-Mail. I imagine Fred sent this out everywhere. You may have received it. But here it is anyway. I have cleaned it up.

Ray

****

Date: Fri, 7 Mar 2003 09:47:38 -0700 Subject: Fwd: A great win for copyright holders
Comments: To: STOCKPHOTO@onelist.com To: PHOTOPRO@PHOTONEWS.COM

Forwarded with permission of the author, Fred Ward.:

From: Fred Ward <<fward@erols.com> Date: Wed Mar 5, 2003 9:50 pm
Subject: A great win for copyright holders

Dear Friends,

In an ocean of bad news it is a great pleasure to report some terrific news today:

I have been in Miami for the past week and a half observing and assisting in my lifelong friend Jerry Greenberg's jury trial for damages against National Geographic Society.

In 2001 Jerry prevailed in his appeal in Atlanta's 11th Federal Court of Appeals where the court found that National Geographic's Complete National Geographic set of CDS were infringing products. Jerry's case was remanded to Miami (where it began) for damages. Geographic massive team of attorneys, stacks of oversized graphics, and a parade of notable witnesses (including the Geographic's CEO John Fahey and Board member and astronaut Michael Collins) did not impress the jury whose eight members found unanimously that National Geographic was guilty of willfully infringing Jerry's copyrights. The jury awarded Jerry the maximum allowed under the law..... $100,000 each for four infringements, $400,.000.

Jerry's motion for a permanent injunction against the infringing products and a motion for his legal fees will be heard shortly.

For now, the message is clear. With copyright and resolve, anything is possible.

Fred Ward

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For now, the message is clear. With copyright and resolve, anything is possible.
Fred Ward

Howard M. Paul Phone: (303) 829-5678 Fax: (303) 871-8356
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"We take photographs with our hearts and we take photographs with our minds. The camera is nothing more than a tool." -- A. Newman

---

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Idaz & Jerry: Here is a new 'More Stuff on Greenberg'
Ray

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Date:3/7/03 8:29:08 PM Eastern Standard Time
From:alfrance@earthlink.net
To:sueray624@aol.com
Sent from the Internet (Details)

More stuff on Greenberg.

Al
Return-Path: <memberupdate@asmp.org>
Received: from hall.mail.mindspring.net ([207.69.200.60])
by emu (EarthLink SMTP Server) with ESMTP id 18RpsN3cA3NZFnx0
Fri, 7 Mar 2003 13:32:59 -0800 (PST)
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by hall.mail.mindspring.net with esmtp (Exim 3.33 #1)
id 18rPNx-00009c-00; Fri, 07 Mar 2003 16:28:09 -0500
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To: memberupdate@asmp.org
From: ASMP Member Alert <memberupdate@asmp.org>
Subject: Greenberg vs. National Geographic Update
Content-Type: multipart/alternative; boundary="============_-1165053483==_ma============"
X-Mozilla-Status2: 00000000

To: ASMP Membership
From: Eugene Mopsik
Re: Greenberg vs. National Geographic

The U.S. District Court in Miami, Florida in the matter of Greenberg vs. National Geographic has awarded the maximum statutory damages of $100,000.00 for each of 4 works infringed. The trial took seven days ending on March 5th. The possibility of appeal by both parties still exists. 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.

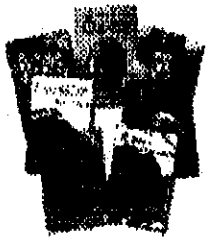
This is a big win for photographers, and both Jerry Greenberg and his attorney, Norman Davis, of Steel Hector & Davis in Miami, Florida, are to be congratulated. Greenberg also deserves thanks from all photographers for having the determination to keep going with this case in spite of all that it has cost him in terms of money, time and energy. Thanks are also due to Victor Perlman of ASMP, and to Patricia Felch, attorney 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.

Some months ago, the US Court of Appeals for the 11th Circuit had reversed the District Court in Florida and ruled in favor of ASMP member Jerry Greenberg. Greenberg contended that the CD-Rom was a new work that contained substantial elements in addition to the republication of Geographic's

Return-Path: <owner-photopro@PHOTONEWS.COM>
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by sparrow (EarthLink SMTP Server) with ESMTP id 18RI0P4Dq3NZFjV0
Fri, 7 Mar 2003 08:47:56 -0800 (PST)
Received: from fido.photonews.com (localhost [127.0.0.1])
by fido.photonews.com (Postfix) with ESMTP
id E1B045B22A; Fri, 7 Mar 2003 10:47:55 -0600 (CST)
Received: from PHOTONEWS.COM by PHOTONEWS.COM (LISTSERV-TCP/IP release 1.8e)
with spool id 81524 for PHOTOPRO@PHOTONEWS.COM; Fri, 7 Mar 2003
10:47:55 -0600
Delivered-To: photopro@photonews.com
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fido.photonews.com (Postfix) with ESMTP id 1C5B35B121 for
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from userid 777) id 114ED7A69FD; Fri, 7 Mar 2003 10:47:55 -0600 (CST)
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Message-ID: <20030307164741.9656E5833@pop.ecentral.com>
Date: Fri, 7 Mar 2003 09:47:38 -0700
Reply-To: PhotoPro@PHOTONEWS.COM
Sender: photopro@PHOTONEWS.COM
From: "Howard M. Paul" <hmpaul@ECENTRAL.COM>
Subject: Fwd: A great win for copyright holders
Comments: To: STOCKPHOTO@onelist.com
To: PHOTOPRO@PHOTONEWS.COM
Precedence: list
X-Mozilla-Status2: 00000000

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From: Fred Ward <<fward@erols.com>
Date: Wed Mar 5, 2003 9:50 pm



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March 6, 2003

Dear Jerry,

Here is what Andy and I have worked out so far in answer to David Walker's queries. If this is OK with you, I think I'll send it along to Walker and also to Pickerell and see if this meets their needs.

Let me know either way.

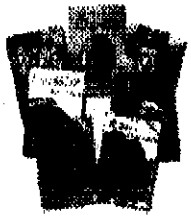
Congratulations again. I spoke to Garrett about it on my way to the airport and told him what to tell the Old Farts Club at noon for the monthly meeting, which I missed. He agreed to give what is usually my report to the group.

I just got back in and am looking at a lot of snow still on the road and in our yard, and mud everywhere. Messy messy.

I'd rather be in Bayfront Park.

Fred

After a six-day jury trial conducted by Magistrate Judge Simonton in the United States District Court for the Southern District of Florida, the jury found that the National Geographic Society had willfully infringed the 4 works at issue in the case, which had been included in Geographic's popular CD-ROM set entitled the "Complete National Geographic, 108 years of National Geographic Magazine on CD-ROM." The works consisted of 4 sets of photographs originally published in the National Geographic Magazine. The jury awarded Mr. Greenberg $100,000 in statutory damages for each work. National Geographic had argued that they had not willfully infringed but had instead relied on oral and written opinions from a number of lawyers, including Robert Sugarman of New York, Judge Kenneth Starr from Chicago, the late Judge Leon Higginbotham, the former chief judge of the Third Circuit Court of Appeals and Geographic's general counsel, Terry Adamson. Each of these lawyers had opined that the National Geographic Magazine had the right under copyright law to reproduce the Greenberg photographs in the CD-ROM set The jury apparently rejected the reliance of counsel defense in determining that National Geographic had willfully infringed. This is the first time in Geographic's history that it had been found liable for willful infringement. National Geographic faces additional litigation in New York and elsewhere arising from its sale of this same set and related products.



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Subj: **More about NGS lawsuits in Photo District News**
Date: Thursday, August 1, 2002 1:21:39 PM
From: fward@erols.com
bcc:

Photo District News has some material both in the monthly magazine (which I haven't seen yet) and online.

You can see two different pieces of the PDN material online by logging on as you see below.

You can log onto:

www.pdnonline.com/features/lawsuit/

to get to the overall page about NGS. David Walker wrote this piece mainly from the viewpoint that NGS was willful in its infringement because of all the internal memos and letters that we got during discovery. It then lists many of the memos and what they contained. Conclusion, they're guilty of willful infringement because they were advised by outside attorneys and by their top staff department heads not to publish the CDs without paying.

There is a second piece to the article that you reach by logging onto:

http://pdn-pix.com/features/lawsuit/weingrad_sec_v.pdf

The pair will give you a good insight into what's been happening in the case.

Fred

---------- Headers ----------
Return-Path: <fward@erols.com>

FDIC said.

GEOGRAPHIC SELLS PICTURES

The **National Geographic Society** is putting thousands of its culture and wildlife photos online for sale.

With the launch of its digital archive on Tuesday (**www.ngsimages.com**), the society is responding to stronger demand for computer accessible images from its clients – including ad agencies, magazines and textbook publishers – which use them to sell their products.

BUSH SIGNS INSURANCE BILL

President Bush signed a bill

[redacted]

Herald 11/27/02

Subj: **The TERMS from NGS on their new Website for selling picture rights**
Date: Saturday, November 30, 2002 11:25:47 PM
From: fward@erols.com
To: lulukiku@aol.com

Jerry,

Here's the NGS TERMS as stated on their Website.

Fred

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Limits on Use. You agree not to use the Image(s) in any way that could be considered
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juxtaposition to accompanying text.

No model release or other releases exist on any images unless we so specify in writing.
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the existence of a model release has not been specified in writing by NGS. In any event,
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the particular photograph involved. You will hold NGS harmless from all claims for the use
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dupe, the Image(s) must be returned to NGS within fourteen (14) days after the invoice
date. Unless a longer period is requested and granted by NGS, You agree to pay NGS a
holding fee of $1 per day per Image after the fourteen (14) day period until You return
the Image(s) to us.

You further agree to pay $100 for each lost or damaged duplicate Image or transparency, to
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only if You agree to be bound by this stipulated damage provision. You agree to assume
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for any loss, damage or misuse of the Image(s).

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DAMAGES FROM ANY SUCH PERSON TO THE FULLEST EXTENT PERMITTED BY

LAW.

Dispute Resolution and Governing Law Any and all disputes arising out of, under or in connection with this Agreement, with the exception of copyright claims, including without limitation, its validity, interpretation, performance and breach, shall be settled by arbitration in Washington, DC pursuant to the rules of the American Arbitration Association. Judgment upon any award rendered may be entered in the highest court of the forum, state or federal, having jurisdiction. This agreement, its validity and effect, shall be interpreted under and governed by the laws of the District of Columbia, and You agree that the arbitrators shall award all costs of arbitration, including legal fees, plus legal rate-of-interest to the successful party. Copyright claims shall be brought in the Federal court having jurisdiction.

If NGS is obligated to go to court, rather than arbitration, to enforce any of its rights, or to collect any fees, You agree to reimburse NGS for its legal fees, costs and disbursements of NGS is successful.

No Waiver. No action of NGS, other than an express written waiver, may be construed as a waiver of any clause of this contract. In the event NGS does waive any specific part of this contract, it does not mean NGS waives any other part. Should any of the above paragraphs be unenforceable, the other paragraphs will remain in full force and effect.

UCC. You agree that the terms of this agreement are made pursuant to Article 2 of the Uniform Commercial Code and agree to be bound by same.

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Received: from rly-xd05.mx.aol.com (rly-xd05.mail.aol.com [172.20.105.170]) by air-xd03.mail.aol.com (v89.21) with ESMTP id MAILINXD31-1130232547; Sat, 30 Nov 2002 23:25:47 -0500
Received: from smtp-hub2.mrf.mail.rcn.net (smtp-hub2.mrf.mail.rcn.net [207.172.4.76]) by rly-xd05.mx.aol.com (v89.21) with ESMTP id MAILRELAYINXD56-1130232530; Sat, 30 Nov 2002 23:25:30 1900

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 by smtp-hub2.mrf.mail.rcn.net with esmtp (Exim 3.35 #4)
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 for lulukiku@aol.com; Sat, 30 Nov 2002 23:25:30 -0500
X-Info: This message was accepted for relay by
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X-Trace: UmFuZG9tSVa9qjizqVj3Ub+cVCv96F9zLgScsANLSZXf5H4NCnPGyzFVu0TDp9TK
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 for lulukiku@aol.com; Sat, 30 Nov 2002 23:25:30 -0500
Message-ID: <3DE98F7C.4050707@erols.com>
Date: Sat, 30 Nov 2002 23:26:36 -0500
From: Fred Ward <fward@erols.com>
Reply-To: fward@erols.com
Organization: Gem Book Publishers
User-Agent: Mozilla/5.0 (Macintosh; U; PPC; en-US; rv:0.9.4) Gecko/20011022 Netscape6/6.2
X-Accept-Language: en,pdf
MIME-Version: 1.0
To: "Greenberg, Idaz & Jerry" <lulukiku@aol.com>
Subject: The TERMS from NGS on their new Website for selling picture rights
Content-Type: text/plain; charset=us-ascii; format=flowed
Content-Transfer-Encoding: 7bit

The Washington Post

BUSINESS

TUESDAY, NOVEMBER 26, 2002

Geographic Gets in the E-Picture

Society to Sell Its Images Online

By YUKI NOGUCHI
Washington Post Staff Writer

Sinewy cheetahs leap across the savannah in pursuit of prey. Grizzly bears swipe greedily at homeward-bound salmon. Dusk casts orange light over a vivid panorama of the Grand Canyon.

Since its founding in 1888, the National Geographic Society has documented the world's natural marvels through 10.6 million images like these, culled mostly from photographs, but also from sketches, paintings, glass plates and daguerreotypes.

"This is a repository for the 20th century," says Maura Mulvihill with a grand gesture, as if encompassing the sweep of history, from cave drawings to images of laser eye surgery.



BY MICHAEL WILLIAMSON—THE WASHINGTON POST

Maura Mulvihill heads National Geographic's online effort to sell the society's images to businesses.

Mulvihill's mission is to make art work for commerce. As vice president of the society's image collection, her job is to sell those images to businesses, which in turn use them to sell their own products. Today, National

See PICTURES, *E5, Col. 1*

Society to Unveil Archive Online Today

PICTURES, From E1

Geographic is officially unveiling its big new online commercial digital archive in an attempt to triple its revenue in the next three to five years.

The task of choosing, scanning, cataloging and marketing the initial 10,000 pictures was a business necessity. Competitors Getty Images Inc. and Corbis have been selling their images digitally for about four years, and the nonprofit National Geographic was falling behind the times. Since 1906, it had been selling its images commercially, but it was done the old-fashioned way, through a glossy print catalogue. Putting those high-resolution images online makes sales to ad agencies, magazines, corporations, textbook firms and billboard makers faster and easier. Right now, the archive fills a large cellar in the basement of the society's headquarters at the corner of 17th and M Streets in Northwest Washington, as well as a smaller refrigerated room that preserves original film of more famous works. Mulvihill's division is charged with selling the works of 140 full-time and freelance photographers that work for National Geographic. The society currently sells 600 to 1,500 images a month, said Mulvihill, who declined to disclose specific revenue figures.

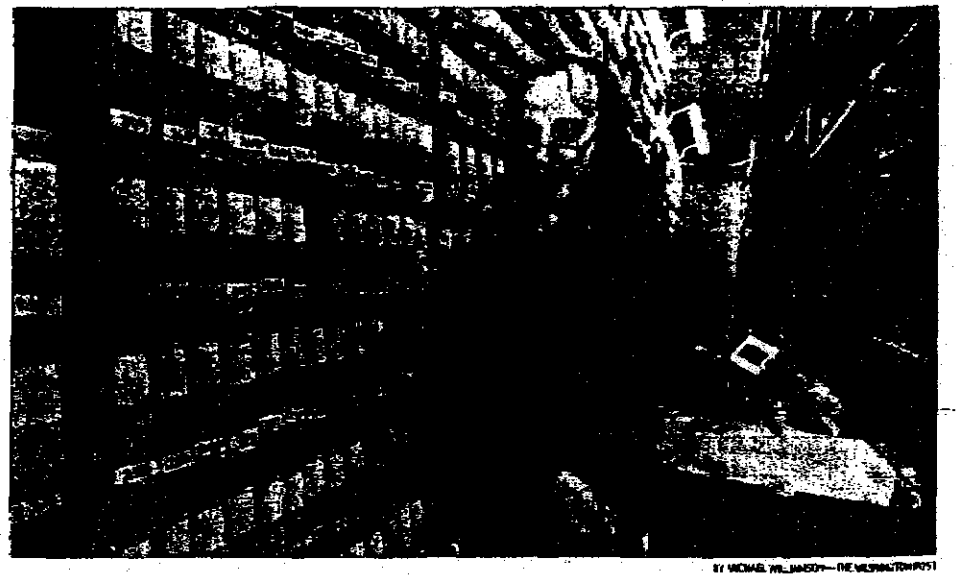
The potential profit is high for images with corporate value. Microsoft Corp., for example, reportedly bought the image of clouds for its new international ad campaign from Corbis, an image database owned by Microsoft founder Bill Gates, for a couple hundred thousand dollars. It's hard to put a price on commercial art, because what sells as art is not necessarily effective as a corporate message. But National Geographic's prices are based primarily on the number of times the image will appear.

If an image appears on a quarter page in an English-language textbook that circulates only in North America, that is likely to cost the publisher about $200. But if the same image is used as a two-year, worldwide campaign for a pharmaceutical company on billboards, magazines and newspapers, it might cost $20,000 to $50,000. In addition, if the company wants the exclusive rights to an image, they pay a premium.

Others are more expensive simply because they are harder to obtain, such as shots of the sunken Titanic, which required a boat crew, lighting equipment and divers.

Most of the images in National Geographic's massive archives are those commissioned by the magazine for certain projects such as living with arctic wolves or expeditions to the Congo. But because Mulvihill acts as an agent to those photographers, they may land assignments to shoot a series intended for a United Airlines advertisement campaign or for Ralph Lauren clothing.

One of the bigger challenges in categorizing the image database is being able to allow businesses to search for certain images by a concept. So they request images that convey "first to market," or "stability," or "competitive edge." A search under "power" would yield them pictures of actual power lines, an electric generator, a bald eagle, and a picture of a kayaker's strong-looking hands grasping a paddle.



BY MICHAEL WILLIAMSON—THE WASHINGTON POST

Bill Sumner, archivist of the National Geographic's image collection, looks over files in a temperature-controlled room that houses 10 million images, including some paintings and photographic prints.

When they can't find something to suit their message, businesses can also doctor most of the images they buy. The sun can be altered to look more purple, or a boat may be digitally removed from the original.

Purists may ask: Does a commercial sale corrupt the artistic value of an image?

"Nothing we do ever drives the production of what we do for the magazine," said William D. Perry Jr., sales manager for National Geographic. "We're just repositioning existing photography, and the journalistic process is insulated from our process."

"We really feel that our efforts go to the goals of the society," of increasing and diffusing geographic knowledge, because the revenue generated from the sales goes back into preservation of the images, Perry said.

Photographer Joel Sartore is comfortable with the re-use. "The more ways the Geographic can think of to get my photos of endangered species and vanishing habitats out there, the chance that they will survive is that much greater," said Sartore, who has been photographing in North and South America for the society for a dozen years.

"From a commercial point of view, [National Geographic is] entitled to sell those photographs, provided they own the copyrights" or have made arrangements with the photographers' consent, said Peter Skinner, a spokesman for the American Society of Media Photographers, which represents about 5,500 magazine and advertisement photographers, including some freelance photographers that work for National Geographic. "In these times of economic crunch, you try to generate revenue any way you can."

Besides, the sale of photos as stock art is also potentially lucrative for the photographers themselves. A star photographer like William A. Allard may make between $60,000 and $80,000 a year in stock photo sales, while a newcomer might make $7,000 to $15,000, Mulvihill said.

National Geographic started installing the images on their new system in mid-summer this year, and is scanning them in at a rate of about 500 a week. It plans to have the initial crop of 10,000 in the system by Thanksgiving.

eMediaweekly

Volume 12, No. 45 • December 14, 1998 THE NEWSWEEKLY FOR DIGITAL MEDIA MANAGERS www.emediaweekly.com

Design Tools ■ Graphics ■ Scanners/Digital Cameras

Heidelberg sues Adobe

Heidelberger Druckmaschinen AG of Heidelberg, Germany, recently sued San Jose, Calif.-based Adobe Systems Inc., alleging patent infringement. The patent, which Heidelberg acquired when it merged with Linotype-Hell AG, covers color retouching. In a statement, Heidelberg said the complaint was filed in an effort to defend its technological developments and "is not meant as an offensive move against Adobe per se."

Peter Dyson, online editor at Seybold Publications of Media, Penn., said the technology in question is used by Adobe's Photoshop image editing software and "would affect any developer with a color retouching package."

Adobe said it believes the case has no merit and intends to vigorously defend itself.

FontXpress 4.0 collects fonts faster, squashes bugs

Morrison SoftDesign this month refreshed its utility for collecting fonts from QuarkXPress documents.

FontXpress for Macintosh 4.0 will collect PostScript fonts more quickly because it no longer searches entire storage volumes, Morrison said. The update also fixes incompatibilities with Mac OS 8.0's Appearance Manager and Easy Open control panels.

Version 4.0's prepress error checking is now in sync with XPress 4.0, the company said; the software no longer reports error messages that are irrelevant in XPress 4.0.

A single-user copy of FontXpress 4.0 has a street price of $70; a site license is $350. Updates are free to registered FontXpress users. A Windows version is due in January.

Morrison SoftDesign of Charlotte, N.C., is at (704) 597-3789 or (800) 583-2917; www.morrisonsoftdesign.com.

PhotoAlto ships collections

UNIX Stock image company PhotoAlto this month released five new CD-ROMs depicting business and nature themes.

The CDs, $299 each, are Building Industry, Panoramic Landscapes, and Business and Teamwork, each from James Hardy; Children's Life from Corinne Malet; and Symbols & Signs from Isabelle Rozenbaum. Compatible with Mac OS, Windows, Sun Solaris and Irix, each CD contains 120 images (except for Panoramic Landscapes, which has 50). The A4-size images, in 300-dpi and 75-dpi resolutions, are JPEG files in RGB mode, the company said.

Phil's Fonts Inc. of Silver Spring, Md., the U.S. distributor of Paris-based PhotoAlto (www.photoalto.com), is at (301) 879-0601 or (800) 424-2977; www.philsfonts.com.

PhotoGraphics 1.0 exposed

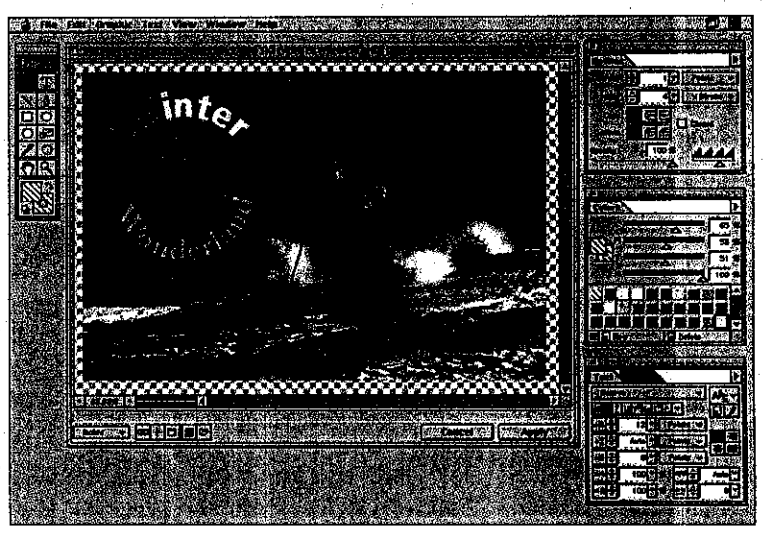
Photoshop plug-in from Extensis offers vector drawing, text handling

BY DANIEL DREW TURNER

Extensis this week pulled the veil off PhotoGraphics 1.0, its plug-in that adds vector drawing and text handling features to Adobe Photoshop 4.x and later. Set to ship on Jan. 25 for Mac OS and Windows 95, 98 and NT, PhotoGraphics will cost $150, Extensis said.

Ted Alspach, Extensis senior product marketing manager, said that PhotoGraphics was conceived not to replace Adobe Illustrator or Macromedia FreeHand, but more as a workflow system for graphic designers using Photoshop who find themselves launching drawing applications in order to complete a few simple tasks, such as placing text along a path.

PhotoGraphics grew out of Extensis' PhotoText plug-in, Alspach said, and retains all its text layout and effects functions, with additions such as super- and subscript.



Going in circles. Extensis' PhotoGraphics 1.0 plug-in can create vector transparencies and place and format multiple blocks of text along a path or object.

The vector drawing tools in PhotoGraphics are intentionally reminiscent of Illustrator's, Alspach said, complete with Illustrator-like keyboard shortcuts. Artists will be able to use Bezier curves to create vector shapes and to

See PHOTOGRAPHICS, *page 10* ▸

CASE STUDY

National Geographic scans a century of issues for CD

Society scans its archives for digital consumption

BY ERIC A. TAUB

With their bold yellow spines, striking photography and magnificent maps, National Geographic magazines are collector's items in many homes; stacks lie dusty in thousands of attics, too cherished to be thrown away. Now the National Geographic Society has brought its archives to life by putting the contents of every issue since its 1888 inception on a set of CD-ROMs.

More than 190,000 pages and 109 years of history are reproduced and indexed in The Complete National Geographic, including every article, photograph, page map and advertisement.

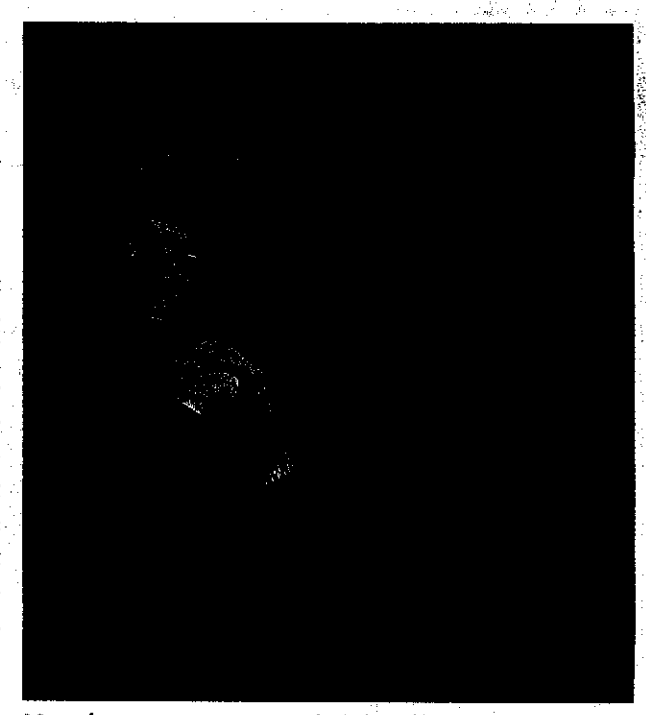
"We code-named this project 'Everest,' partially because we had not realized the enormity of this undertaking," said Larry Lux, senior vice president and managing director at National Geographic Interactive, a for-profit division of the National Geographic Society.

Setting up base camp

The National Geographic Society, based in Washington, D.C., decided in 1995 to archive its magazine content as a resource for students and educators. National Geographic sought a product that would be as faithful to the print product as possible, without any extraneous bells and whistles.

"We were not going to introduce video or delete any content," Lux said. "We knew that we couldn't improve the print version of the magazine."

One of the first tasks was deciding how to format the content. The team considered converting the pages to Adobe Acrobat PDF or coding the text in HTML, but it decided against both options, according to Tom Stanton, National Geographic Interactive vice president of operations. Copyright was the primary concern: Stanton said team members feared that if they rearranged information in any way, they'd have to reacquire certain copyrights. So they reproduced the content in such a way that consumers can't cut and paste information.



DANUTA OTFINOWSKI

Man about town. Larry Lux led the effort to digitize more than 100 years of National Geographic magazines.

Although they said they wanted to

See ARCHIVES, *page 11* ▸

Archives

Continued from page 8

include everything in the bound magazines, they soon realized it wasn't feasible to include the many two-sided gatefold maps because the scanning process was too complex.

Beginning the ascent

In August 1996, National Geographic commissioned Dataware Technologies of Cambridge, Mass., to design a familiar and easy-to-use interface for the product.

"Our focus group testing told us that people wanted to be able to use this product without having to read any manuals," Lux said.

Each disc's opening screen displays thumbnails of the magazine covers; clicking on a cover opens the table of contents for that issue.

Indexing was the next decision. Lux and his associates said they ruled out using OCR to generate full text searches.

"We didn't think the value would justify the resources to put it into place," he said.

National Geographic had long indexed its issues for internal purposes, so much of the search data, such as article titles, dates and photographers, was available. Dataware incorporated that information into a searchable index using its CD Author Development System, manually indexing the magazine's advertisements as well.

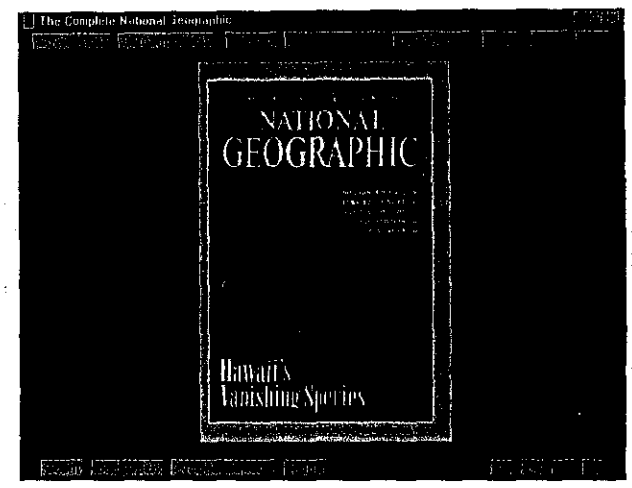
National Geographic and Dataware chose Document Automation Development of Overland Park, Kan., to scan the magazine's pages. That company's propriety software, DocuTrak, indexes and tracks images and information, which helps automate the workflow.

For internal quality control, DAD indexed each page it scanned, entering the page number, volume and year into a database; identifying whether content was editorial or advertising; and noting where editorial ended and ads began.

DAD worked from three sets of magazines: a master and two backups. Two sets also went to Dataware. Short on some issues, Lux's staff canvassed garage sales and used bookstores, and contacted individual collectors to acquire missing copies.

DAD used Hewlett-Packard ScanJet 4C scanners; DocuTrak automatically prompted the scanner operator to place the correct page on the glass. The company added two manual levels of quality control: Each day, staff members checked the previous day's work to make sure all the pages were scanned. Later they checked the CDs and compared the scanned images with the original pages.

Color correction was modest. National Geographic wanted to replicate the original look of each page as closely as possible. If originals were saturated or washed out, the image was kept that way. If a page was printed off-center in the magazine, it was scanned off-center. Older issues with damaged covers were electronically restored by copying and pasting from others in Adobe Photoshop.



Birds of paradise. This cover from September 1995 is one of more than 190,000 pages scanned.

A year's issues — about 2,000 pages — were scanned each day. Every evening, DocuTrak compressed the images and moved the files to a Panasonic CD-ROM burning station, clearing the Windows NT server for the next day's input. DAD burned two sets of CDs: a set containing JPEG images that was sent to Dataware to be incorporated into the product, and a noncompressed backup disc.

Reaching the summit

Lux said he and his development partners struggled to maintain the quality of the scanned images and limit the number of CDs.

"We didn't know how many discs most people could deal with," he said.

Apparently, 31 isn't too many. National Geographic has sold 300,000 of the $150 CD-ROM sets since the package was released in the fall of 1997, making it the best-selling reference product in North America, according to Lux. (A $199 four-disc DVD version, not included in these figures, was released this fall.) Yearly updates are available on disc. National Geographic hopes that by the end of 1999, customers will be able to download updates from the Internet.

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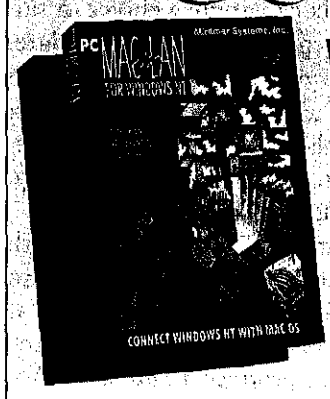
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Publishers Side With NGS Over Photog In Reuse Case

Posted November 4th, 2007 by Julia Dudnik Stern

In addition to entirely unauthorized image use, reuse of images beyond the scope of the original licensing agreement is a prominent issue in the business of stock licensing. The best-publicized, precedent-setting case of this nature is 1997's Tasini v. *The New York Times*. After a series of appeals, the newspaper lost to the freelance writer, with the court deciding that republishing copyrighted work in a database, outside of the original publication's context and without permission or compensation, constituted infringement.

Another landmark case that will affect how imagery is reused, Greenberg v. National Geographic Society, is currently moving closer to final resolution. The general counsel of the National Press Photographers Association, Mickey H. Osterreicher, has penned an in-depth but plain-language outline of the issues. In this lawsuit, photographer Jerry Greenberg sued the magazine publisher in 1997 for reproducing his images on a compilation CD. Greenberg says he licensed the images for use in the print edition, and the CD is an entirely new product. The publisher argues that the CD is a revision, hence does not constitute either a new product or an infringement.

The U.S. courts' decisions in this case can only be described as vacillating. Thus far, various divisions have ruled for both sides and subsequently vacated these decisions. Currently, the case is pending a new, supposedly final hearing by all 12 judges of the 11th Circuit Court of Appeals. Not surprisingly, publishing giants including Gannett, Hearst, Time, Newsweek, Forbes and a long list of others have sought permission to file amicus (friend-of-the-court) briefs arguing the case of NGS.

"It is also unfortunate to note that as of this date no one has sought leave to file an amicus brief on behalf of the Plaintiff/Appellee (Mr. Greenberg), and the time may have passed to do so," comments Osterreicher. It is indeed surprising that in an industry that stands to lose revenue, should the court side with the publisher, neither leading companies nor advocacy groups have gotten involved.

This entry was posted on Sunday, November 4th, 2007 at 10:30 pm and is filed under Commentary. You can follow any responses to this entry through the RSS 2.0 feed. You can leave a response, or trackback from your own site.

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Photogs Ask Supreme Court To Hear NGS Case

Three photographers have separately petitioned the U.S. Supreme Court for review of their failed copyright infringement claims against the National Geographic Society.

Fred Ward, Douglas Faulkner and Louis Psihoyos are all seeking judgment against the publisher over *The Complete National Geographic*, a CD compilation that includes all past issues of the magazine.

Earlier this year, the U.S. Court of Appeals for the Second Circuit ruled that the NGS CD doesn't infringe the photographers' copyrights because it is a revision of existing works, rather than a new work. Under copyright law, publishers can issue revisions of existing works without permission from the owners of articles or photos included in the original works.

But the photographers insists that the NGS CD is a new work rather than a revision of an existing work because it includes a search engine, advertising and other elements that distinguish it from the original magazines.

The Second Circuit ruling against the photographers, contradicted an earlier ruling by the U.S. Court of Appeals for the Eleventh Circuit, which concluded that the NGS CD was a new product rather than a revision. The plaintiff in that case, photographer Jerry Greenberg, won a $400,000 jury award for copyright infringement.

"[The Supreme Court's] review is urgently needed to resolve the conflict between the Second and Eleventh Circuits," Ward's lawyers argued in their petition to the high court. "Unless NGS is held accountable for the engine of infringement it has created, copyright will soon mean nothing in the digital world and the incentives on which our copyright system rests will be severely diminished."

NGS spokesperson M.J. Jacobsen says the publisher will not oppose the requests for a Supreme Court hearing, in order to get the conflict between the appellate court rulings resolved.

"It is a virtually impossible position for any [publisher] to know that one federal appellate court holds a single product perfectly appropriate and lawful under federal law in three states and another federal appellate court to hold precisely the same product an improper infringement of federal copyright law in three other states," Jacobsen says.

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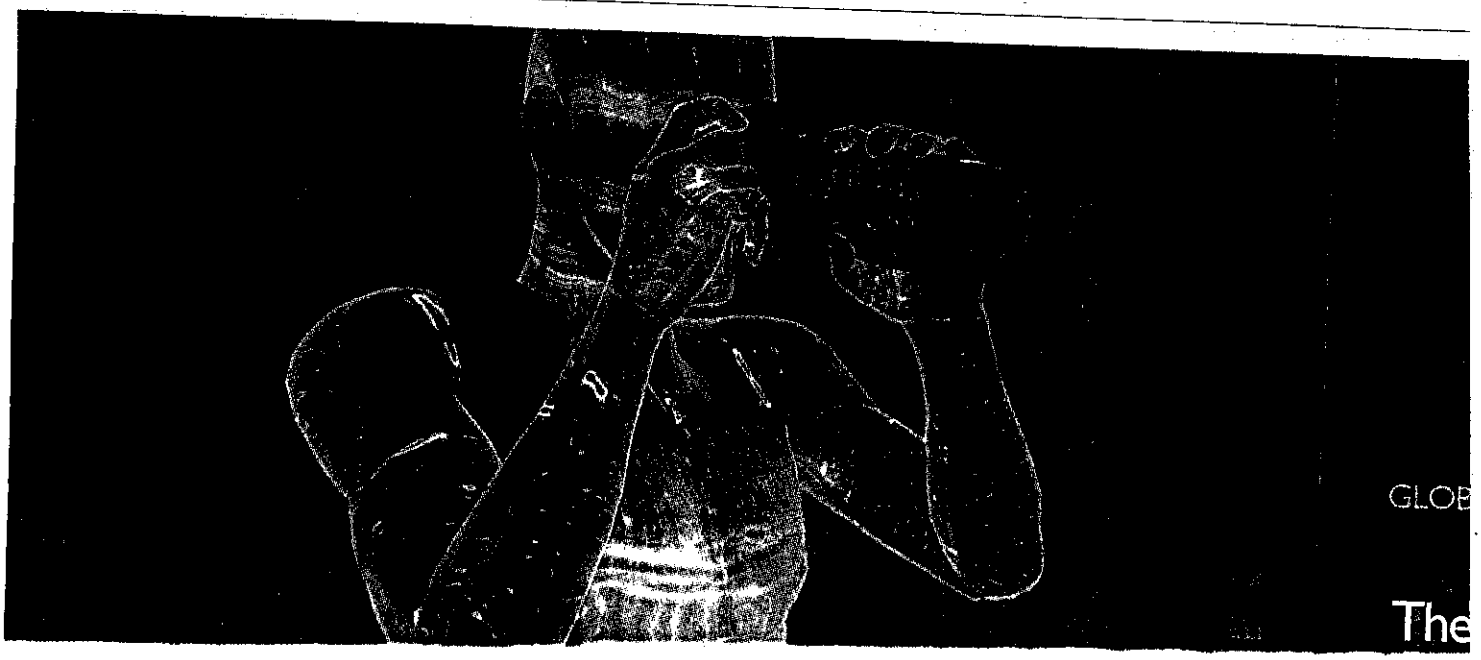
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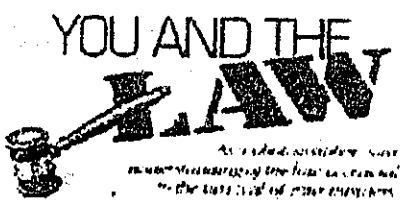
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AMBIGUOUS LANGUAGE

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The Court then looked to extrinsic

Continued on page 2

National Geographic Society

Continued from page 1

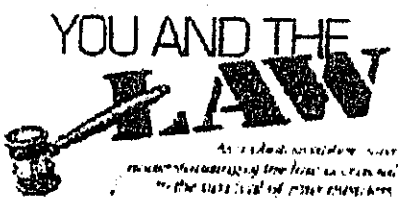
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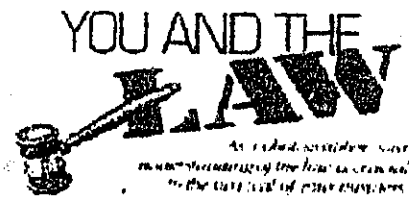
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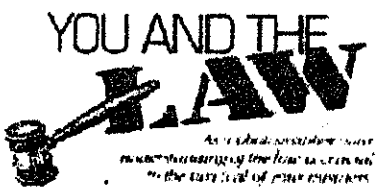
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A picture is worth ...

Freelance photographer seeks U.S. Supreme Court review of his fight with National Geographic over use of his photos

by **R. Robin McDonald**
robin.mcdonald@incisivemedia.com

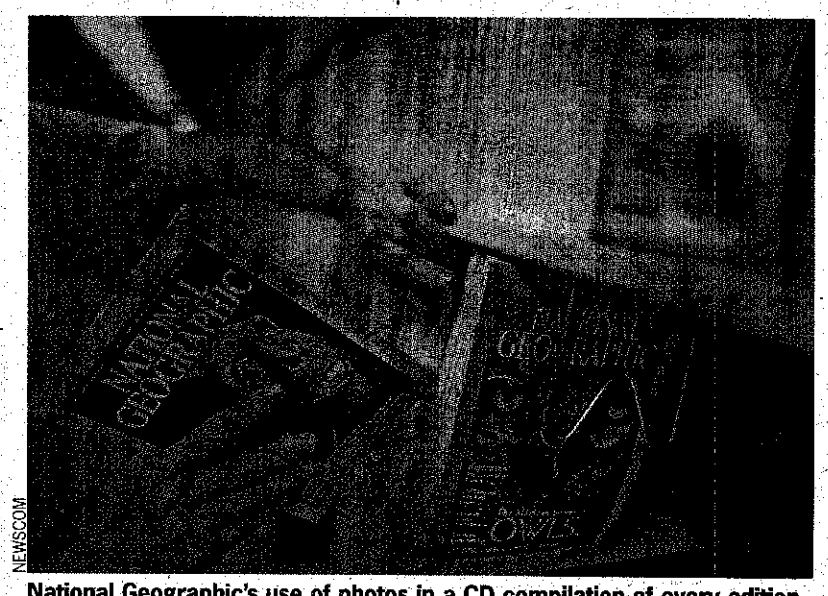
A Florida photographer is asking the U.S. Supreme Court to revisit a landmark copyright decision to determine whether federal appellate courts in Georgia and New York have interpreted it correctly.

The move by freelance underwater photographer Jerry Greenberg extends his 11-year fight with the National Geographic Society over its use of his photographs in a CD compilation of every edition of its flagship magazine.



Davis

From 1962 to 1990, National Geographic published 64 of Greenberg's photos, including one of a shark in the Florida Keys that made the cover. National Geographic paid Greenberg for the publication rights, which were conveyed back to Greenberg in the mid-1980s, said the photographer's longtime Miami attorney, Norman Davis of Squire Sanders & Dempsey.



NEWSCOM

National Geographic's use of photos in a CD compilation of every edition of its magazine has sparked an 11-year battle in court with a freelance photographer from Florida.

In 1997, when National Geographic developed "The Complete National Geographic," a CD archive of its magazine library, Greenberg attempted to negotiate a new publication contract based on the CD library. But National Geographic claimed the CD set did not infringe on Greenberg's copyright.

Since 2005, two federal appellate circuits, the 2nd in New York and the 11th in Atlanta, have agreed with National Geographic. In separate cases — brought by freelancers in New York and Greenberg in Florida against the National Geographic over the CD library — the appellate courts have held the CDs do not infringe on the copyrights of its freelance contributors.

Greenberg's appeal asks the Supreme Court to clarify Justice

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■ Dealmakers A8

CAPITAL SOURCES

Banks fail to communicate with customers amid crisis

Ray Ruga, principal of a Coral Gables communication and market intelligence firm, says he knows of a person flying from Argentina to Miami to pull their money out of a bank account to put it in a safe-deposit box.



by Wayne Tompkins

"That to me was absolutely startling," Ruga said. "They just fear for their savings. If this occurred on a mass scale, the banking system would collapse. It is important that our [banking] system now react in a way that takes the concerns and fears of the stakeholders into account, and that they address them."

Ruga is seeing little evidence that banks are doing effective crisis communication.

"'I've tried to call my bank. I can't get in touch with anybody. No one really knows what's going on.' What you sense is frustration," he said of recent discussions.

His firm, **CVOX Group**, which specializes in the financial ser-

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ON THE WEB

• Multimedia: Ray Ruga discusses customer concerns
• Bank study

DailyBusinessReview.com



SPANISH BROADCASTING SYSTEM

Radio station owner-operator Spanish Broadcasting System was $10 million short of getting its $25 million credit line.

CORPORATE FINANCE

Spanish Broadcasting denied funds in wake of Lehman Bros. collapse

by **Mike Seemuth**
Special to the Review

Radio station owner-operator Spanish Broadcasting System was unable to draw down $10 million of a $25 million credit line because investment bank Lehman Brothers Holdings collapsed into bankruptcy last month.

Miami-based Spanish Broadcasting said it drew down $15 million on Oct. 8 after requesting the $25 million maximum under its revolving credit agreement with Lehman Commercial Paper, Merrill Lynch, Wachovia Bank and other lenders.

Lehman's commercial paper unit failed to fund its $10 million share of Spanish Broadcasting's $25 million drawdown request after the giant investment banker filed Sept. 14 for Chapter 11 bankruptcy.

Spanish Broadcasting also disclosed in a filing with the Securities and Exchange Commission that it would use the $15 million sum together with other funds to repay an $18 million non-interest bearing note due in January. The company had $39 million in cash as of June 30.

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Pedro Hernandez, Albert del Castillo and Lori Smith-Lalla

DEALMAKERS

'Pre-event' money

Squire Sanders trio completes bond issue so Citizens can react to disaster

See Page A8

Marcus & Millichap
Real Estate Investment Services
SOUTH FLORIDA INVESTOR SYMPOSIUM

PANEL SPEAKERS:



Gene A. Berman
Managing Director
Marcus & Millichap



Harvey E. Green
President and CEO
Marcus & Millichap



Hessam Nadji
Managing Director
Research Services
Marcus & Millichap



William E. Hughes
Managing Director
Marcus & Millichap
Capital Corporation



Bernard J. Haddigan
Managing Director
Marcus & Millichap
National Retail Group



Alan L. Pontius
Managing Director
Marcus & Millichap
National Office and
Industrial Properties Group

TUESDAY, OCTOBER 28, 2008
6:00 p.m. to 7:00 p.m. Registration and Cocktail Reception
7:00 p.m. to 8:00 p.m. Investor Symposium and Property Presentation

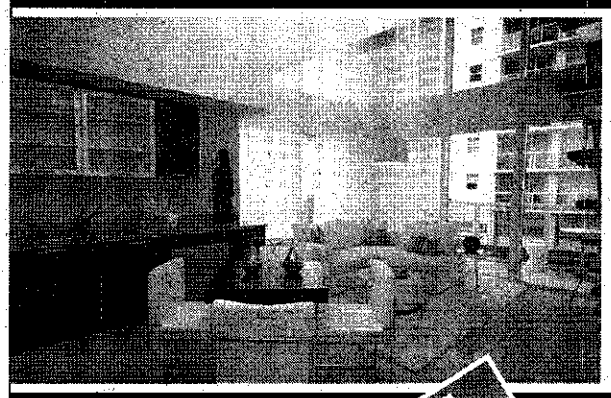
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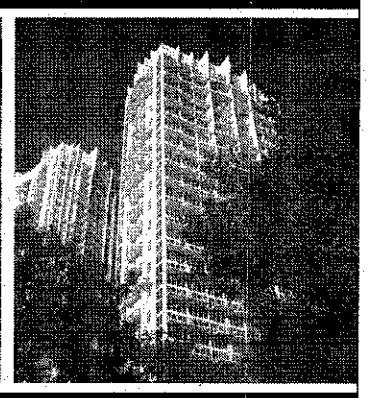
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BUSINESS BRIEFS

Bankers want more oversight over accounting rules

Bloomberg News

The U.S. banking industry, which blames accounting rules for exacerbating the financial crisis, said Congress should consider increasing government control over the independent board that writes the measures.

The Financial Accounting Standards Board lacks "accountability" and doesn't ensure that benefits of its rules outweigh the costs, American Bankers Association president Edward Yingling said in congressional testimony Tuesday. The ABA criticism echoes former House Speaker Newt Gingrich, who says FASB "tends to be too academic and too rigid."

The assault on FASB follows failed efforts to suspend fair-value accounting standards, which require companies to review their holdings each quarter and report losses if values have declined. Some lawmakers say the provision is eroding banks' capital by forcing them to write down to fire-sale prices illiquid securities they have no intention of selling.

The Securities and Exchange Commission has authority to review FASB's funding, approve its status as the drafter of accounting rules and nominate its members.

Fed sets up new program to buy money-fund assets

Bloomberg News

The Federal Reserve will help finance purchases of up to $600 billion in assets from money-market mutual funds roiled by redemptions from investors seeking the safety of government debt.

"The short-term debt markets have been under considerable strain in recent weeks as money market mutual funds and other investors have had difficulty selling assets to satisfy redemption requests," the Fed said in a statement Tuesday. About $500 billion has flowed out of prime money-market funds since August, a central bank official said.

JPMorgan Chase will run the five special units that will buy certificates of deposit, bank notes and commercial paper with a remaining maturity of 90 days or less. The Fed will lend up to $540 billion to the five funds, an official told reporters on a conference call on condition of anonymity.

The new effort is called the Money Market Investor Funding Facility, the Fed said. Each unit will by paper from up to 10 separate issuers.

Regions Financial profit drops 80 percent on housing losses

Bloomberg News

Regions Financial, the Alabama-based bank with dozens of branches in Florida, said it will sell preferred shares to the federal government after third-quarter profit plunged 80 percent on losses from loans to home builders and borrowers.

Net income fell to $79.5 million, or 11 cents a share, from $394.2 million, or 56 cents, a year earlier, the Birmingham-based bank said Tuesday. Excluding merger-related charges and discontinued operations, profit was 15 cents a share, missing the 27-cent average estimate of 19 analysts surveyed by Bloomberg.

Regions said it plans to sell as much as $3.5 billion in preferred shares as part of the government's plan to inject capital into banks. Region is among the first regional banks to confirm plans to participate in the Treasury Department's $250 billion effort, which includes $125 billion in mandatory injections in nine large institutions.

National City, Fifth Third, KeyCorp report losses

Bloomberg News

National City, Fifth Third Bancorp and KeyCorp, Ohio's largest banks, reported third-quarter losses amid the worst housing slump since the Great Depression.

National City announced plans to cut about 4,000 jobs, or 14 percent of its workforce, over the next three years after posting a net loss of $729 million, or 85 cents a share, the Cleveland-based company said in a statement. Fifth Third in Cincinnati reported a quarterly loss of $56 million, or 61 cents, and Cleveland-based KeyCorp's loss was $36 million, or 10 cents.

The losses add to pressure on the managements of National City, Fifth Third and KeyCorp after shares of the companies fell more than 50 percent this year.

McClatchy saw worst ad drop of the year in September

The Associated Press

Newspaper publisher McClatchy, owner of the Miami Herald, said Tuesday that declines in its advertising revenue picked up pace in September as the ad market took a beating from the ongoing credit crunch and other economic woes.

McClatchy had its worst advertising month all year as combined revenue for print and online ads dropped 19.9 percent in September compared with last year. It fell 18 percent in August, a slight reprieve from June and July, when year-over-year declines exceeded 19 percent, including 19.5 percent in June.

McClatchy has seen double-digit declines all year on weak classified and national advertising.

U.S. retailers' weekly sales rise least since May

Bloomberg News

U.S. retail sales rose at the slowest pace since May last week as discouraged Americans cutback on spending.

Sales at stores open at least a year increased 0.9 percent last week from a year earlier, the International Council of Shopping Centers and Goldman Sachs Group said Tuesday in a joint statement. The ICSC reiterated its October same-store sales growth forecast of 1 percent to 2 percent.

The slowdown signals that consumers have grown increasingly concerned that an economic recovery will be delayed.

American Express third-quarter profit beats estimates

Bloomberg News

American Express, the biggest U.S. credit-card company by purchases, reported third-quarter profit that beat analysts' estimates.

Profit from continuing operations declined 23 percent to $861 million, or 74 cents a share, beating the 59-cent average estimate of 15 analysts surveyed by Bloomberg. Revenue at the New York-based lender rose 3 percent to $7.16 billion, American Express said Monday.

American Express lost more than half its market value this year as rising U.S. unemployment forces consumers to spend less and default on loans more. ■

Financial Review

INSIDER TRADING

Bioheart director sells shares to raise cash for capital fund

by **Mike Seemuth**
Special to the Review

Private equity investment firm **Astri Group** sold shares of cardiovascular therapy developer **Bioheart** at depressed prices to raise capital.

Coral Gables-based Astri has sold more than $250,000 of stock in Sunrise-based Bioheart at share prices ranging from $3.99 in early September to $1.90 this week.

Mike Tomas, president of Astri and a director of Bioheart, reported in Form 4 filings with the Securities and Exchange Commission that most of the selling was done "in order to generate capital required by the Astri Group for reasons unrelated to Bioheart."

Tomas did not return a phone call for comment. He has served since 2001 as president of Astri, a specialist in financing early-stage companies.

Nine-year-old Bioheart is testing an experimental therapy that involves extracting muscle cells from a patient's thigh and injecting them into the scar tissue of the patient's heart to improve cardiovascular function.

Tomas has been a director of Bioheart since 2003 and serves on the boards of several other companies.

In June, he was named chairman of the board of advisors of the Eugenio Pino & Family Global Entrepreneurship Center at Florida International University.

Tomas shares voting and investment power over the 224,738 Bioheart shares that Astri owned as of Monday, compared to 354,340 shares on Sept. 3, or 36 percent fewer.

SEC records show that almost all of the indirect sales of Bioheart stock by Tomas since early September were conducted under a preset trading plan he adopted Aug. 26 to comply with Rule 10b5-1 of federal securities law. Insiders attest they have no material, non-public information about their companies when they adopt such plans.

Bioheart shares (Nasdaq: BHRT) traded late Tuesday at $1.84, well below the price of the company's initial public offering of stock earlier this year.

The company issued 1.1 million shares to the public for the first time in February at $5.25 per share.

The IPO was downsized in price and volume.

Late last year, the company had planned an initial offering of 3.5 million shares priced from $14 to $16.

Howard Leonhardt, chairman, chief executive officer and largest shareholder of Bioheart, bought shares Feb. 19 at the $5.25 public offering price and bought more the same day at lower open-market prices averaging $5.13 per share.

But since then, no insiders have purchased Bioheart stock despite its sharply lower price, according to securities database Yahoo Online.

Incorporated in 1999, Bioheart has a lead product candidate called MyoCell, a cell-based therapy designed to minimize the impact of scar tissue on damaged hearts. More than 300 patients are involved in ongoing Phase II and Phase III clinical trials of the MyoCell therapy regimen for possible approval by the U.S. Food and Drug Administration.

The MyoCell therapy regimen is promising, but Bioheart is a money-losing company that generates little revenue and often sells stock or borrows money to cover research and other expenses.

Bioheart's net loss in the six months ended June 30 widened to $7.1 million, or 51 cents per share, from $5 million, or 39 cents per share, in the first half of last year. Revenues were negligible in the January-June period, falling to about $42,000 from about $208,000 during the same period last year.

While insiders have avoided buying stock in Bioheart, several shareholders have guaranteed repayment of part of the company's debt. In June, former Miami Dolphins football players **Dan Marino** and **Jason Taylor** and another Bioheart shareholder, board member **Samuel Ahn**, pledged collateral valued at $1.85 million to secure a loan from Bank America to the company.

Bioheart Inc. at a glance

Headquarters: Sunrise
Major operations: A biotechnology company, Bioheart focuses on discovering, developing, and commercializing autologous cell therapies for the treatment of heart damage.
Stock listing: BHRT (Nasdaq)

Late Tuesday

Price	$1.84
Change	⬇$0.06 / ⬇3.37%
Volume	12,300

The last year

52-week high	$5.25
52-week low	$1.59

Source: Bloomberg News

SBA Communications president reports involuntary stock sale

Jeffrey Stoops, president and chief executive officer of **SBA Communications**, reported an involuntary sale of $1.28 million of SBA stock to satisfy margin-loan collateral requirements.

Stoops disclosed in a Form 4 filing with the SEC that an unidentified lender conducted the involuntary sale of 100,000 SBA shares on his behalf. SBA owns and operates wireless communications towers.

Stoops previously had pledged the 100,000 shares to the lender as security for a margin loan to purchase SBA shares and pay associated withholding taxes.

The involuntary sale reduced his direct ownership of SBA stock to 990,079 shares, a 9 percent decrease. Stoops indirectly owns 919,863 shares through a limited partnership and 5,800 shares through a trust for the benefit of his four children.

The lender completed the involuntary sale Oct. 10 at a price of $12.82 per share.

Shares of SBA (Nasdaq: SBAC) closed Tuesday at $18.25. The highest price in the last year was $38.50 last November and the lowest was $11.28 on Oct. 10.

Eleven analysts covering SBA recommend buying its stock, three have neutral hold ratings, and one expects better returns on shares of other companies in the communications tower business, Thomson Financial reported.

Lennar director invests $32,000 in home-building company

Sidney Lapidus, a director of **Lennar**, invested $32,000 in the Miami-based home-building company's super-voting Class B common stock.

Lapidus, a retired partner of private equity investment firm Warburg Pincus, has been a Lennar director since 1997. He also serves as a director of two other publicly held companies, Pennsylvania-based office and home furnishings producer Knoll and Dallas-based retailer Neiman Marcus.

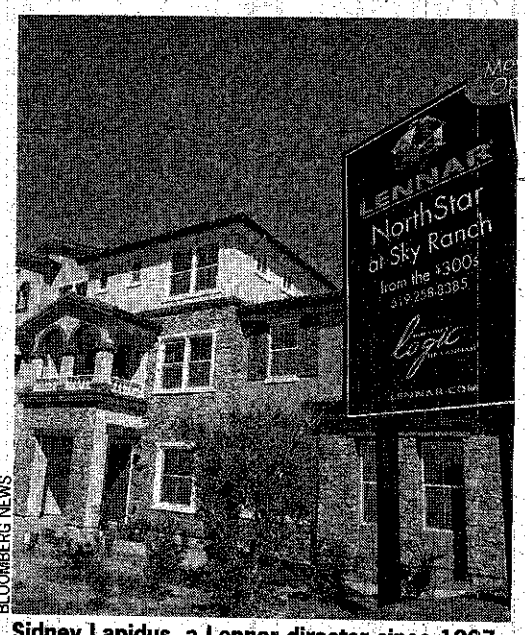
Lapidus bought 5,000 Class B common shares of Lennar on Oct. 10 for $6.40 each. The purchase boosted his ownership of the Class B stock to 32,000 shares, an 18 percent increase.

He also owns 187,842 of Lennar's more widely traded Class A common shares. Each Class B common share of Lennar entitles its owner to 10 votes on proposals requiring shareholder approval, and each Class A common share carries one vote.

Lennar's Class A shares (NYSE: LEN) closed Tuesday at $9.016. The shares have ranged from $25 about a year ago to $7.83 on Oct. 16.

Lennar's Class B shares (NYSE: LENB) closed Tuesday at $6.34. The 52-week price range extends from $23.21 about a year ago to $5.29 on Oct. 10.

Six analysts covering Lennar recommend investing in the company, eight have hold ratings on the stock, and three expect better investment returns on other homebuilding stocks, Thomson Financial reported. ■



BLOOMBERG NEWS

Sidney Lapidus, a Lennar director since 1997, bought 5,000 Class B common shares of Lennar on Oct. 10 for $6.40 each. The purchase boosted his ownership by 18 percent.

Events

Today

Latin American Business Association: Networking event with Miami-Dade County Schools Superintendent Alberto Carvalho, 5:30 p.m., La Palma, 116 Alhambra Circle, Coral Gables. Free. Call (786) 280-7330.

North Dade South Broward Estate Planning Council: Meeting, 5:45 p.m., Sheraton DCOTA Hotel, Wine Room Restaurant, 1825 Griffin Road, Dania Beach. Cost: $40. E-mail: aalsopp@cbiz.com

Oct. 23

Greater Hollywood Chamber of Commerce: Business Seminar with Orlando Herrera of Anthony Robbins Companies, 7:30 a.m., Hollywood Beach Marriott, 2501 N. Ocean Drive, Hollywood. Cost: $25 members, $40 future members. Call (954) 923-4000.

See Events, Page A13

People



Berkowitz



Branch

• **Richard A. Berkowitz**, managing director of Berkowitz Dick Pollack & Brant, has been named chairman of the statewide board of directors for Take Stock in Children.

• **Gloria S. Branch**, a private banker for the Palm Beach County market at Colonial Bank in Boca Raton, has been named chairman of the Florida Atlantic University's National Alumni Association board of directors.

• **Bob Rubin**, a former senior vice president of Wachovia Wealth Management, and **Charles Herrington III,** a former vice president and senior trust officer with Merrill Lynch, have opened their own wealth management firm, Rubin Herrington. The firm will be located at 1200 N. Federal Highway, Suite 200, Boca Raton. They will specialize in wealth preservation and distribution solutions for families and businesses of multigenerational wealth. Rubin will be president and Herrington will be vice president of the firm.

• **Debbie Abrams** has joined Rubin Herrington as vice president. She was vice president of Sabre Technical Services, a joint venture with Giuliani Partners.

• **Mercantile Bank** has been recognized by the Latin Builders Association as "Bank of the Year" for its outstanding quality, good customer service and innovation in the financial world. ■

ON REAL ESTATE

by **Eric Kalis**

Miami-Dade property picked up for $460,000

Address: 15665 SW 13th Terrace, Miami-Dade County
Property type: 5,000-square-foot parcel zoned for residential use
Price: $460,000, or $92 per square foot
Seller: Bella Villas Homes Inc., Jose Rieumont, president
Buyer: Oscar Silva and Erica Silva

Doral residential parcel sells for $405,000

Address: 8750 NW 111th Court, Doral
Property type: 2,120-square-foot parcel zoned for residential use
Price: $405,000, or $191.04 per square foot
Seller: Tousa Homes Inc., Larry Streib, division president
Buyer: Mikel Aizpura

Lauderdale mixed-use building goes for $425,000

Address: 1409 SE First Ave., Fort Lauderdale
Property type: 1,903-square-foot mixed-use building completed in 1947 on a 0.15-acre lot
Price: $425,000, or $223.33 per square foot
Sellers: James Litrides and Dina Litrides
Buyer: AYDA Weiss LLC, Ayda Weiss, managing member
Past sales: $170,000 in 1995

Deal of the Day

Auto dealer gets $14M loan from Toyota



MELANIE BELL

West Palm Nissan obtained a $13.95 million mortgage from Toyota Motor Credit Corp. for a Royal Palm Beach showroom.
Address: 9205 Southern Blvd., Royal Palm Beach
Property type: 35,434-square-foot auto showroom on four parcels totaling 34 acres
Loan Value: *$13.95 million*
Lender: Toyota Motor Credit Corp.,
Borrower: *West Palm Nissan LLC, Robert O'Shaughnessy, executive vice president of Finance* ■

Two Palm Beach County lots sold by same seller

Address: 11687 Rock Lake Terrace, Palm Beach County
Property type: 0.13-acre parcel zoned for residential use
Price: $ 422,061, or $74.53 per square foot
Seller: Boynton Beach Associates XVII LLLP, N. Maria Menendez, vice president
Buyers: Charles Barker and Lisa Barker

Address: 8148 Emerald Winds Circle, Canyon Springs
Property type: 0.18-acre parcel zoned for residential use
Price: $490,570, or $62.39 per square foot
Seller: Boynton Beach Associates XVII LLLP, N. Maria Menendez, vice president
Buyers: Kerry Sokalsky and Sharon Sokalsky

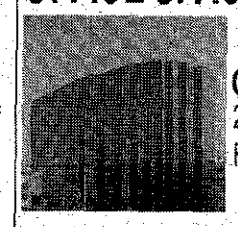
Residential parcel purchased for $410,000

Address: 10945 Deer Park Lane, Palm Beach County
Property type: 0.14-acre parcel zoned for residential use
Price: $410,000, or $69.26 per square foot
Seller: G L Homes Of Boynton Beach Associates XI Ltd., Steven Helfman, vice president
Buyers: Philip Greenberg and Bonita Greenberg ■

These reports are based on public records filed with the clerks of courts. Building area is cited in gross square footage, the total area of a property as computed for assessment purposes by the county appraiser.

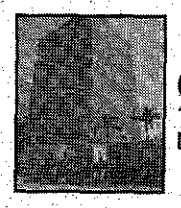
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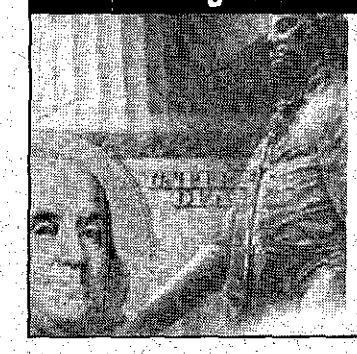
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CAPITAL SOURCES

From Page A1

vices sector, produced a study to see how well 40 South Florida banks and credit unions were using their Web site's home pages to communicate with customers, employees and investors about the financial crisis. The study concluded Oct. 12 and does not include messages added to Web sites since that time. [**BankAtlantic**, for example, added a message from chairman **Alan Levan** dated Oct. 16.]

"Obviously in this volatile crisis environment, stakeholders are going to be seeking information of events and how they affect their interest," Ruga said. "One of the first stops for customers of financial institutions is the Web site. It's the first line of communications defense. We wanted to study and see how they were utilizing this. It's not a tool anymore; it's a necessary component to have."

He said that if banks are not effectively using their Web sites to communicate with customers, "it spoke systemically of some other communication problems they are going to be facing."

And what the study found was that strongest institutions generally did the best job of communicating, while the weakest banks did not.

"That's one of the most interesting parts of it, is that the firms that probably needed to do it less are the ones who did it the most," Ruga said. "That was the correlation we were seeking to identify. I don't know if it's a cause and effect, but obviously they felt confident enough in their standing that they could reach out and explain their strength and their outlook to their stakeholders, while the weaker ones either did not feel that they had a story to tell or were so involved in the internal management of this crisis that they may have developed more of a bunker mentality, and by definition are not as good communicators."

Of the 40 institutions, 28 did not have any information posted on their Web pages addressing the crisis, concerns of customers or the institution's current stability and outlook. Only eight in any way addressed the downturn. Of these, only four directly address the crisis, "and yet, even these do not make their effort as easily available to visitors to the Web sites as they could, minimizing the impact of their effort."

Of the 12 institutions that posted information, 33 percent of those highlighted their ratings by BauerFinancial, a Coral Gables-based bank-rating service. These firms all received five stars, the highest rating. An analysis of the BauerFinancial ratings for all 40 institutions found that of the 12 that communicated on the crisis, eight received a five-star rating, reflecting that the banks with the more effective communications tended to be higher rated.

The study found that many banks are using third-party validators such as BauerFinancial.

"It's not us saying that we are strong; it's someone else saying that we are strong," Ruga said.

One of the highest-rated banks in the study was **Sun American Bank**, where chief executive **Michael Golden** has placed a brief audio message on the bank's home page assuring customers of the bank's financial health.

"Our bank is not highly leveraged, it has no exposure to subprime lending, no negative amortization mortgages and only nominal exposure to residential lending in general," Golden said in his message.

Three credit unions also scored high in the study: **Miami Federal Credit Union** for its chief executive's letter to stakeholders and both **Miami Firefighters Federal** and **University** credit unions for their letters to customers.

"We did a mail out to all of the customers, and we just finished a letter to the stockholders. I'm going to do a separate letter to the customers just outlining specifically how solid the bank is," said **Charles Schuette**, chairman of **Coconut Grove Bank**, which already touts its five-star BauerFinancial rating on its Web site. "For those who use the Internet, it will be communicated on the Internet."

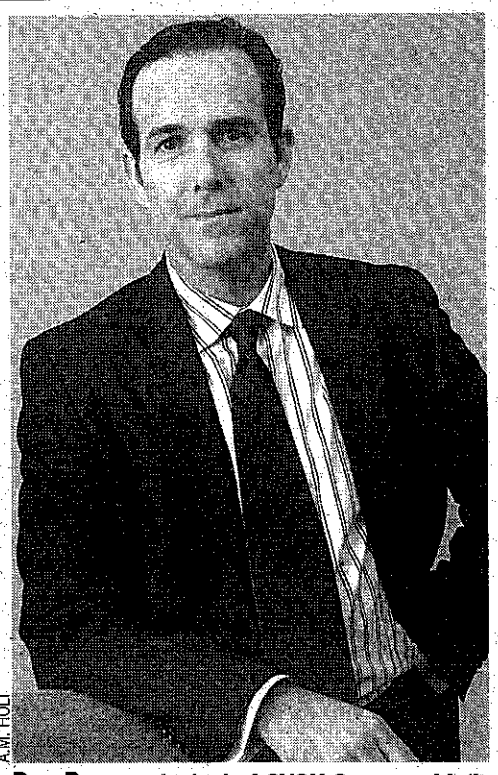
Rick Kuci, Coconut Grove's chief lending officer, said the bank's concern is what to do when the market changes daily.

"One day the market drops 700 points, the next day its up 900," he said. "We're just trying to get a consistent theme out to our customers that we do have the five-star rating; we're safe, sound and secure. We are fielding phone calls from them every day as they see other news out there, another bank in trouble ... just reassuring them. Not everyone uses the Internet. We're using bank statements because we know everyone gets those."

One struggling bank that did well in the study was Miami-based **Ocean Bank**, which has labored under a two-star "problematic" rating from BauerFinancial.

"I think Ocean Bank did a relatively good job in their letter to the stakeholders, and they had a two-star ranking," Ruga said. "Their CEO in this case is really taking it to the forefront. Firms that communicate effectively on top of managing their firm effectively have the opportunity to re-establish a relationship and start rebuilding the trust and strengthening the brand with consumers for the long run."

Some institutions that have chosen not to address the crisis on their home pages, among them Coral Gables-based BankUnited, have opted to communicate through other channels.



A.M. HOLT

Ray Ruga, principal of CVOX Group, said, 'It is important that our [banking] system now react in a way that takes the concerns and fears of the stakeholders into account.'

"We've been using our employees to talk to our customers," said **Melissa Gracey**, director of marketing for Coral Gables-based **BankUnited**. "Our customer base is so diverse, from business owners to elderly savers to investor types, our goal since everything started getting bumpy is to make sure our employees were the highest trained that they could be."

Gracey said the majority of BankUnited's customers have relationships with many banks.

"If they walk into Bank X, and the teller doesn't know anything about FDIC insurance, and our teller can tell them everything, when we get past this, they're going to go where they felt the most comfortable," she said.

Communication plays a crucial role in the banking world because the current financial meltdown is as much a crisis of confidence as it is a balance sheet problem, Ruga said.

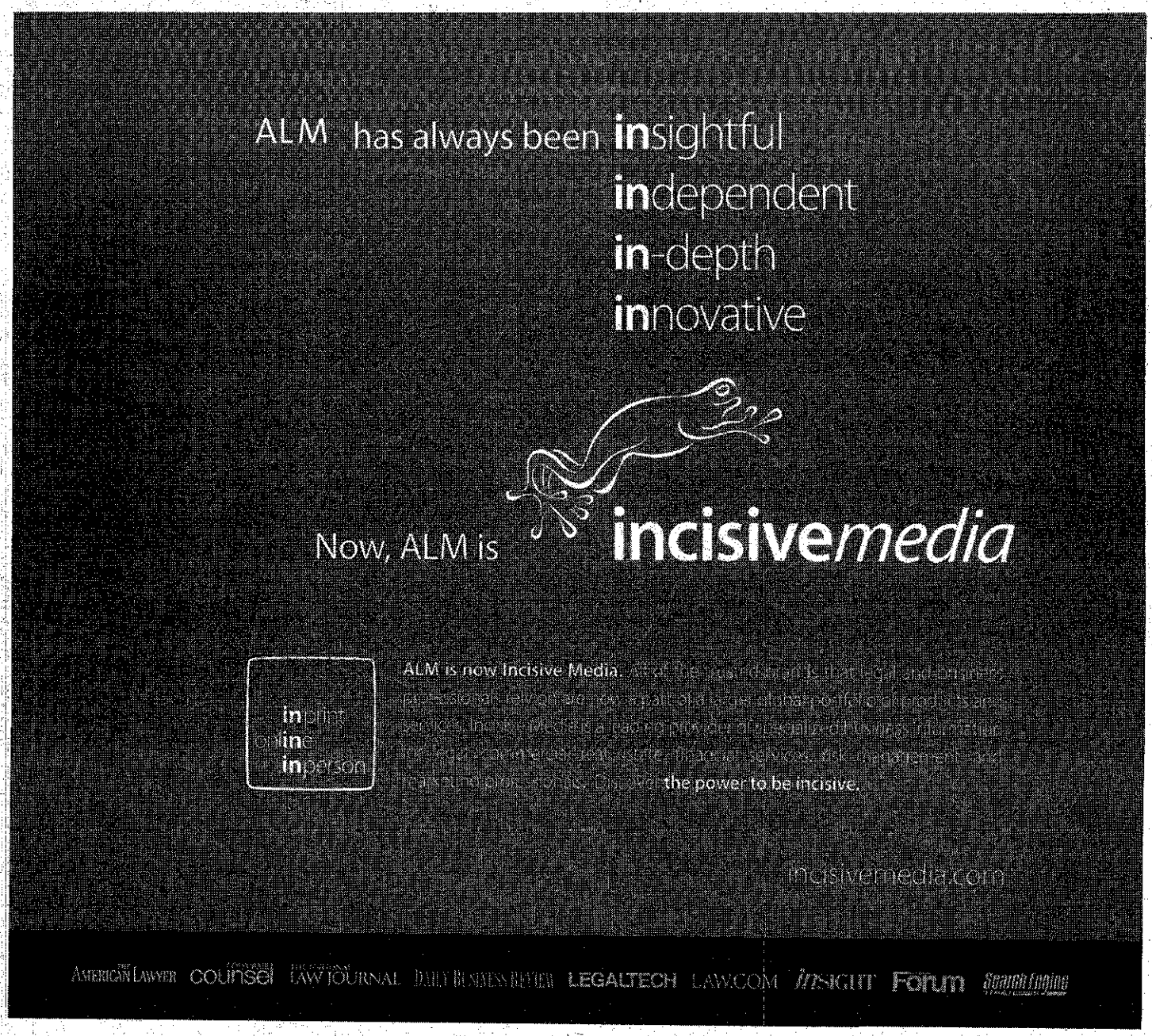
"Confidence usually is implied in the stability of the market," Ruga said. "People usually leave it into the background. What the banks tend to focus on communication-wise is really the value proposition and the benefits and really more communicating in a marketing perspective, 'Why we are better, why we offer more,' etc. This crisis is a global financial crisis, and a lot of these firms really are not equipped with the type of communications team that they need to handle this type of challenge. Many have been caught, if not off-guard, at least they've lost some of their footing, and I think their teams are not really up to the task."

Ruga said in some cases there is a logical explanation.

"Their focus has been on the banking side. This is doing what they do best," he said. "Which is trying to shore up their balance sheets and navigating the institution through the crisis as opposed to viewing the communications as an integral part of this."

The work that these banks are doing internally to shore up their balance sheets? "Those very efforts are what need to be communicated," Ruga said. "The work that you are putting in is the story." ■

Wayne Tompkins can be reached at wayne.tompkins@incisivemedia.com or at (305) 347-6645.



PUBLICATION

From Page A1

Ruth Bader Ginsburg's majority decision in the 2001 case of *New York Times v. Tasini*, which sought to settle a dispute between freelance writers and publishers over the digitized use of the writers' works.

Greenberg's petition asserts federal appellate copyright rulings by the two circuits citing Tasini have "warped" the Ginsburg majority opinion.

"We believe the Supreme Court would be interested in what has been done by two of the [federal appellate] circuits in the Tasini decision," Davis said. "The Supreme Court, I think, will agree that the Tasini decision has been wrongfully applied. In a very volatile copyright environment, that's not a good thing."

Tasini, named for lead plaintiff and freelance writer Jonathan Tasini, determined publishers violated freelance writers' copyrights if they sold previously published freelance articles to online databases without securing new permission from the authors. The case provided guidance in interpreting and applying revisions made in 1976 to federal copyright laws after the technological revolution that has created new avenues of publication.

The decision was considered a win for freelance writers who could negotiate new permissions and contracts with publishers for what the court majority held were new uses of previously published works.

Greenberg's case began in Miami, where U.S. District Magistrate Judge Andrea Simonton found for National Geographic. Greenberg appealed to the 11th Circuit, which in 2001 reversed the district court and remanded the case, finding the magazine infringed the photographer's copyright. The 11th Circuit opinion was released shortly before Tasini was handed down.

Simonton subsequently found National Geographic owed Greenberg $400,000 in damages. The magazine appealed, and a new 11th Circuit panel, citing the intervening Tasini decision, last year reversed the first panel's ruling. In June, the 11th Circuit sitting en banc split 7-5 in favor of National Geographic. The decision was compatible with the 2005 finding by the 2nd Circuit on virtually identical copyright questions.

The two appellate court majorities adopted arguments by National Geographic and a coterie of amici publishers that Ginsburg's majority opinion in Tasini — while restricting the publishers from selling freelancers work to online databases such as Lexis and Westlaw without securing the authors' permission — allowed publishers to place entire publication libraries on CDs and sell them without owing anything to the freelance authors and photographers whose works were reproduced in the collections.

Jerry Greenberg's petition to the justices states that his case 'presents the question of whether a database aggregating many collective works constitutes a 'revision' of each of its constituent collective works.'

The 11th Circuit's latest decision determined that because National Geographic's digital library reproduced complete magazine issues "exactly as they are presented in the print version," publishers retained the privilege of reproducing them under federal copyright laws without renegotiating freelance contracts.

The majority also decided new elements such as the operating software and search engines on the CDs — even if they carry copyrights — were not enough to make "The Complete National Geographic," a new collective work, subject to copyright privilege.

"The addition of new material to a collective work will not, by itself, take the revised collective work outside the privilege," the majority opinion stated.

The 11th Circuit ruling turned on the definitions of an acceptable revision and a new work as determined by Tasini. Publishers including National Geographic have acknowledged their arguments are not based on specific language in Tasini but rather on dicta, the explanatory commentary included in the opinion that does not directly address the facts of the case under review.

In Tasini, Ginsburg wrote for the 7-2 majority that electronic and CD-ROM databases of individual articles culled from periodicals could not be considered "revisions" or revised editions of previously published issues, such as revised editions of an encyclopedia or multiple editions of a daily newspaper. Therefore, publishers may not sell the rights to reproduce those articles to computer or online databases without contracting for the publication rights from the authors.

In deciding the databases were not simply a revised edition, the Supreme Court focused on the articles' appearance in online databases without the graphics, formatting and layout that accompanied their original publication.

"Those databases simply cannot bear characterization as a 'revision' of any one periodical edition," Ginsburg wrote. "We would reach the same conclusion if the [New York] Times sent intact newspapers to the electronic publishers."

The court majority also specifically rejected an analogy offered by publishers saying the electronic databases were no different than microfilm and microfiche reproductions. The court found that comparison "wanting."

"Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film," Ginsburg wrote. "Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper."

As a result, a user views an article in context, Ginsburg wrote. In electronic databases, "by contrast, the articles appear disconnected from their original context. ... In short, unlike microforms, the databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any 'revision' thereof."

Greenberg's petition to the justices states that his case "presents the question of whether a database aggregating many collective works constitutes a 'revision' of each of its constituent collective works."

What constitutes a revision is key to the ongoing legal debate because the 1976 copyright revisions were intended "to limit the ability of a publisher to republish contributions to collective works without providing compensation to the freelance artists who should benefit from the demand for their work after the initial publication," according to the petition. That section is the backdrop against which freelance artists and publishers negotiate their contracts.

Greenberg's petition said both circuits "have held that a publisher can avoid paying the artist anything under Tasini by the simple expediency of creating 'context' by including a feature that allows users to 'flip' between the pages of individual magazines."

"Yet the artist receives nary a penny," the petition said. "Publishers can sell access to individual articles, stories or pictures, so long as the rest of the pages in the issue are a click away. Once a Google search can find it, the author's copyright for that individual text, picture or video is essentially worthless."

The petition challenges the court to "clarify that publishers cannot reap the benefits of appropriating the market for the freelancer's individual works without compensating the freelancer."

Terry Adamson, executive vice president of the National Geographic Society, said he was not surprised Greenberg asked the high court to take the case. He said the magazine is evaluating whether to respond. ■

R. Robin McDonald reports for the Fulton County Daily Report, an IncisiveMedia affiliate of the Daily Business Review.

SPANISH

From Page A1

A spokeswoman for Spanish Broadcasting declined to comment on the impact of the Lehman Brothers' bankruptcy — the largest in history — on SBS. The bank's downfall accelerated the continuing global credit crisis.

Despite Spanish Broadcasting's financing problems, a major shareholder sees no evidence of a serious cash shortage at the company.

"The good news for shareholders is there is no liquidity crunch here," said Daniel Donoghue, managing director of Chicago-based investment firm Discovery Group, which owns about one-tenth of Spanish Broadcasting. "They have enough on that credit facility to pay that note. That's a seller note that they have from when they bought the television business."

In 2006, Spanish Broadcasting paid $37.6 million, including $17 million in cash and $18.5 million of non-interest bearing notes, to acquire the licenses and other operating assets of television stations WSBS-Channel 50 in Miami and Channel 22 in Key West. The stations operate under the Mega TV brand.

He is not a happy shareholder, though. In several SEC filings this year, Donoghue has disclosed letters he has written to Spanish Broadcasting blaming management for a steep plunge in the company's stock price.

"Sometimes bad guys do the right things, and they are sort of blessed with a really great debt structure," Donoghue said. "They don't have balance sheet problems or a debt problem. I almost wish they did, because that would result in them doing what I think are smarter things with their business — principally not spending on television the way they have been."

Spanish Broadcasting's Class A common shares, listed under Nasdaq ticker symbol SBSA, closed Tuesday at 27 cents each, down from $1.85 at the end of last year. Founded in 1983, Spanish Broadcasting completed its initial public offering in 1999 at a price of $20 per share.

"It's a hard pill to swallow. There has been such massive destruction of value there," Donoghue said.

Spanish Broadcasting owns and operates 20 radio stations aimed at Hispanic listeners in such major U.S. metropolitan markets as Miami, New York, Chicago and Los Angeles. The company's four FM stations in Miami are WRMA "Romance" (106.7), WXDJ "El Zol" (94.7), WCMQ "Clasica" (92.3) and WRAZ "La Raza" (106.3).

Under the Mega TV brand, the company also offers original programming through a two-station operation to South Florida viewers who subscribe to satellite television service DirecTV.

Spanish Broadcasting disclosed in August that weak business conditions led the company to reduce the asset value of "certain individual stations" in Los Angeles, San Francisco, Puerto Rico, Miami and New York by $396 million as of June 30.

The non-cash asset impairment charge was the major cause of the company's net loss of $300 million in the first half, a reversal from net income of $3.4 million during the same six-month period last year.

Consolidated revenue from January through June fell to $81.6 million from $86.8 million in the same period last year. Revenue from radio stations in the first half declined to $74 million from $82 million in last year's first half, down 10 percent, and investor fears of further declines have eroded the company's share price.

The revenue decline is a symptom of industrywide problems in the radio business. Radio station revenues in the top 100 U.S. markets fell in each month from January through August this year, compared with the same months last year, the Radio Advertising Bureau reported.

Whether Spanish Broadcasting can avoid liquidity problems may depend on its ability to conserve cash in the current harsh climate for radio broadcasters.

"Their situation is becoming more tenuous. It's one of the reasons I dropped coverage of Spanish Broadcasting about a month ago," said David Joyce, an analyst with New York City-based investment firm Miller Tabak.

Asked if Spanish Broadcasting would be able to repay its $18 million note due in January, Joyce said "conceivably, yes," but the company's ability to repay may depend on "what their cash-burn rate is for the third quarter and fourth quarter." The company's cash shrank to $39 million as of June 30 from $61 million at the end of last year.

The Nasdaq stock market may de-list Spanish Broadcasting if its stock fails to trade consistently at prices of $1 or more by early next year. The issue may become moot, however, if Spanish Broadcasting sheds its publicly held status in a going-private transaction. Going private would require the approval of chairman of the board, president and chief executive officer Raul Alarcon, who controls about 70 percent of the company's shareholder voting power.

Donoghue said some of Spanish Broadcasting's lenders have asked him if Discovery Group would sell its stake in the company in a going-private transaction. "There is a price at which we would support it," he said without elaboration, but "if they are going to go private at 50 cents [per share], forget it." ■

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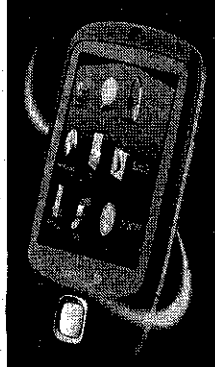
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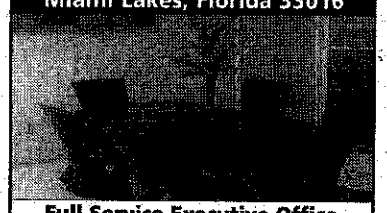
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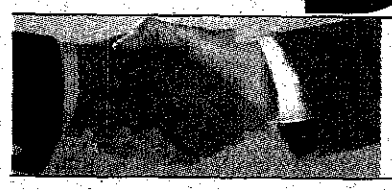
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Dealmakers

by Review Staff



Dealmakers details the players behind recent significant business transactions. Deals that qualify include real estate purchases, stock or debt transactions, M&A work, investment banking or privatizations. An expanded Dealmaker of the Week highlights a person involved in a transaction of special interest — selected either because of its size or scope or because of the details of the underlying deal.

To suggest candidates for Dealmakers, contact Jay Rees at jay.rees@incisivemedia.com. Dealmakers should be based in South Florida, but transactions need not involve local companies or properties.

Equity One relationship a factor in Publix land buy

Dealmakers: Rafi Zitvar, Doron Valero, Greg Kessel and Joe Valls

The deal: Publix Supermarkets paid $14.25 million, or about $180 per square foot, for four properties totaling 1.82 acres at the intersection of Flagler Street, Douglas Road and Ponce de Leon Boulevard in Miami-Dade County. Portions of the site are located in the cities of Coral Gables and Miami.

Details: Publix was looking for a site for a new 50,000-square-foot store with rooftop parking that would allow the supermarket chain to close a nearby store it is leasing. Zitvar and Valero represented Publix, while Kessel and Valls represented seller Ponce Medical Plaza LLC, a Miami company managed by Carlos Ortega and Leonardo Ortega. The deal closed Oct. 8 after six months of negotiations, Zitvar said.

Global Fund obtained site plan approvals from both the Coral Gables and Miami city commissions before closing the deal. Construction — beginning with the demolition of four small buildings on the properties — is to begin in the fourth quarter of 2009, Zitvar said.

The sellers bought the site in August 2006 with the intention of building a residential complex, but the housing market soured, Zitvar said. A grocery store makes the most sense in today's market because of the high-profile location and the demographics of nearby residents, Zitvar said.

"I do not need to tell anyone how busy Ponce and Flagler are," he said. "This is probably the most dense location in Miami-Dade and one of the most dense sites in all of Florida. The average household income for families living near the site is $100,000."

An existing relationship between Valero, a former president and chief operating officer of shopping center investor Equity One, and Publix made the deal possible, Zitvar said. Zitvar is a former director of capital markets for Equity One, the largest landlord for Publix in Florida.

Publix's second quarter financial report shows the supermarket chain is weathering the economic storm. Sales in the second quarter of 2008 were $5.9 billion, a 3.5 percent increase from the same period in 2007.

Background: Zitvar is principal of Global Fund Investments. Valero is managing partner at Global. Kessel and Valls are brokers with the firm.

Squire Sanders trio completes bond issue so Citizens can react to disaster

Dealmaker: Attorneys Albert del Castillo, Pedro Hernandez and Lori Smith-Lalla

The deal: The Squire Sanders & Dempsey attorneys represented Citizens Property Insurance on a $1.75 billion bond issue for "pre-event" financing of its coastal high-risk account, to cover future storm damage claims.

Details: When the $330 billion auction rate securities market became a victim of the credit crunch in January, the collapse of demand for variable-rate debt instruments sent issuers of such bonds scrambling to find alternative financing as the typically low interest rates offered by auction rate securities spiked to historic levels. Citizens, the state's property and casualty insurer of last resort, was among many issuers caught in the downdraft.

"They needed to get out of that type of debt instrument, and they did," del Castillo said.

Citizens had to replace its auction rate debt with other types of debts to continue to maintain its liquidity and be able to pay policyholder claims after a catastrophic hurricane.

"What Citizens always tried to do is to help them always maintain an adequate liquidity position so that Citizens can meet its claims paying obligations," del Castillo said.

"It was very difficult to price and sell the bonds at the interest rates that made sense for Citizens," del Castillo said. "It was a big challenge. Ultimately Citizens was able to access the capital markets, but only after some delays and restructuring the financing."



RICHARD M. BROOKS

Pedro Hernandez, Albert del Castillo and Lori Smith-Lalla work for Squire Sanders, which represents Citizens as bond counsel.

Citizens restructured the financing so that instead of going with a three- to five-year maturity, the debt was offered almost wholly with a one-year maturity and a smaller piece was done as a three-year obligation.

"Instead of having $1.5 billion or $2 billion of one- to five-year debt, Citizens issued $1.5 billion of one-year notes and then $250 million of three-year bonds," he said.

Yields range from 2.5 percent to 4.37 percent. The deal closed in June.

"Citizens will have more than $20 billion of claims-paying capacity," said John Forney, managing director with Raymond James, Citizens' financial adviser, who called the financing "a reasonable deal under completely unreasonable market circumstances."

In addition to the $1.75 billion in bonds for its high risk account, in mid-May and early June Citizens obtained a $1.6 billion line of credit from a banking syndicate for its personal lines and commercial lines accounts.

"We have completely restructured the liquidity program, which will benefit all Floridians if a disaster were to strike Florida," Bruce Douglas, then-chairman of Citizens Property Insurance's board of governors, said at the time.

Background: Del Castillo is Squire Sanders' Florida practice coordinator and has an extensive public finance practice, working on bond issues throughout the country with particular emphasis in Florida and Puerto Rico. The firm represents Citizens as bond counsel. Smith-Lalla is a senior associate, and Hernandez is an associate at the firm.

The law firm Bryant Miller Olive represented Citizens as disclosure counsel. The Tallahassee law firm of Nabors Giblin & Nickerson represented Merrill Lynch as underwriters counsel. ■

— Wayne Tompkins

Owner sells farmer's market after it grew too big for him

Dealmakers: Peter Berg and Steve Aminov

The Deal: Berg brokered the $8.45 million sale of Gennaro's Farmer's Market, a Fort Lauderdale wholesale and retail produce operation.

The business, incorporated as Gennaro's Produce Inc., was owned by John "Gennaro" Mugnano of Coral Springs. The buyer was Armando Romero of North Miami, whom Berg described as "somebody coming out of the [commercial] real estate business" and looking for a new opportunity.

The deal closed Sept. 2

Details: Mugnano hired Berg to find a buyer for the farmer's market he built and opened in 2005. "The business had grown rapidly and, in all honesty, he was working too hard," Berg said of Mugnano.

Located on U.S. 441 just north of Commercial Boulevard, the two-acre property includes a 12,500-square-foot retail market, which Mugnano converted from a warehouse when he bought the property in 2005, plus a 25,000-square-foot refrigerated warehouse that he built and is the base of operations for the company's wholesale business.

Gennaro's sold produce to retail customers and hundreds of area restaurants. Gennaro's had gross revenue of $10 million to $15 million in 2007, Berg said.

The buyer "had some very good ideas about how to grow the business," Berg said of Romero.

The deal, which took a year to complete, was financed by TotalBank of Miami, Berg said. Miami attorney Vivian de los Cuevas of Broad and Cassel represented the buyer while Ian Pesses of Bezel Long of Boca Raton represented the seller, Berg said.

Background: Berg, a certified business intermediary, is managing director of Transworld Business Brokers in Fort Lauderdale. Transworld broker Steve Aminov assisted in the deal.

Lawyers work health care subsidiary sale to Humana

Dealmakers: David Wells, Carrie Levine and Roberto Palenzuela

The Deal: Wells, Levine and Palenzuela represented West Palm Beach-based Metropolitan Health Networks in a $14 million deal to sell its Metcare Health Plans subsidiary to Louisville, Ky.-based Humana Medical Plans. The deal, in which Humana purchased all of Metcare Health Plans' common stock, closed Aug. 29.

Details: Metcare Health Plans operates Advantage Care, an HMO that provides health care coverage to Medicare patients in Florida. As part of the deal, Metropolitan will continue to serve Advantage Care members through its provider service network business, Metcare of Florida.

"Humana focuses on what it's good at, the marketing to members, and Metropolitan focuses on what it's good at and what most of it's business is, which is providing services," Wells said.

Wells said the deal is designed to improve a firm's operations and is not dependent on inexpensive debt.

"I think there's going to be a refocusing on operational efficiencies and few deals driven by how they're financed," Wells said. "The M&A activity over the last few years was clearly driven by cheap debt. When cheap debt disappeared, the big deals stopped. What I think isn't going to stop are the deals designed to improve the businesses."

The deal will add 7,000 customers to Humana's portfolio. Metcare Health Plans' Advantage Care serves beneficiaries in 13 Florida counties.

Metropolitan Health Networks will also expand its relationship with CarePlus, a Humana-owned health plan for Medicare Advantage beneficiaries, to include patients in those 13 counties.

Metropolitan is a publicly traded company that offers comprehensive health care services for Medicare Advantage customers in South and Central Florida. Humana is one of the country's largest publicly traded health and supplemental benefits companies with 11.4 million members.

The Florida Office of Insurance Regulation and the Centers for Medicare & Medicaid Services approved the deal.

Background: Wells is a partner in the business practice group at Hunton & Williams' Miami office. Levine is a Hunton & Williams associate. Palenzuela is general counsel of Metropolitan. ■

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BUSINESS OF LAW

Bailout questions

Banking clients balance need for cash infusions with fear of having tighter government controls

by **Lynne Marek**
lynne.marek@incisivemedia.com

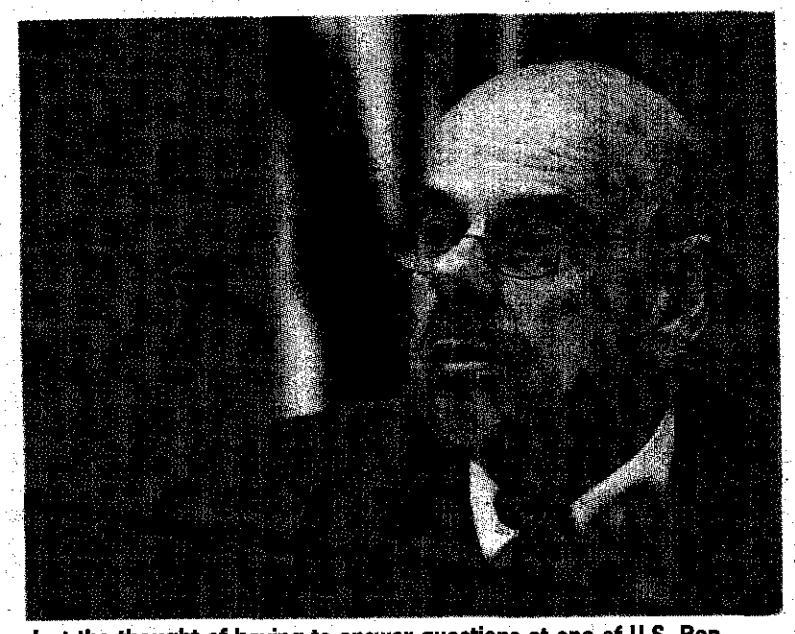
Regulatory, banking and capital market attorneys have a new calling: interpreting for worried clients how the $700 billion financial industry rescue package will help or harm them.

Client questions are focusing on the terms of participating in the new capital, short-term debt and asset-relief programs spawned by the Emergency Economic Stabilization Act. There are potential conflicts of interest, executive-compensation restrictions and oversight issues that are giving companies pause.

"Things are happening so fast that people are having trouble reacting in an efficient and concerted manner," said Jeff Taft, a partner in the Washington office and the financial services regulation and enforcement group of Chicago's Mayer Brown. "Everybody's strategy is just kind of constantly evolving."

Nine of the largest U.S. banks that agreed to participate in the federal government's initial $125 billion capital infusion into their companies have little leeway to negotiate terms of the loans.

But thousands of other small and mid-sized banks will want to weigh legal terms linked to accepting any of the additional $125 billion in direct capital investment the government is offering. The same goes for participating in the related program that will allow financial institutions to sell devalued mortgage-backed securities or other so-called "troubled assets" to the government.



Just the thought of having to answer questions at one of U.S. Rep. Henry Waxman's oversight committees is enough to scare some banking clients away from government cash.

The biggest concern for most clients considering the programs would be the legal implications of having the U.S. government as a potential shareholder by virtue of the preferred shares the government will receive in exchange for capital, which could be converted into common shares, attorneys said.

There may be corporate governance requirements, federal reporting duties or a limited loss of autonomy that could accompany the government's "passive" investment, attorneys said.

"Each of these programs comes with some controls," said Duane Wall, a banking industry partner in White & Case's New York office. "You're really going to have to decide: Do you need the assistance, and do you need it sufficiently to accept the conditions that have been imposed?"

Clients are particularly eager to avoid increased government oversight following the public grilling and denunciations some executives involved in the financial meltdown endured recently before congressional committees, such as the House Committee on Oversight and Government Reform.

"I don't think a lot of people envy the idea of being called up to Capitol Hill to one of [U.S. Rep. Henry] Waxman's oversight hearings," Wall said.

Clients will want to understand how assets to be sold to the government under the troubled-asset program will be assigned a price, whether through an auction or some other mechanism, because the monetary benefits of such sales may be undercut in some cases by conditions of the transaction, attorneys said.

For instance, if the government

See Bailout, Page A10

LAW & TECHNOLOGY

Does YouTube issue show McCain's stance on copyright law?

by **Nate Raymond**
nate.raymond@incisivemedia.com

Do a series of letters between John McCain's presidential campaign and YouTube suggest how the senator would deal with copyright enforcement if elected president?

That's the question after a back-and-forth between the campaign's general counsel, Caplin & Drysdale partner Trevor Potter, and lawyers at YouTube last week.

The exchange began Monday when Potter wrote to complain about what he saw as an excessive number of requests by TV networks for the Web site to take down videos the campaign posted.

YouTube counsel said it cannot perform a substantive legal review of every takedown notice due to the sheer volume and the site's scale.

"Numerous times during the course of the campaign, our advertisements or Web videos have been the subject of [Digital Millennium Copyright Act] takedown notices regarding uses that are clearly privileged under the fair use doctrine," Potter wrote.

The disputed material were news reports reproduced either in part or in their entirety. YouTube removed these videos "despite the complete lack of merit in these copyright claims," Potter said. By removing the videos, he said YouTube "chilled" the campaign's political speech.

"We recognize that YouTube has said it adheres to the notice-and-takedown procedures established by the DMCA," Potter wrote. "But nothing in the DMCA requires a host like YouTube to comply automatically with takedown notices, while blinding itself to their legal merit (or, as here, their lack thereof)."

The McCain campaign understood YouTube might get too many videos and takedown notices to conduct a full fair use review on each, Potter said. But he proposed YouTube "com-

See Law & Technology, Page A10

Events

Today
Palm Beach County Bar Association: Networking & Learning luncheon for Solo & Small Firm Practitioners, 11:45 a.m., Bar Association Office, 1601 Belvedere Road, Suite 302 E., West Palm Beach. Cost: $10 members, $20 nonmembers. Call (561) 687-2800.
South Palm Beach County Bar Association: Civil Practice CLE

See Events, Page A12

People



Loumiet



Benitez

In the community

• **Carlos Loumiet**, a partner with Hunton & Williams in Miami, has been named chairman of the board of the New America Alliance.

On the move

• **Karina Benitez** has been named associate with Cordero & Associates in Miami. She was a law clerk with the firm. Benitez has a law degree from St. Thomas University and a bachelor's degree from Florida International University.

• **Natalia Gari** has also been named associate with Cordero & Associates in Miami. She was also a law clerk with the firm. Gari has a law degree from St. Thomas University and a bachelor's degree from the University of Miami.



Gari

• **E. Lennon Kraus** has been named associate with Aronfeld Trial Lawyers in Coral Gables. He was a law clerk with the firm. Kraus has a law degree from the University of Miami and a bachelor's degree from Michigan State University.

• **Bruce E. Shemrock** has joined Aronfeld Trial Lawyers in Coral Gables as an associate. He was a litigation case management specialist with Lawex Corp. Shemrock has a law degree from Nova Southeastern University and a bachelor's degree from Embry-Riddle Aeronautical University. He also attended the University of Saskatchewan, Canada. ■

Correction

An article published Oct. 21 titled "Baptist Health loses fight for trust money" incorrectly listed Andrew Lamb's law firm affiliation. He is a name partner with Hall Lamb & Hall in Miami. ■

BAILOUT

From Page A9

decides to publish the name of a financial institution selling tainted assets alongside the other transaction information, such as the price, the stigma of being associated with the troubled assets may hurt the company and outweigh the value of the sale, lawyers said.

Conflicts of interests

For companies that earlier this month considered, during a short 48-hour window, whether to apply to become a federal contractor that would help the government run the programs or manage assets, lawyers fielded many calls about potential conflicts of interest.

The conflicts might arise for companies that sought to act as a contractor for the government in managing assets purchased by the U.S. Treasury Department and also tried to act as a participant in selling their own soured mortgage loans or securities to the government.

Government guidelines dictating separation of those interests will have to be made clear, given the sheer number of financial contractors — perhaps as many as 30 — needed to run the programs, lawyers said.

"Any time you're contracting with the government, it raises all sorts of issues; conflicts of interest being just one of them," Taft said.

Lawyers found clients particularly concerned about restrictions on executive compensation that will be imposed if a company receives a direct capital infusion or more than $300 million under the asset-sale program. Taft said that clients could avoid those restrictions at least in the sale-of-assets program by not selling more than $300 million to the government.

The new law prohibits companies generally from offering or paying senior executives certain "golden parachute" benefits that might be paid after they leave the company. It also prohibits the company from taking tax deductions of more than $500,000 for a given executive. For some companies, the tax aspect won't matter because they wouldn't be taking the deductions for executive pay in any case, said George Simon, a partner in the Chicago office of Foley & Lardner.

Still, it's an important condition that companies should carefully consider because it could affect their ability to recruit top executives in the future or pursue a particular succession plan, said Cynthia Lance, the corporate secretary and general counsel for First Midwest Bancorp, an Itasca, Ill.-based bank with a $9 billion market capitalization.

For companies on the fence as to whether to participate in the government programs, they should consider creating an independent committee to make the decision to avoid creating conflicts of interest for executives, said Meg Tahyar, a transactional and capital markets partner in the Paris office of New York's Davis Polk & Wardwell who has been shuttling to New York during the crisis. Executives trying to decide whether a given program might be a sound choice for the health of their company could be conflicted if they know participation might affect their own compensation, lawyers said.

Companies that have considered trying to skirt the compensation restrictions by setting up special entities that would take the government's capital infusion are unlikely to be successful, Taft said.

"Treasury is going to look very dimly on that type of approach," he said.

Other clients, including those that aren't financial companies, also want to understand how they may be able to participate in the new federal programs or benefit from regulatory changes associated with them, lawyers said.

Specifically, municipalities, nonprofits, universities, labor unions and other organizations that hold the tainted mortgage-backed securities and other now-devalued assets in endowments, pension funds and other portfolios would also like the opportunity to sell assets to the government, Simon said.

While the Treasury Department could extend the program to these other companies, that possibility appears to be waning with the government's shift toward direct investment in financial institutions, he said.

Hospitals and funding

One program that will be offered to non-financial companies starting Monday is the Federal Reserve's offer to buy commercial paper, or short-term debt issued by companies, as a means to increase access to funding for businesses. Some clients such as hospitals that have big short-term funding needs are eager to take the government up on the offer amid the difficulty in accessing credit, Simon said.

"These hospital systems have huge short-term financing needs for receivables," Simon said. "They're constantly rolling over commercial paper to finance the receivables they have for bills."

Aside from government restrictions that will be attached to participation in the new federal programs, companies are prodding their lawyers for information on increased federal regulation that will follow the financial debacle, which had its roots in unrealistic home mortgage lending practices and the sale of mortgages securities to investors.

The increased federal regulation will likely reach beyond banks to include the hedge funds and private-equity funds that have played significant roles in financing businesses during the past decade, the lawyers say. It will also ripple through to the businesses that have been dependent on the financing streams and the trading of securities on financial exchanges.

Clients want to know what the Securities and Exchange Commission is going to do to "prevent my stock from getting hammered" for reasons not related to the fundamentals of the company, Simon said. The agency may have to reconsider permanent restrictions on short-selling, among other things, he said.

"When you go through a crisis, you tend to get overregulation," Wall said.

Some clients are suggesting that a more dramatic, wholesale overhaul of the U.S. financial regulatory system to better streamline the work of disparate federal regulators and separate state regulators may be needed, Tahyar said.

The new regulatory framework will be evolving just as government enforcement agencies and prosecutors strike at the companies and individuals that may have fueled the financial meltdown by engaging in fraudulent or other improper business activities, the lawyers said. Last month, the FBI opened inquiries into possible mortgage fraud at mortgage lenders Fannie Mae and Freddie Mac, Lehman Brothers Holdings and insurer American International Group. ■

Lynne Marek reports for the National Law Journal, an Incisivemedia affiliate of the Daily Business Review.

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LAW & TECHNOLOGY

From Page A9

mit to a full legal review" of videos from accounts controlled by political candidates and campaigns.

He didn't have to wait long for a response.

YouTube chief counsel Zahavah Levine responded Tuesday by in essence saying, sorry, but no.

Levine said YouTube cannot perform a substantive legal review of every takedown notice due to the sheer volume and the site's scale. For instance, while the site might deem McCain's videos permissible under the fair use doctrine, others might contest such a finding.

The disputed material were news reports reproduced either in part or in their entirety.

"Lawyers and judges constantly disagree about what does and does not constitute fair use," Levine wrote. "No number of lawyers could possibly determine with a reasonable level of certainty whether all the videos for which we receive disputed takedown notices qualify as fair use."

More importantly, YouTube doesn't have enough information about all of the videos it gets, she said. It's not the one uploading the videos, nor is it the one holding the copyright.

As to limiting the review to political candidates, Levine said no way.

"While we agree with you that the U.S. presidential election-related content is invaluable and worthy of the highest level of protection, there is a lot of other content on our global site that our users around the world find to be equally important," she said.

Levine signed off with a suggestion for what a McCain administration might do to resolve the issue.

"We look forward to working with Senator (or President) McCain on ways to combat abuse of the DMCA takedown process on YouTube, including by way of example strengthening the fair use doctrine so that intermediaries like us can rely on this important doctrine with a measure of business certainty," Levine said.

So, if elected, would McCain want to, as YouTube suggests, strengthen the fair use doctrine? The Electronic Frontier Foundation, reacting on its blog to the letters, called it "heartening to see a presidential campaign recognize the importance of fair use and 'remix culture.'"

But Peter Simmons, a partner at Fried Frank Harris Shriver & Jacobson who represented EMI Group in its litigation against Bertelsmann over Napster, doesn't think the letters show so much a desire to change copyright law as a desire to win an election.

"I'd be hesitant to read any message in terms of McCain's views on IP law development," Simmons said. "This strikes me more as an expedient or opportunistic campaign just trying to get their message out during the time remaining before the elections." ■

Nate Raymond reports for The American Lawyer, an Incisivemedia affiliate of the Daily Business Review.

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LAW BRIEFS

Repairs begin to shore up Florida Supreme Court

National Law Journal

The Florida Supreme Court has erected a safety fence outside its Tallahassee building and is beginning repairs to its basement, where water seepage has destroyed about 12,000 books during the last two years.

The basement houses the court's law library. The rare book room, which includes books dating to the 1500s such as law books from Spanish rule and some written in Cherokee on tribal law, was moved upstairs without damage.

The courthouse built in 1948 has cracks in the basement walls, probably due to heavy truck traffic nearby, said Florida Supreme Court spokesman Craig Waters. Water seepage over the years forced the court to discard 11,646 library books worth about $12,000.

"We thought we had solved the problem a few years ago by fixing the basement floor," he said.

Part of the basement will be closed during construction, but the law library will remain open after books were moved to other parts of the basement.

"We are taking every step possible to ensure that the public has access to the building and that any inconvenience is minimized to the full extent that public safety permits," Chief Justice Peggy A. Quince said in a statement.

The destroyed books will not be replaced since the information can now be found online. ■

EVENTS From Page A9

on "Effective Courtroom Strategies," with former Palm Beach County Circuit Judge William Berger, 11:45 a.m., Marriott Boca Raton, 5150 Town Center Circle, Boca Raton. Cost: $35 members, $55 nonmembers. Call (561) 482-3838.

The Broward County Chapter of the Federal Bar Association: "GTMO — A view from inside," with Paul Rashkind, supervisory assistant federal public defender and chief of appeals for the Office of the Federal Public Defender, Southern District of Florida, noon, Riverside Hotel, 620 E. Las Olas Blvd., Fort Lauderdale. Cost: $30 members, $35 nonmembers, $15 judiciary, $5 more at the door. E-mail: rharrod@bergersingerman.com

Voluntary Bar Speed-Networking Event: Asian Pacific American Bar Association, Caribbean Bar Association, Cuban American Bar Association, Miami Beach Bar Association, Dade County Bar Association, Florida Muslim Bar Association, Puerto Rican Bar Association, T.J. Reddick Bar Association, Wilkie D. Ferguson Bar Association, 6 p.m., Historical Museum of Southern Florida, 101 W. Flagler St., Miami. Cost: $20. E-mail: nydia@menendezlawfirm.com

Florida Association for Women Lawyers, Miami-Dade Chapter: Dinner with FAWL director Laura Wendell for members, 7 p.m., Cita's Italian Chop House, 3176 Commodore Plaza, Coconut Grove. Cost: $40. E-mail: lwendell@wsh-law.com.

Oct. 23

Wilkie D. Ferguson Jr. Bar Association: Black Judicial Forum, noon, The Bankers Club, One Biscayne Tower, 14th Floor, Miami. Cost: $25 members, $30 nonmembers, $15 law students. E-mail: RacoleHenry@gmail.com

Florida Association of Criminal Defense Lawyers, Miami Chapter: Judicial luncheon with Judges Bertila Soto and Reemberto Diaz, noon, Biscayne Bay Marriott, 1633 N. Bayshore Drive, Miami. Cost: $20 members, $30 nonmembers. Call (305) 670-9919.

Broward County Bar Association Young Lawyers Section: Luncheon, noon, Tower Club, 100 SE Third Ave., Fort Lauderdale. Cost: $25. Call (954) 764-8040.

Broward County Crime Commission: 2008 Broward County Prosecutor of the Year gala, 6 p.m., Palm-Aire Country Club & Resort, 2600 Palm-Aire Drive North, Pompano Beach. Cost: $25 members, $75 nonmembers. Call (754) 423-1976. ■

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EVENTS From Page A3

Women's Council of Realtors, Greater Palm Beach Chapter: Meeting with state Sen. Dave Aronberg on "Issues Impacting Florida's Economy," 7:45 a.m., Aberdeen Country Club, 8251 Aberdeen Drive, Boynton Beach. Cost: $30. Call (561) 573-0557.
Greater Miami Chamber of Commerce: Bagels with the Boss, 8 a.m., Chamber office, 1601 Biscayne Blvd., Ballroom level, Miami. Free. Call (305) 577-5446.
Realtor Association of Greater Miami and the Beaches: Code of Ethics Training, 9 a.m., The Miami Herald Building, 2010 NW 150th Ave., Pembroke Pines. Free for members, $25 nonmembers. Call (305) 468-7000.
Broward County Chamber of Commerce: Executive Business After Hours, 5 p.m., Charley's Crab Restaurant, 3000 NE 32nd Ave., Fort Lauderdale. Cost: $10. Call (954) 565-5750.
Commercial Real Estate Women, Fort Lauderdale/Palm Beach Chapter: Cosmetics and Wine, 6 p.m., Neiman Marcus, 5860 Glades Road, Boca Raton. Free. Call (561) 733-2259.
The Environmental Coalition of Miami Beach: Fundraiser to benefit a greener and more sustainable Miami Beach, 7 p.m., Shore Club Hotel, Red Room, 1901 Collins Ave., Miami Beach. Cost: $50 donation. E-mail: ecomb@ecomb.org
South Florida Foreclosure Experts, Real Estate WNC Meetup: Foreclosures and Real Estate monthly update and networking, 7 p.m., Denny's Conference Room, 3151 Powerline Road, Fort Lauderdale. Free. Call (954) 696-3624.

Oct. 24
Realtors Commercial Alliance of Greater Miami and the Beaches: Commercial Super Expo and Conference, "The Evolution of Office," 8 a.m., Miami Mart Airport Hotel, 711 NW 72nd Ave., Miami. Cost: $59 members, $79 nonmembers. Call (305) 468-7060.
Junior Achievement of South Florida: Fall bowl-a-thon, 7 p.m., Sparez at Davie, 5325 S. University Drive, Davie. Cost: $100 team donation, $15 bowling fee. Call (954) 788-8422.
The Loan Committee: Monthly meeting, noon, Westin Hotel, 400 Corporate Drive, Fort Lauderdale. Cost: $25. E-mail: sgfenvironmentl@jangomail.com
Women's Council of Realtors: Charity Golf Tournament, 1:15 p.m., The President Country Club, 2300 Presidential Way, West Palm Beach. Cost: $125 single, $450 four players, $50 nongolfers. Call (561) 523-5526.

Oct. 25
Stiles Corporation: Family Fun Day, 10 a.m., Village Shoppes of Pine Plaza, 4261 Pine Island Road, Sunrise. Free. Call (954) 627-9377.
Junior Achievement of South Florida: Fall bowl-a-thon, noon and 3 p.m., Brunswick Margate Lanes, 2020 N. State Road 7, Margate. Cost: $100 team donation, $15 bowling fee. Call (954) 788-8422.
Junior Achievement of South Florida: Fall bowl-a-thon, noon and 3 p.m., AMF Davie, 8200 W. State Road 84, Davie. Cost: $100 team donation, $15 bowling fee. Call (954) 788-8422.
The YMCA of Greater Miami: Annual gala, 7 p.m., Mandarin Oriental, 500 Brickell Key Drive, Miami. Cost: $500. Call (305) 357-4000.

Oct. 27-30
Urban Land Institute: Fall meeting and Urban Land Expo, 8 a.m., Miami Beach Convention Center, 1901 Convention Center Drive, Miami Beach. Cost varies. Call (800) 321-5011.

Oct. 27
Realtor Association of Greater Miami and the Beaches: Breakfast and seminar on "Upstage the Competition, Certified Home Marketing Specialist Designation," 8:30 a.m., RAMB headquarters, 700 S. Royal Poinciana Blvd., Suite 400, Miami Springs. Cost: $199 members, $239 nonmembers. Call (305) 468-7000.
Broward Days: Kick-off reception, 5:30 p.m., Riverside Hotel, 620 E. Las Olas Blvd., Fort Lauderdale. Free for members, $100 membership for nonmembers. Call (954) 383-0654.

Oct. 28
Realtor Association of Greater Miami and the Beaches: Advanced Short Sales Seminar, 8:30 a.m., RAMB headquarters, 700 S. Royal Poinciana Blvd., Suite 400, Miami Springs. Cost: $99 members, $149 nonmembers. Call (305) 468-7000.
Florida Association of British Business: British Networking, 6:30 p.m., American Legion Hall, Harveys, 6447 NE Seventh Ave., Miami. Free. Call (305) 371-9340.

Oct. 28-29
Realtor Association of Greater Miami and the Beaches: "Real Estate Assistants — Intensive Quick Start Program," 9 a.m., RAMB headquarters, 700 S. Royal Poinciana Blvd., Suite 400, Miami Springs. Cost: $179 members, $239 nonmembers. Call (305) 468-7000.

Oct. 29-30
Professional Pricing Society: Fall Conference, 7 a.m., Intercontinental Hotel, 100 Chopin Plaza, Miami. Cost: $1,695 members, $1,995 nonmembers. Call (770) 509-9933.
Rachlin: Annual Governmental Symposium on "Updates on Accounting Practices for Governmental Employees," 9 a.m., Signature Grand, 6900 W. State Road 84, Davie. Free. Call (954) 525-1040.

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Realtor Association of Greater Miami and the Beaches: Advanced Short Sales Seminar, 8:30 a.m., Residence Inn Marriott, 19900 W. Country Club Drive, Aventura. Cost: $99 members, $149 nonmembers. Call (305) 468-7000.
Realtor Association of Greater Miami and the Beaches: Code of Ethics Training, 9 a.m., Intracoastal Mall, 3577 NE 163rd St., North Miami. Free for members, $25 nonmembers. Call (305) 468-7000.
Greater Miami Chamber of Commerce: Dueling Diagnosis: A Debate Around Healthcare Reform, 11:30 a.m., Chamber office, 1601 Biscayne Blvd., Ballroom level, Miami. Cost: $35 members, $45 nonmembers. Call (305) 577-5491.
Greater Hollywood Chamber of Commerce: Business After Hours, 5 p.m., Tuscany Italian Bistro and Lounge, 5800 Seminole Way, Hollywood. Cost: $7 members, $12 future members. Call (954) 923-4000.
Staples and Greater Fort Lauderdale Chamber of Commerce: Small Business Bailout networking forum, 5 p.m., Staples Fort Lauderdale Store, 1701 E. Commercial Blvd., Fort Lauderdale. Free. Call (305) 572-1390.

Nov. 2-4
Realtors Association of Greater Miami and the Beaches: International Congress, 9:30 a.m., Miami Beach Resort & Spa, 4833 Collins Ave., Miami Beach. Cost: $249 members, $299 nonmembers. Call (305) 468-7000.

Nov. 5
Broward County Chamber of Commerce and South Florida Chamber of Commerce: Along with many world class partners, alliances and chambers of commerce. South Florida Business-to-Business Expo, International Trade Show, Hospitality/Tourism and Travel Expo, Business Card Exchange, 4 p.m., Broward County Convention Center, 1950 Eisenhower Blvd., Fort Lauderdale. Cost: $10. Call (954) 565-5750.
Florida Institute of CPAs Gold Coast Chapter: Meeting, 4:15 p.m., Tropical Acres Restaurant, 2500 Griffin Road, Dania Beach. Cost: $38 members, $48 nonmembers. Call (954) 962-6397.
South Florida Hedge Fund Managers: "Opportunities in the Credit Space," 6 p.m., The Conrad Hotel, 1395 Brickell Ave., Miami. Cost: $50 donation to The Community Partnership for Homeless in Miami or The Wounded Warrior Project. Call (305) 379-4200.
Broward Real Estate Investors Association: Monthly meeting, 6 p.m., IGFA Fishing Hall of Fame, 300 Gulf Stream Way, Dania Beach. Cost: $20. Call (954) 424-3008.

Nov. 6
South Florida Hispanic Chamber of Commerce: Annual Sunshine Awards luncheon, noon, Conrad Hotel, 1395 Brickell Ave., Miami. Cost: $60 members, $75 nonmembers. Call (305) 534-1903. ■

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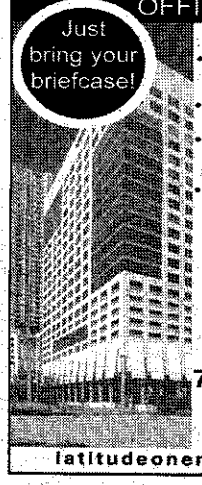
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Photographer takes copyright fight to U.S. high court

HIS LAWYER SAYS 11TH, 2ND CIRCUITS misinterpreted Supreme Court ruling in their decisions favoring National Geographic

BY R. ROBIN MCDONALD

A FLORIDA PHOTOGRAPHER is asking the U.S. Supreme Court to revisit a landmark copyright decision to determine whether federal appellate courts in Georgia and New York have interpreted it correctly.

The move by freelance underwater photographer Jerry Greenberg extends his 11-year fight with the National Geographic Society over its use of his photographs in a CD compilation of every edition of its flagship magazine.



ALISON CHURCH

The case turns on what Justice Ruth Bader Ginsburg meant.

Between 1962 and 1990, National Geographic published 64 of Greenberg's photos, including one of a shark in the Florida Keys that became a magazine cover. National Geographic paid Greenberg for the publication rights, which were conveyed back to

See **Copyright,** *page 9*

Find related court documents by clicking on this story at DailyReportOnline.com.

Photographer takes copyright fight to U.S. high court

Copyright, from page 1

Greenberg in the mid-1980s, said the photographer's longtime Miami attorney, Norman Davis of Squire, Sanders & Dempsey.

In 1997, when National Geographic developed "The Complete National Geographic," a CD archive of its entire magazine library, Greenberg attempted to negotiate a new publication contract based on the CD library. But National Geographic claimed the CD set did not infringe Greenberg's copyright, Davis said.

Since 2005, two federal appellate circuits, the 2nd in New York and the 11th in Atlanta, have agreed with National Geographic. In separate cases brought by freelance writers in New York and Greenberg in Florida against the National Geographic over the CD library, the appellate courts have held that publishing the magazine's archive on computer CDs does not infringe the copyrights of its freelance contributors.

Greenberg's appeal asks the Supreme Court to clarify Justice Ruth Bader Ginsburg's majority decision in the 2001 case of *New York Times v. Tasini,* 533 U.S. 483, which also sought to settle a dispute between freelance writers and publishers over the digitized use of the writers' works.

Greenberg's petition asserts that federal appellate copyright rulings by the 11th and 2nd Circuits citing *Tasini* have "warped" the Ginsburg majority opinion.

"We believe the Supreme Court would be interested in what has been done by two of the [federal appellate] circuits in the *Tasini* decision," Davis said. "The Supreme Court, I think, will agree that the *Tasini* decision has been wrongfully applied. In a very volatile copyright environment, that's not a good thing."

Tasini, named for lead plaintiff and freelance writer Jonathan Tasini, determined that publishers violated freelance writers' copyrights if they sold previously published freelance articles to online databases without securing new permission from the authors. The case provided guidance in interpreting and applying revisions made in 1976 to section 201(c) of the federal copyright laws in the context of the technological revolution that has created new avenues of publication.

The decision was considered a win for freelance writers who could then negotiate new permissions and monetary contracts with publishers for what the court majority held were new uses of previously published works.

Back-and-forth case

Greenberg's case began in Florida, where a federal judge originally found for National Geographic. Greenberg appealed to the 11th Circuit, which in 2001 reversed the district court and remanded the case, finding that National Geographic had infringed the photographer's copyright. The 11th circuit opinion was released shortly before *Tasini* was handed down.

The Florida district court subsequently found that National Geographic owed Greenberg $400,000 in damages. National Geographic appealed, and last year a new 11th Circuit panel—citing the intervening *Tasini* decision—reversed the first panel's ruling in favor of National Geographic. In June the 11th Circuit, sitting en banc, split 7-5 in favor of National Geographic. That decision was compatible with a 2005 finding by the 2nd Circuit of New York regarding virtually identical copyright questions.

The two appellate circuits' majorities adopted arguments by National Geographic and a coterie of amici publishers that Ginsburg's majority opinion in *Tasini*—while restricting the publishers from selling freelancers work to online databases such as Lexis and Westlaw without securing the authors' permission—allowed publishers to place entire publication libraries on CDs and then sell them without owing anything to the freelance authors and photographers whose works are reproduced in those collections.

The 11th Circuit's en banc majority decision, determined that because National Geographic's digital library reproduced complete magazine issues "exactly as they are presented in the print version," publishers retained the privilege of reproducing them under federal copyright laws without renegotiating contracts with their writers and photographers.

rbb PUBLIC RELATIONS

"The Supreme Court, I think, will agree that the *Tasini* decision has been wrongfully applied. In a very volatile copyright environment, that's not a good thing.

—Norman Davis, photographer's lawyer

The majority also decided that new elements such as the operating software and search engines that were added to the CD-ROM library—even if they carry copyrights—were not enough to make "The Complete National Geographic" a new collective work subject to copyright privilege.

"The addition of new material to a collective work will not, by itself, take the revised collective work outside the privilege," the majority opinion stated.

Interpreting Ginsburg

The 11th Circuit ruling turned on the definitions of an acceptable revision and a new work as determined by *Tasini*. Publishers, including National Geographic, have acknowledged that their arguments are not based on specific language in *Tasini* but rather on dicta—explanatory commentary included in the opinion that does not directly address the facts of the case under review.

In *Tasini*, Ginsburg wrote for the 7-2 majority that electronic and CD-ROM databases compiled of individual articles culled from periodicals could not be considered "revisions" or revised editions of previously published issues—such as revised editions of an encyclopedia or multiple editions of a daily newspaper. Therefore, publishers may not sell the rights to reproduce those articles to computer or online databases without contracting for the publication rights from the authors.

In deciding that the databases were not simply a revised edition, the Supreme Court focused on the articles' appearance in online databases without the graphics, formatting and layout that accompanied their original publication.

"Those databases simply cannot bear characterization as a 'revision' of any one periodical edition," Ginsburg wrote. "We would reach the same conclusion if the [*New York*] *Times* sent intact newspapers to the electronic publishers."

The court majority also specifically rejected an analogy offered by publishers saying that the electronic databases were no different than microfilm and microfiche reproductions. The court found that comparison "wanting."

"Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film," Ginsburg wrote. "Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper."

As a result, a user views an article in context, Ginsburg wrote. In electronic databases, "by contrast, the articles appear disconnected from their original context. ... In short, unlike microforms, the databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any 'revision' thereof."

Petitioning the court

Greenberg's petition to the justices states that his case "presents the question of whether a database aggregating many collective works constitutes a 'revision' of each of its constituent collective works."

What constitutes a revision is key to the ongoing legal debate because, according to the petition, the 1976 copyright revisions embodied in Section 201(c) were intended "to limit the ability of a publisher to republish contributions to collective works without providing compensation to the freelance artists who should benefit from the demand for their work after the initial publication."

That section is the backdrop against which freelance artists and publishers negotiate their contracts, the petition asserts.

Both the 11th and 2nd Circuits, Greenberg's petition says, "have held that a publisher can avoid paying the artist anything under *Tasini* by the simple expediency of creating 'context' by including a feature that allows users to 'flip' between the pages of individual magazines."

"So long as publishers use an image-based database with a flip function," the petition continues, "they can place their entire archive of magazines or newspapers on the Web for free, benefiting from advertising revenues or increased traffic. Yet the artist receives nary a penny. ... Publishers can sell access to individual articles, stories, or pictures, so long as the rest of the pages in the issue are a click away. Once a Google search can find it, the author's copyright for that individual text, picture or video is essentially worthless."

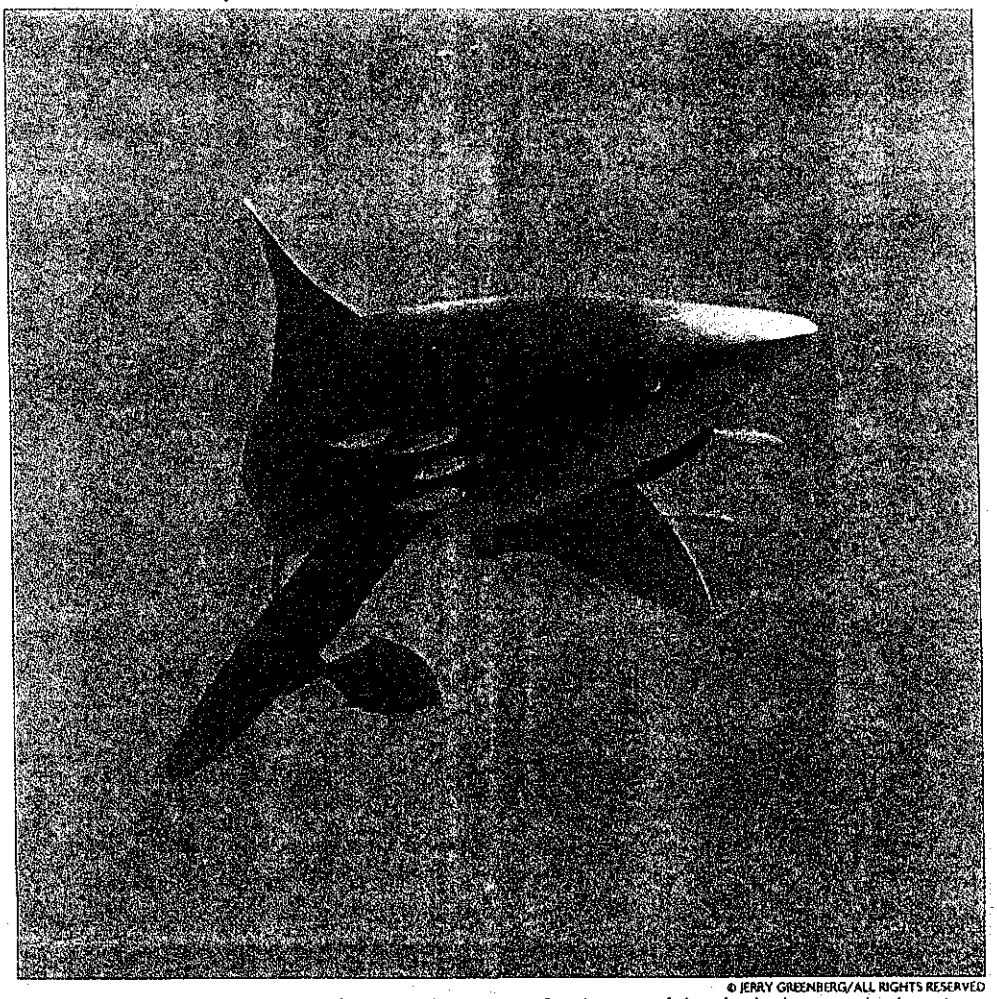
Finally, in urging the high court to hear the case, Greenberg's petition concludes, "[T]he outcome of this dispute will determine whether freelance artists will share in the benefits of modern technology. ... This Court should clarify that publishers cannot reap the benefits of appropriating the market for the freelancer's individual works without compensating the freelancer."

On Thursday, Terry Adamson, executive vice president of the National Geographic Society, said he was not surprised Greenberg asked the high court to take the case.

In an e-mail to the *Daily Report*, he said, "We are evaluating whether to respond, and, if we do, what to add for the Court's consideration whether to grant or deny certiorari. As the 11th and 2nd Circuits have both held, we believe that the Supreme Court has clearly outlined the parameters of the statutory 201(c) privilege when it spoke in 2001 in *Tasini v. The New York Times et al.* and that the CNG [Complete National Geographic] is well within those parameters."

R. Robin McDonald can be reached at robin.mcdonald@incisivemedia.com or (404) 419-2835.

FRIDAY, OCTOBER 17, 2008
DAILY REPORT
A SMART READ FOR SMART READERS



© JERRY GREENBERG/ALL RIGHTS RESERVED

Jerry Greenberg sued the National Geographic Society for the use of this shark photo and others in a CD archive of its entire magazine library. He has petitioned the U.S. Supreme Court to hear his case.

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DAILY REPORT

A SMART READ FOR SMART READERS

October 17, 2008 Circulation: 4,450

Photographer takes copyright fight to U.S. high court

HIS LAWYER SAYS 11TH, 2ND CIRCUITS misinterpreted Supreme Court ruling in their decisions favoring National Geographic

BY R. ROBIN MCDONALD

A FLORIDA PHOTOGRAPHER is asking the U.S. Supreme Court to revisit a landmark copyright decision to determine whether federal appellate courts in Georgia and New York have interpreted it correctly.

The move by freelance underwater photographer Jerry Greenberg extends his 11-year fight with the National Geographic Society over its use of his photographs in a CD compilation of every edition of its flagship magazine.



ALISON CHURCH

The case turns on what Justice Ruth Bader Ginsburg meant.

Between 1962 and 1990, National Geographic published 64 of Greenberg's photos, including one of a shark in the Florida Keys that became a magazine cover. National Geographic paid Greenberg for the publication rights, which were conveyed back to

See ***Copyright****, page 9*

Find related court documents by clicking on this story at DailyReportOnline.com.

Photographer takes copyright fight to U.S. high court

Copyright, from page 1

Greenberg in the mid-1980s, said the photographer's longtime Miami attorney, Norman Davis of Squire, Sanders & Dempsey.

In 1997, when National Geographic developed "The Complete National Geographic," a CD archive of its entire magazine library, Greenberg attempted to negotiate a new publication contract based on the CD library. But National Geographic claimed the CD set did not infringe Greenberg's copyright, Davis said.

Since 2005, two federal appellate circuits, the 2nd in New York and the 11th in Atlanta, have agreed with National Geographic. In separate cases brought by freelance writers in New York and Greenberg in Florida against the National Geographic over the CD library, the appellate courts have held that publishing the magazine's archive on computer CDs does not infringe the copyrights of its freelance contributors.

Greenberg's appeal asks the Supreme Court to clarify Justice Ruth Bader Ginsburg's majority decision in the 2001 case of *New York Times v. Tasini*, 533 U.S. 483, which also sought to settle a dispute between freelance writers and publishers over the digitized use of the writers' works.

Greenberg's petition asserts that federal appellate copyright rulings by the 11th and 2nd Circuits citing *Tasini* have "warped" the Ginsburg majority opinion.

"We believe the Supreme Court would be interested in what has been done by two of the [federal appellate] circuits in the *Tasini* decision," Davis said. "The Supreme Court, I think, will agree that the *Tasini* decision has been wrongfully applied. In a very volatile copyright environment, that's not a good thing."

Tasini, named for lead plaintiff and freelance writer Jonathan Tasini, determined that publishers violated freelance writers' copyrights if they sold previously published freelance articles to online databases without securing new permission from the authors. The case provided guidance in interpreting and applying revisions made in 1976 to section 201(c) of the federal copyright laws in the context of the technological revolution that has created new avenues of publication.

The decision was considered a win for freelance writers who could then negotiate new permissions and monetary contracts with publishers for what the court majority held were new uses of previously published works.

Back-and-forth case

Greenberg's case began in Florida, where a federal judge originally found for National Geographic. Greenberg appealed to the 11th Circuit, which in 2001 reversed the district court and remanded the case, finding that National Geographic had infringed the photographer's copyright. The 11th circuit opinion was released shortly before *Tasini* was handed down.

The Florida district court subsequently found that National Geographic owed Greenberg $400,000 in damages. National Geographic appealed, and last year a new 11th Circuit panel—citing the intervening *Tasini* decision—reversed the first panel's ruling in favor of National Geographic. In June the 11th Circuit, sitting en banc, split 7-5 in favor of National Geographic. That decision was compatible with a 2005 finding by the 2nd Circuit of New York regarding virtually identical copyright questions.

The two appellate circuits' majorities adopted arguments by National Geographic and a coterie of amici publishers that Ginsburg's majority opinion in *Tasini*—while restricting the publishers from selling freelancers work to online databases such as Lexis and Westlaw without securing the authors' permission—allowed publishers to place entire publication libraries on CDs and then sell them without owing anything to the freelance authors and photographers whose works are reproduced in those collections.

The 11th Circuit's en banc majority decision, determined that because National Geographic's digital library reproduced complete magazine issues "exactly as they are presented in the print version," publishers retained the privilege of reproducing them under federal copyright laws without renegotiating contracts with their writers and photographers.

rbb Public Relations

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—Norman Davis, photographer's lawyer

The majority also decided that new elements such as the operating software and search engines that were added to the CD-ROM library—even if they carry copyrights—were not enough to make "The Complete National Geographic" a new collective work subject to copyright privilege.

"The addition of new material to a collective work will not, by itself, take the revised collective work outside the privilege," the majority opinion stated.

Interpreting Ginsburg

The 11th Circuit ruling turned on the definitions of an acceptable revision and a new work as determined by *Tasini*. Publishers, including National Geographic, have acknowledged that their arguments are not based on specific language in *Tasini* but rather on dicta—explanatory commentary included in the opinion that does not directly address the facts of the case under review.

In *Tasini*, Ginsburg wrote for the 7-2 majority that electronic and CD-ROM databases compiled of individual articles culled from periodicals could not be considered "revisions" or revised editions of previously published issues—such as revised editions of an encyclopedia or multiple editions of a daily newspaper. Therefore, publishers may not sell the rights to reproduce those articles to computer or online databases without contracting for the publication rights from the authors.

In deciding that the databases were not simply a revised edition, the Supreme Court focused on the articles' appearance in online databases without the graphics, formatting and layout that accompanied their original publication.

"Those databases simply cannot bear characterization as a 'revision' of any one periodical edition," Ginsburg wrote. "We would reach the same conclusion if the [*New York*] *Times* sent intact newspapers to the electronic publishers."

The court majority also specifically rejected an analogy offered by publishers saying that the electronic databases were no different than microfilm and microfiche reproductions. The court found that comparison "wanting."

"Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film," Ginsburg wrote. "Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper."

As a result, a user views an article in context, Ginsburg wrote. In electronic databases, "by contrast, the articles appear disconnected from their original context. ... In short, unlike microforms, the databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any 'revision' thereof."

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Finally, in urging the high court to hear the case, Greenberg's petition concludes, "[T]he outcome of this dispute will determine whether freelance artists will share in the benefits of modern technology. ... This Court should clarify that publishers cannot reap the benefits of appropriating the market for the freelancer's individual works without compensating the freelancer."

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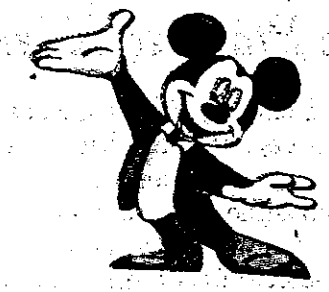
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Jerry Greenberg sued the National Geographic Society for the use of this shark photo and others in a CD archive of its entire magazine library. He has petitioned the U.S. Supreme Court to hear his case.

Business Day

The New York Times

2/20/02



Justices to Review Copyright Extension

By LINDA GREENHOUSE

WASHINGTON, Feb. 19 — The Supreme Court agreed today to decide whether the 1998 law that extended the duration of existing copyrights by 20 years was constitutional. The court's action took the world of copyright holders and users by surprise and held the potential of producing the most important copyright case in decades.

A challenge to the law, the Sonny Bono Copyright Term Extension Act, which many had regarded as a fanciful academic exercise, suddenly looked very different once the Supreme Court declared its interest.

The issue is whether the Constitution's grant of authority to Congress to issue copyrights and patents "for limited times" to "promote the progress of science and useful arts" contains any real limitation on how that power is to be exercised. That question has implications for future cases as the battle over the ownership of intellectual property focuses on the Internet.

As a practical matter, the consequences could be enormous, both for those with stakes in copyrights that are running out and for the growing community of people — represented by the plaintiffs in this case — trying to use the Internet to expand the boundaries of the public domain. If the 20-year extension was unconstitutional, early Mickey Mouse depictions would no longer belong exclusively to the Walt Disney Company — although Disney would retain trademark protection for the character.

Two lower federal courts here had rejected arguments by a coalition of publishers and individuals that the latest extension of copyright protection — the 11th in the last 40 years — defeated the original intent of the Copyright Clause, in which the framers sought to grant a limited monopoly that would encourage and reward the creation of works while ensuring eventual

Continued on Page 6

SPOTLIGHT THROWN ON PUBLIC DOMAIN

The Supreme Court's decision to hear the copyright case is likely to focus attention on which works should be in the public domain, legal experts said. Page C7.

The Extension Of Copyrights

Continued From First Business Page

public access. The initial Copyright Act, which Congress amended only once in the next 150 years, provided for a 14-year term, with a 14-year renewal only if the author was still alive.

The plaintiffs had argued unsuccessfully that extending copyright protection for existing works did nothing to promote new creativity while subverting the concept of "limited times." They had also argued that the extension restricted free speech in violation of the First Amendment. They lost in a 2-to-1 ruling by the United States Court of Appeals for the District of Columbia Circuit one year ago.

After the plaintiffs filed their Supreme Court appeal last October, the Bush administration urged the Supreme Court to reject the case, Eldred v. Ashcroft, No. 01-618. The administration pointed out that there were no conflicting rulings on the validity of the 1998 law — with lower court disagreement being the most important criterion for Supreme Court review — and "no decision of any court holding that Congress cannot, consistent with the Copyright Clause, enact legislation that extends the term of existing copyrights."

The 1998 extension was a result of intense lobbying by a group of powerful corporate copyright holders, most visibly Disney, which faced the imminent expiration of copyrights on depictions of its most famous cartoon characters. Mickey Mouse, first copyrighted in 1928, would have been the first to go under the old law, which gave a 75-year copyright to works created for hire and owned by corporations. That became 95 years under the new law, both prospectively and for existing works; material created by individuals, previously protected for the life of the artist or author, plus 50 years, also received 20 more years.

Support for the extension also came from those who argued that it was necessary to match the copyright term granted by the European Union.

The plaintiffs' Supreme Court appeal, filed by Prof. Lawrence Lessig of Stanford Law School, garnered support from concerned groups including the American Library Association and other libraries. Now that the court has agreed to hear the case, with arguments to be held in the fall, briefs will undoubtedly pour into the court from copyright holders as well as from public domain advocates.

The libraries' brief accused Congress of "transforming a limited monopoly into a virtually limitless one." Prof. Peter Jaszi, a copyright expert at American University, whose law students wrote the brief, said today that he was "flabbergasted and delighted" that the justices had accepted the case.

While "copyright is good," he said, the challenge was "based on the proposition that constitutionally, you can have too much of a good thing." He said that while the court had interpreted Congress's exercise of its copyright authority many times, it had never before taken on a direct challenge to that authority.

The plaintiffs' direct challenge to Congress in fact may have made their case attractive to justices who might otherwise not have been interested in a copyright dispute. The court is in the midst of its most active and skeptical scrutiny of Congressional action in more than 50 years. In his appeal, Professor Lessig cited recent decisions curbing Congress's exercise of another of its powers under Article I, Section 8, of the Constitution, the power to regulate interstate commerce.

He also argued that the 20-year extension would block "an extraordinary range of creative invention" from entering the public domain "just at the time that the Internet is enabling a much broader range of individuals to draw upon and develop this creative work."

National Geographic on DVD, CD-ROM

By ROY BASSAVE
Herald Staff Writer

Visit different cultures, peruse award-winning articles and photographs, and peek into the nature of rare plants and animals. With ***The Complete National Geographic: 109 Years of National Geographic Magazine*** on DVD and CD-ROM, all this and more is as close as your desktop.

This collection includes every page, article, page map, advertisement and magazine cover from every issue from 1888-1997. The DVD version holds all 190,000 pages on four discs; the CD-ROM version fills 31 CDs. Despite the breadth of the collection, the pull-out maps for which National Geographic is famous aren't included here. Not to worry, though. The release of *National Geographic Maps* ($79, for Windows), an eight CD-ROM set of every fold-out map ever published by the magazine, is scheduled for release later this month.

But this set provides an example of DVD's high storage capacity and demonstrates a good reason to invest in the latest PCs featuring the technology. *The Complete National Geographic* is the first of many DVD titles due for release by the holidays.

The Complete National Geographic is searchable using a number of criteria, including date, issue or cover subject, topic, title, or keyword; explorer, writer, or photographer; advertiser; or photograph or map. Printing capabilities allow users to print any article or photo in color or black and white.

The DVD set also features compelling video productions from National Geographic in full-screen format with broadcast-quality sharpness. A collector's version of the CD-ROM set, packaged in an elegant wooden case, is available for an estimated retail price of $199.

NEW ON CD-ROM

The Complete National Geographic: 109 Years of National Geographic Magazine on CD-ROM and DVD-ROM.

Category: Educational.

Recommended ages: 6 and up.

Phone: 1-800-234-3088

Web site: www.mindscape.com

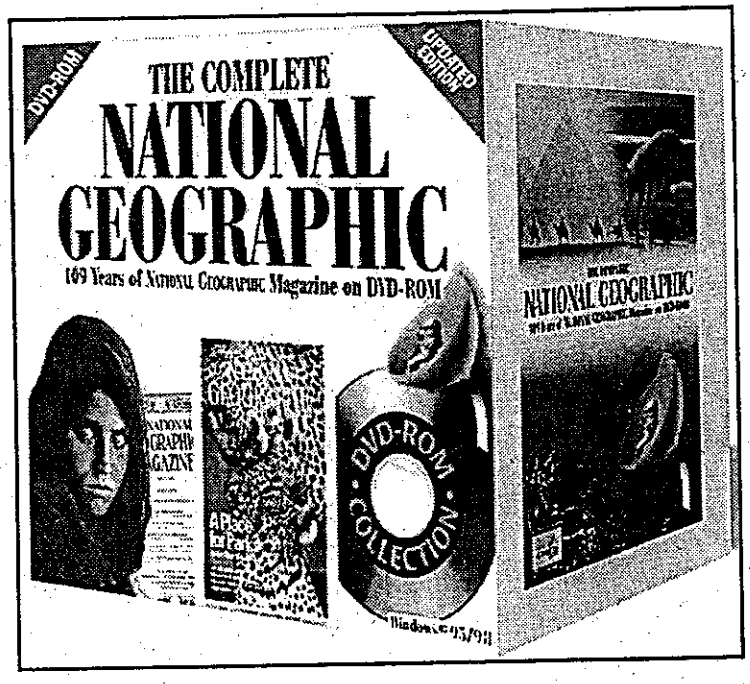
Computers used: HP 8960 400 MHz Pentium II MMX with 96 megabytes RAM with DVD ($2,300 with monitor).

Printer Used: HP DeskJet 1120 Cxl Color Printer ($200).

PC minimum system requirements: Pentium 100 MHz or better, 16 megabytes of RAM, SVGA color monitor, 8X CD-ROM drive, DVD-ROM drive, sound card and speakers, color or black and white printer, 28.8 modem, mouse, Windows 95.

Macintosh system requirements: Performa or better, 33Mhz, 16 megabytes of RAM, color monitor with 256 colors, 8X CD-ROM drive, DVD-ROM, sound card and speakers, color or black and white printer, 28.8 modem, mouse, QuickTime 1.6.1 or higher, System 7.0.1 or higher.

Estimated selling price, manufacturer: $179 for CD-ROM, $199 for DVD; Mindscape.



SAVING ATTIC SPACE: Forget hanging on to issues of National Geographic; every single page is available in this set for home computers.

Subject: Seeking Nat. Geo CD plantiffs
Date: Fri, 20 Feb 1998 12:10:46 -0700
From: "Howard M. Paul" <hmpaul@ecentral.com>
To: STOCKPHOTO@PEACH.EASE.LSOFT.COM
Newsgroups: bit.listproc.stockphoto

Anyone know how to contact the photographers that are suing the National Geographic Society over re-use of their work (on the CD set) without compensation?

I would like to learn if they are seeking, or would accept, a friend-of-the-court brief from a national photography organization.

Howard M. Paul <hmpaul@ecentral.com>
Photography for Communication and Commerce
and
E m e r g e n c y ! S t o c k
Denver, Colorado USA
Phone: (303) 829-5678 Fax: (303) 871-8356

****
Home of the NFL Champion Denver Broncos
****

"...what a privilege it is to be a photographer, to stand mid-stream in life and feel it swirl around you, as real as the prairie wind." --- Jim Richardson

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For Information About Stock Photography Software
Visit The STOCKPHOTO Network Web Site => http://www.stockphoto.net

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Jerry - Here is a positive outcome — Fred

Subject: NAFP PRESS RELEASE-LAWSUIT SETTLED
Date: Fri, 13 Mar 1998 11:11:11 -0700
From: "KLarkin440 (by way of \"Howard M. Paul\" <hmpaul@ecentral.com>)" <KLarkin440@AOL.
To: STOCKPHOTO@PEACH.EASE.LSOFT.COM
Newsgroups: bit.listproc.stockphoto

Associated Press Settles Lawsuit With Freelance Photographers; Admits Photographers Own Copyright

(March 13, 1998) NEW YORK--The Associated Press agreed late Wednesday to settle a lawsuit brought by three freelance photographers and the National Association of Freelance Photographers. As part of the settlement, AP recognizes the claims of copyright ownership by the three photographers.

In exchange, the photographers have agreed to permit AP's continued use of the five images contested in the litigation. Both sides further agree to drop all remaining charges, and to cover their own expenses.

The settlement comes on the heels of AP's admission in Federal Court, that it cannot make a legal claim of copyright ownership on all images created by freelance photographers which are currently held in its archive.

The AP's admission came in response to a copyright infringement complaint filed by Kevin Larkin, president of the NAFP. The AP admitted it could not claim copyright ownership to photographs of Wayne Gretzky which were created by Mr. Larkin. The admission was based on the fact that Larkin had crossed out, and thus nullified, a legend on a check which AP issued to pay Larkin for the assignment.

The AP maintains that the check legend, which is printed on the face of all its freelancers paychecks, transfers copyright ownership in all images created while on assignment for the news agency. The NAFP argued that by crossing out, or altering the legend, there was no copyright transfer. The AP admission confirms the NAFP's contention.

"We are pleased we were able to force the AP to admit that their legend is not an ironclad transfer of all rights," said Larkin. "And, although we did not achieve the grand victory we had hoped for, we have proven their unrelenting claims to our copyrights to be without merit."

"We were able to achieve something most photographers only dream of, much less fight for. We reclaimed that which is rightfully ours -- our photographs."

The NAFP agreed to the settlement because the AP's admission proves that freelance photographers can maintain control of their copyrights, Larkin said.

The individual photographers agreed to settle their individual claims because they achieved substantially all that was necessary to prove the purpose of the litigation, Larkin added.

"Rather than risk further delays, and spend more money with little more to be gained, we got a quick and decisive victory, and have set a precedent we will build upon in the future," Larkin said.

"Any freelance photographer can now keep their copyright safe from the AP. All they need is a pen."

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Exec. Vice-President
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HURSCHMANN@aol.com

JOEL L. HECKER, Esq.
Attorney-At-Law
Russo & Burke
212 557-9600

For Information on Market Lead E-mail & Fax Services
Visit The STOCKPHOTO Network Web Site => http://www.stockphoto.net

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Subject: copyright infringement update
Date: Fri, 3 Apr 1998 13:28:21 -0500
From: Joe McGovern <joemn@lori.state.ri.us>
To: STOCKPHOTO@PEACH.EASE.LSOFT.COM
Newsgroups: bit.listproc.stockphoto

Thought this might interest the group:
*** Playboy awarded $3.74 million in Internet case

Playboy said Thursday a federal judge in southern California has awarded the media company what it believes to be the largest Internet- related damages award to date. The award was made against a commercial Internet service that used almost 7,500 Playboy-owned pictures on its Web site without authorization. The $3.74 million award, plus attorneys' fees and court costs, was assessed against San Diego-based Five Senses Productions and its owner, Francesco Sanfilippo, Playboy said. It said the judgment is a landmark legal victory for the company, which spends millions of dollars annually on photography and design to produce its images. See
http://www.infobeat.com/stories/cgi/story.cgi?id=2553593080-cb9

Joe McGovern
Photography by Joe McGovern
Joe McGovern
Photography By Joe McGovern
joemn@lori.state.ri.us

For Information on Subscribing or Unsubscribing from this Listserv
Visit The STOCKPHOTO Network Web Site => http://www.stockphoto.net

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Jerry — Here is an interesting case to refer to Norman —

Fred

LEGAL DEVELOPMENTS

Infringement In The Garden Of Good And Evil?

SAVANNAH, Georgia—Photographer Jack Leigh has sued Warner Brothers in federal district court here, charging that the studio copied a photo he shot for the cover of the best-selling book, *Midnight in the Garden of Good and Evil*, then used the photo without permission to promote the movie version. Warner Brothers denies the allegations.

Leigh's photo depicts a small statue, which he photographed so as to make it appear life-size. In April, 1997, he wrote to Warner Brothers asking the studio how it planned to use his photo in connection with the film adaptation of the book. Warner Brothers responded that it had no intention of using Leigh's image to promote the movie, Leigh claims.



© RANDOM HOUSE/PHOTO BY JACK LEIGH



© WARNER BROTHERS

Left: Leigh's photograph. Right: A Warner Brothers online promotion for the film with similar image.

But by late 1997, a similar picture to Leigh's was appearing on posters, billboards and film trailers. A cover for a movie soundtrack also features the photo, and the film itself contains one or more scenes that contain "copies and/or derivatives" of the photo, Leigh claims.

Leigh is alleging that Warner Brothers re-created the photo from Leigh's original image, according to his attorney, Todd Deveau.

Leigh, who registered the work prior to the alleged infringement, is seeking statutory damages from Warner Brothers. He's also charging the studio with violating the Lanham Act, which prohibits someone from crediting a work to someone other than the copyright holder. That charge is based on the studio's use of its own copyright notice on posters and Web sites which feature the disputed photo.

Attorneys for Warner Brothers did not return repeated calls for comment.

The 'Tasini' decision gives publishers powerful

Free-lanced

rights to freely recycle writers' works on databases,

Freebies

CD-ROMs and the Internet

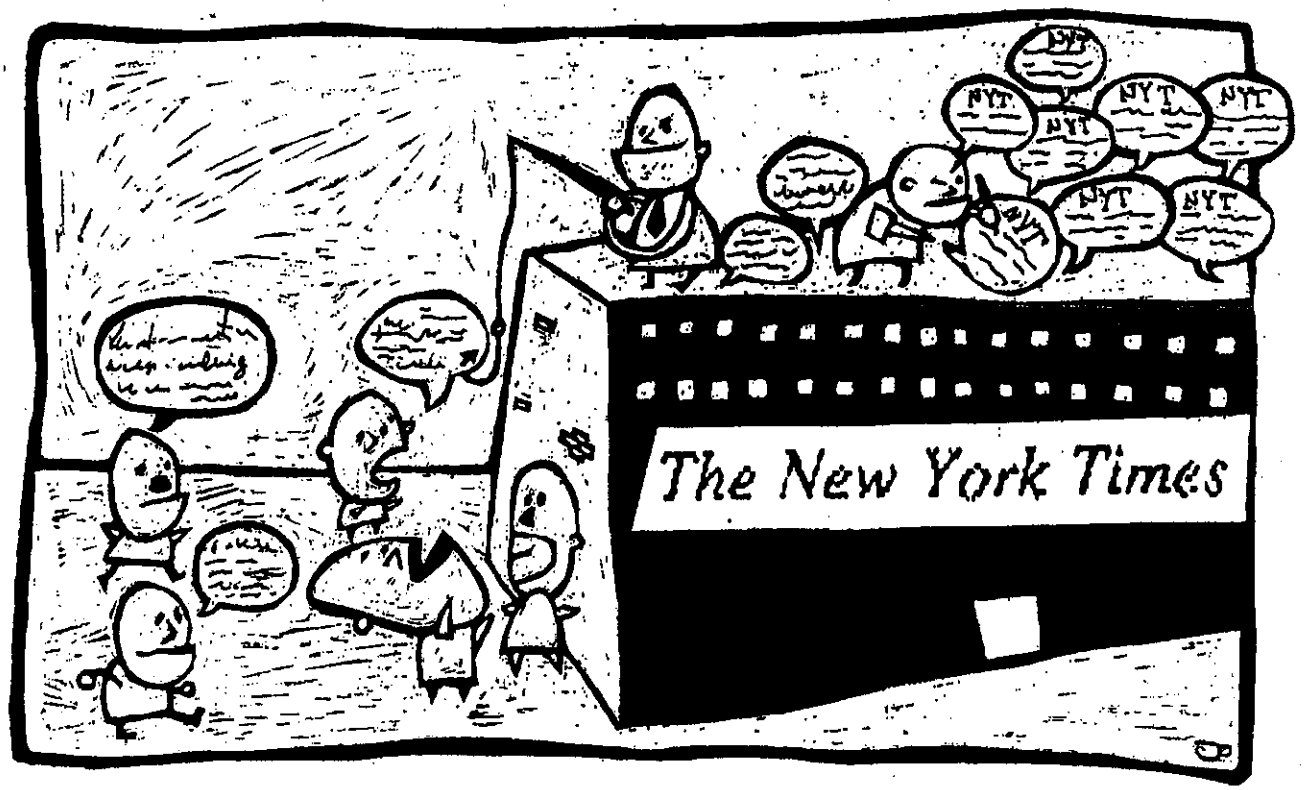
FOR YOUR INFORMATION
COURTESY WESTLIGHT

By SIMON J. FRANKEL

Last December, I wrote an article for this publication about an important decision from the Sixth Circuit U.S. Court of Appeals concerning photocopying and the fair use defense under the Copyright Act. When I provided the piece to an editor at *The Recorder*, we did not discuss ownership of the copyright. To the extent I considered the matter, I assumed and understood that I was giving the paper an implied license to print my article in its *Intellectual Property* supplement, since that was all we discussed. *The Recorder* did not pay me for the article.

Within a month or two, I learned from a friend that, while searching the Web for articles on photocopying and copyright law, she had run across my article on the *Intellectual Property* Web site. I was a bit surprised, as my editor had never mentioned such reproduction, and I did not think *The Recorder* had an implied license to include my piece on its

Simon J. Frankel is an associate with Howard, Rice, Nemerovski, Canady, Falk & Rabkin in San Francisco.



JO RIVERS

Web site. (Of course, it was difficult to see what additional compensation I had lost.)

Now, in a case of first impression, the U.S. District Court for the Southern District of New York has suggested that *The Recorder* had the right to do so. That is, it was free to reproduce my article on its Web site without seeking my permission or paying me any consideration. The decision by Judge Sonia Sotomayor (who was recently nominated to the Second Circuit) may yet be reversed by the Second Circuit or superseded by Congress. But it has important implications for free-lance writers and many publishers.

PERMISSION REQUIRED?

At issue in *Tasini v. The New York Times Co.* was whether publishers are entitled to place the contents of their periodicals into electronic databases and onto CD-ROMs without first securing the permission of the free-lance writers whose contributions are included in those periodicals. The plaintiffs were six free-lance writers, who had sold their works to *Newsday*, *The New York Times* and *Sports Illustrated*. These publications had entered into agreements with Mead Data Central Corp. whereby they transferred the text of the stories in each issue to Nexis, which then made them available to subscribers. In addition, pursuant to an agreement with University Microfilms Inc. (UMI), the contents of *The New York Times* are distributed on CD-ROM by UMI.

Of course, the authors had given the publisher defendants — *Newsday*, *The New York Times* and *Sports Illustrated* — the right to reproduce their articles in those publications. Did that authorization somehow include the right to authorize the electronic defendants — Nexis and UMI — to include the authors' articles in their databases? That was the important question before the court.

The court first rejected the elaborate arguments of *Newsday* and *Sports Illustrated* that the plaintiff authors had in fact transferred the electronic rights to their articles. *Newsday* contended that the transfer was effected by the fact that the backs of the payment checks for the articles stated that *Newsday* received the "right to include" the articles "in electronic library archives." But there was no evidence the authors had agreed to such terms when the publishers sent their articles to Nexis — the checks only came later — and the terms did not necessarily transfer rights encompassing Nexis. The court similarly rejected *Sports Illustrated*'s half-hearted contention that its contract, giving it the right "first to publish" an article, somehow gave it the right to publish the article first in any medium.

The parties agreed that the publications at issue, such as individual issues of *Newsday*, constituted "collective works" under the terms of the Copyright Act — that is, a work "in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole." The decision therefore turned on the interpretation of one provision of the 1976 Copyright Act. Section 201(c) provides:

> Copyright in each separate contribution to a collective work



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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.

REVISION OR REPRODUCTION?

As the court noted, if this provision ended with its first sentence, the plaintiffs would have prevailed. But the second sentence then gives the publishers "only the privilege" to reproduce and distribute "any revision of that collective work." Is electronic reproduction of articles on Nexis and on CD-ROMs simply a "revision" of the collective work in which an author's article appeared, and therefore allowed by §201(c)? Or is it really the reproduction of the original articles themselves — in a new collective work (a Nexis database, for example) and in a new medium — beyond the privilege accorded the publishers by §201(c)?

Dwelling on the language of §201(c) — which was all it had to go on — the court emphasized that the statute "contains no express limitation upon the medium in which a revision can be created. To the contrary, 'any revision' of a collective work is permissible, provided it is a revision of 'that collective work.' "

The court then turned to the term "revision," as applied to collective works, and concluded that "Congress plainly intended to prevent publishers from reshaping or altering the content of individual articles. With this limitation in place, Congress apparently was willing to permit publishers significant leeway, i.e., the leeway to create 'any revision' of their collective works." The court based this conclusion in part on scattered excerpts from the legislative history of the 1976 act suggesting that authors were more concerned with preventing publishers from changing individual works in producing "revisions" than with what publishers could do with the collective work itself. Hence, "[t]he key limitation imposed upon publishers under §201(c) rests in the fact that publishers are permitted only to reproduce a particular plaintiff's article 'as part of' a revised version of 'that collective work' in which the article originally appeared."

selves, rather than the collective works.

SELECTION ALONE IS COPYRIGHTABLE

In response, the court fell back on the argument that the defendants' "original selection of articles, a defining element of their periodicals, is preserved electronically," because articles appear in the "databases solely because the defendant publishers earlier made the editorial determination that those articles would appeal to readers." (The court remarked that *The New York Times*, with its motto of "all the news that's fit to print," was "the epitome of a publication in which selection alone reflects sufficient originality to merit copyright protection" in the collective work.)

And, when retrieved electronically on Nexis, articles include identification by publication, issue, date, and page number as well as by author, "in such a way that the publisher defendants' original selection remains evident online." To the court, then, the issue was "whether the electronic reproductions retain enough of defendants' periodicals to be recognizable as versions of those periodicals." The court also concluded that it was enough that "the electronic databases preserve defendants' original selection of articles."

This conclusion appears to sweep too broadly. Although articles online appear there because they were included in collective works and are identified as coming from those collective works, the articles, when viewed online, do not appear in or as part of those works (other than through identifying information); the electronic databases reproduce the contributions of the original authors. The text one retrieves on Nexis hardly resembles the selection or arrangement present in *The New York Times* from the newsstand; all that is there on the screen is the text of the individual articles. As the plaintiffs pointed out, the court's analysis focused only on what was retained electronically from the collective work, not on what was lost, allowing the court to conclude that the publishers had only reproduced "revisions" of their collective works, within the scope of the privilege accorded by §201(c).

The plaintiffs did not help their case by appearing to concede that §201(c) might allow publishers the right to make microfilm editions of a periodical. And indeed, authors have, for years, acquiesced in the reproduction of their articles on microfilm versions of the publications in which they appeared — in part, no doubt, because microfilm rights never produced the financial stakes now at issue with electronic rights.

It may be time for Congress to take action to clarify the scope and meaning of revision rights in collective works.

This analysis left the court grappling with the issue of whether Nexis and the CD-ROMs reproduce the collective works of the publishers — that is, issues of their periodicals — or simply reproduce the individual articles included in the issues. The plaintiffs correctly pointed out that searches on Nexis (in contrast to CD-ROMs) retrieve the full text of individual articles, not entire issues, hence removing the originality manifested in the publishers' compilation of the collective works. Of course, Nexis reproduces the entire text content of the collective work, but only by reproducing the text of each article, identified as coming from the collective work, in a form that bears scant resemblance to the original collective work. This certainly supports the conclusion that the publishers were reproducing the plaintiffs' articles them-

But as users of such microfilm newspapers know, this medium simply reproduces the image of the newspaper, presenting whole issues of periodicals so that articles in a particular issue continue to appear together. Microfilm does not reproduce and make available individual articles in the same way that Nexis does. This undermines the court's flip comment that "if it is 'possible' that §201(c) permits microfilm reproductions of collective works, it is impossible that §201(c) prohibits reproductions in a new medium."

DATABASES v. CD-ROM

As this suggests, there is a distinction between Nexis (where the publications' graphics and photographs are stripped away) and the

CD-ROM reproductions, which actually present the image of the original. Judge Sotomayor's decision makes more sense applied to CD-ROMs, which present an image of the original periodical — a revision of the collective work — as does microfilm, than applied to Nexis, which reproduces stripped-down versions of the individual articles. But because Judge Sotomayor found that even reproduction on Nexis qualified as a "revision," she did not dwell on these differences.

Although *Tasini* dealt only with electronic reproduction on Nexis and CD-ROM, the holding has obvious implications for the reproduction of periodical articles on Web sites. As with Nexis, an article on a Web site generally appears by itself; it is identified as coming from a collective work, but does not appear as part of that work. But under the court's analysis, reproduction of articles on Web sites ought to qualify as revision of the collective work — and hence not require permission from the individual articles' authors — so long as all the articles from an issue of a periodical are available, somewhere, on the Web site. This reasoning certainly undercuts any cause of action I might have had against *The Recorder.*

But it's unclear that the breadth of the decision is what Congress intended in §201(c). Was Congress thinking of such media when it enacted the 1976 act? Judge Sotomayor concluded that, while Congress was aware of new technologies at the time of the 1976 act, it "did not fully understand their implications," and therefore "expressly declined . . . to settle the copyright implications of 'automatic systems capable of storing, processing, retrieving, or transferring information.' " This doesn't fully answer the question of whether Congress intended that the right of "revision" extend to the media that now surround us. Certainly the difficulty in applying the "revision" to Nexis and CD-ROMs suggests that the term may not be applicable to reproduction in a new medium.

Of course, free-lance writers may secure (or at least try) by contract what the *Tasini* decision may deny them: the right to profit from the electronic distribution of their articles. And, in theory, publishers should pay somewhat higher prices for publication rights now that it is clear they are securing electronic distribution rights as well. In fact, beginning a few years ago (after Tasini filed suit), most major newspaper and magazine publishers began using "all-rights" contracts with free-lancers, giving the publishers rights in all electronic media. Hence, while *Tasini* has continuing relevance to rights to back-issues of periodicals, its prospective significance may be limited.

Whether or not the court's conclusion was entirely correct, Judge Sotomayor was surely right that "modern technology has created a situation in which revision rights are much more valuable than anticipated as of the time that the specific terms of the Copyright Act were being negotiated. If Congress agrees with plaintiffs that, in today's world of pricey electronic information systems, §201(c) no longer serves its intended purposes, Congress is free to revise that provision to achieve a more equitable result."

The Copyright Act has always lagged behind technological developments, but it may be time for Congress to take action to clarify the scope and meaning of revision rights in collective works. Meanwhile, an appeal to the Second Circuit is likely. Either way, Judge Sotomayor's recent work itself may be subject to revision. ■

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Subject: ASJA Contracts Watch #56 & Copyright
Date: Wed, 18 Feb 1998 09:15:26 -0700
From: "Howard M. Paul" <hmpaul@ecentral.com>
To: STOCKPHOTO@PEACH.EASE.LSOFT.COM
Newsgroups: bit.listproc.stockphoto

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I know that the leadership of both groups read NPPA-L, PhotoPro and/or Stockphoto-L (or lurk hereabout). I believe this message will reach them in this manner. Others in the 'biz should be aware of these two cases as well.

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> The brief was prepared by the American Society of Media >Photographers and endorsed by the Advertising Photographers of >America, American Institute of Graphic Arts, ASJA, American Society >of Picture Professionals, Authors Guild, Garden Writers Association >of America, Graphic Artists Guild, Independent Writers of Southern >California, North American Nature Photography Association, Outdoor >Writers Association of America, PEN Center USA West, Picture Agency >Council of America, Science Fiction and Fantasy Writers of America, >Society of American Travel Writers Freelance Council, Volunteer >Lawyers for the Arts, Washington Independent Writers, Writers Guild >of America East and Writers Guild of America West.
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Jerry - Here is a positive outcome — Fred

Subject: NAFP PRESS RELEASE-LAWSUIT SETTLED
Date: Fri, 13 Mar 1998 11:11:11 -0700
From: "KLarkin440 (by way of \"Howard M. Paul\" <hmpaul@ecentral.com>)" <KLarkin440@AOL.
To: STOCKPHOTO@PEACH.EASE.LSOFT.COM
Newsgroups: bit.listproc.stockphoto

Associated Press Settles Lawsuit With Freelance Photographers; Admits Photographers Own Copyright

(March 13, 1998) NEW YORK--The Associated Press agreed late Wednesday to settle a lawsuit brought by three freelance photographers and the National Association of Freelance Photographers. As part of the settlement, AP recognizes the claims of copyright ownership by the three photographers.

In exchange, the photographers have agreed to permit AP's continued use of the five images contested in the litigation. Both sides further agree to drop all remaining charges, and to cover their own expenses.

The settlement comes on the heels of AP's admission in Federal Court, that it cannot make a legal claim of copyright ownership on all images created by freelance photographers which are currently held in its archive.

The AP's admission came in response to a copyright infringement complaint filed by Kevin Larkin, president of the NAFP. The AP admitted it could not claim copyright ownership to photographs of Wayne Gretzky which were created by Mr. Larkin. The admission was based on the fact that Larkin had crossed out, and thus nullified, a legend on a check which AP issued to pay Larkin for the assignment.

The AP maintains that the check legend, which is printed on the face of all its freelancers paychecks, transfers copyright ownership in all images created while on assignment for the news agency. The NAFP argued that by crossing out, or altering the legend, there was no copyright transfer. The AP admission confirms the NAFP's contention.

"We are pleased we were able to force the AP to admit that their legend is not an ironclad transfer of all rights," said Larkin. "And, although we did not achieve the grand victory we had hoped for, we have proven their unrelenting claims to our copyrights to be without merit."

"We were able to achieve something most photographers only dream of, much less fight for. We reclaimed that which is rightfully ours -- our photographs."

The NAFP agreed to the settlement because the AP's admission proves that freelance photographers can maintain control of their copyrights, Larkin said.

The individual photographers agreed to settle their individual claims because they achieved substantially all that was necessary to prove the purpose of the litigation, Larkin added.

"Rather than risk further delays, and spend more money with little more to be gained, we got a quick and decisive victory, and have set a precedent we will build upon in the future," Larkin said.

"Any freelance photographer can now keep their copyright safe from the AP. All they need is a pen."

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A SMART READ FOR SMART READERS

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Photographer takes copyright fight to U.S. high court

HIS LAWYER SAYS 11TH, 2ND CIRCUITS misinterpreted Supreme Court ruling in their decisions favoring National Geographic

BY R. ROBIN MCDONALD

A FLORIDA PHOTOGRAPHER is asking the U.S. Supreme Court to revisit a landmark copyright decision to determine whether federal appellate courts in Georgia and New York have interpreted it correctly.

The move by freelance underwater photographer Jerry Greenberg extends his 11-year fight with the National Geographic Society over its use of his photographs in a CD compilation of every edition of its flagship magazine.



ALISON CHURCH

The case turns on what Justice Ruth Bader Ginsburg meant.

Between 1962 and 1990, National Geographic published 64 of Greenberg's photos, including one of a shark in the Florida Keys that became a magazine cover. National Geographic paid Greenberg for the publication rights, which were conveyed back to

See ***Copyright****, page 9*

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Photographer takes copyright fight to U.S. high court

Copyright, from page 1

Greenberg in the mid-1980s, said the photographer's longtime Miami attorney, Norman Davis of Squire, Sanders & Dempsey.

In 1997, when National Geographic developed "The Complete National Geographic," a CD archive of its entire magazine library, Greenberg attempted to negotiate a new publication contract based on the CD library. But National Geographic claimed the CD set did not infringe Greenberg's copyright, Davis said.

Since 2005, two federal appellate circuits, the 2nd in New York and the 11th in Atlanta, have agreed with National Geographic. In separate cases brought by freelance writers in New York and Greenberg in Florida against the National Geographic over the CD library, the appellate courts have held that publishing the magazine's archive on computer CDs does not infringe the copyrights of its freelance contributors.

Greenberg's appeal asks the Supreme Court to clarify Justice Ruth Bader Ginsburg's majority decision in the 2001 case of *New York Times v. Tasini*, 533 U.S. 483, which also sought to settle a dispute between freelance writers and publishers over the digitized use of the writers' works.

Greenberg's petition asserts that federal appellate copyright rulings by the 11th and 2nd Circuits citing *Tasini* have "warped" the Ginsburg majority opinion.

"We believe the Supreme Court would be interested in what has been done by two of the [federal appellate] circuits in the *Tasini* decision," Davis said. "The Supreme Court, I think, will agree that the *Tasini* decision has been wrongfully applied. In a very volatile copyright environment, that's not a good thing."

Tasini, named for lead plaintiff and freelance writer Jonathan Tasini, determined that publishers violated freelance writers' copyrights if they sold previously published freelance articles to online databases without securing new permission from the authors. The case provided guidance in interpreting and applying revisions made in 1976 to section 201(c) of the federal copyright laws in the context of the technological revolution that has created new avenues of publication.

The decision was considered a win for freelance writers who could then negotiate new permissions and monetary contracts with publishers for what the court majority held were new uses of previously published works.

Back-and-forth case

Greenberg's case began in Florida, where a federal judge originally found for National Geographic. Greenberg appealed to the 11th Circuit, which in 2001 reversed the district court and remanded the case, finding that National Geographic had infringed the photographer's copyright. The 11th circuit opinion was released shortly before *Tasini* was handed down.

The Florida district court subsequently found that National Geographic owed Greenberg $400,000 in damages. National Geographic appealed, and last year a new 11th Circuit panel—citing the intervening *Tasini* decision—reversed the first panel's ruling in favor of National Geographic. In June the 11th Circuit, sitting en banc, split 7-5 in favor of National Geographic. That decision was compatible with a 2005 finding by the 2nd Circuit of New York regarding virtually identical copyright questions.

The two appellate circuits' majorities adopted arguments by National Geographic and a coterie of amici publishers that Ginsburg's majority opinion in *Tasini*—while restricting the publishers from selling freelancers work to online databases such as Lexis and Westlaw without securing the authors' permission—allowed publishers to place entire publication libraries on CDs and then sell them without owing anything to the freelance authors and photographers whose works are reproduced in those collections.

The 11th Circuit's en banc majority decision, determined that because National Geographic's digital library reproduced complete magazine issues "exactly as they are presented in the print version," publishers retained the privilege of reproducing them under federal copyright laws without renegotiating contracts with their writers and photographers.

rbb PUBLIC RELATIONS

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—Norman Davis, photographer's lawyer

The majority also decided that new elements such as the operating software and search engines that were added to the CD-ROM library—even if they carry copyrights—were not enough to make "The Complete National Geographic" a new collective work subject to copyright privilege.

"The addition of new material to a collective work will not, by itself, take the revised collective work outside the privilege," the majority opinion stated.

Interpreting Ginsburg

The 11th Circuit ruling turned on the definitions of an acceptable revision and a new work as determined by *Tasini*. Publishers, including National Geographic, have acknowledged that their arguments are not based on specific language in *Tasini* but rather on dicta—explanatory commentary included in the opinion that does not directly address the facts of the case under review.

In *Tasini*, Ginsburg wrote for the 7-2 majority that electronic and CD-ROM databases compiled of individual articles culled from periodicals could not be considered "revisions" or revised editions of previously published issues—such as revised editions of an encyclopedia or multiple editions of a daily newspaper. Therefore, publishers may not sell the rights to reproduce those articles to computer or online databases without contracting for the publication rights from the authors.

In deciding that the databases were not simply a revised edition, the Supreme Court focused on the articles' appearance in online databases without the graphics, formatting and layout that accompanied their original publication.

"Those databases simply cannot bear characterization as a 'revision' of any one periodical edition," Ginsburg wrote. "We would reach the same conclusion if the [*New York*] *Times* sent intact newspapers to the electronic publishers."

The court majority also specifically rejected an analogy offered by publishers saying that the electronic databases were no different than microfilm and microfiche reproductions. The court found that comparison "wanting."

"Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film," Ginsburg wrote. "Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper."

As a result, a user views an article in context, Ginsburg wrote. In electronic databases, "by contrast, the articles appear disconnected from their original context. ... In short, unlike microforms, the databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any 'revision' thereof."

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Petitioning the court

Greenberg's petition to the justices states that his case "presents the question of whether a database aggregating many collective works constitutes a 'revision' of each of its constituent collective works."

What constitutes a revision is key to the ongoing legal debate because, according to the petition, the 1976 copyright revisions embodied in Section 201(c) were intended "to limit the ability of a publisher to republish contributions to collective works without providing compensation to the freelance artists who should benefit from the demand for their work after the initial publication."

That section is the backdrop against which freelance artists and publishers negotiate their contracts, the petition asserts.

Both the 11th and 2nd Circuits, Greenberg's petition says, "have held that a publisher can avoid paying the artist anything under *Tasini* by the simple expediency of creating 'context' by including a feature that allows users to 'flip' between the pages of individual magazines."

"So long as publishers use an image-based database with a flip function," the petition continues, "they can place their entire archive of magazines or newspapers on the Web for free, benefiting from advertising revenues or increased traffic. Yet the artist receives nary a penny. ... Publishers can sell access to individual articles, stories, or pictures, so long as the rest of the pages in the issue are a click away. Once a Google search can find it, the author's copyright for that individual text, picture or video is essentially worthless."

Finally, in urging the high court to hear the case, Greenberg's petition concludes, "[T]he outcome of this dispute will determine whether freelance artists will share in the benefits of modern technology. ... This Court should clarify that publishers cannot reap the benefits of appropriating the market for the freelancer's individual works without compensating the freelancer."

On Thursday, Terry Adamson, executive vice president of the National Geographic Society, said he was not surprised Greenberg asked the high court to take the case.

In an e-mail to the *Daily Report*, he said, "We are evaluating whether to respond, and, if we do, what to add for the Court's consideration whether to grant or deny certiorari. As the 11th and 2nd Circuits have both held, we believe that the Supreme Court has clearly outlined the parameters of the statutory 201(c) privilege when it spoke in 2001 in *Tasini v. The New York Times et al.* and that the CNG [Complete National Geographic] is well within those parameters."

R. Robin McDonald can be reached at robin.mcdonald@incisivemedia.com or (404) 419-2835.

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Jerry Greenberg sued the National Geographic Society for the use of this shark photo and others in a CD archive of its entire magazine library. He has petitioned the U.S. Supreme Court to hear his case.

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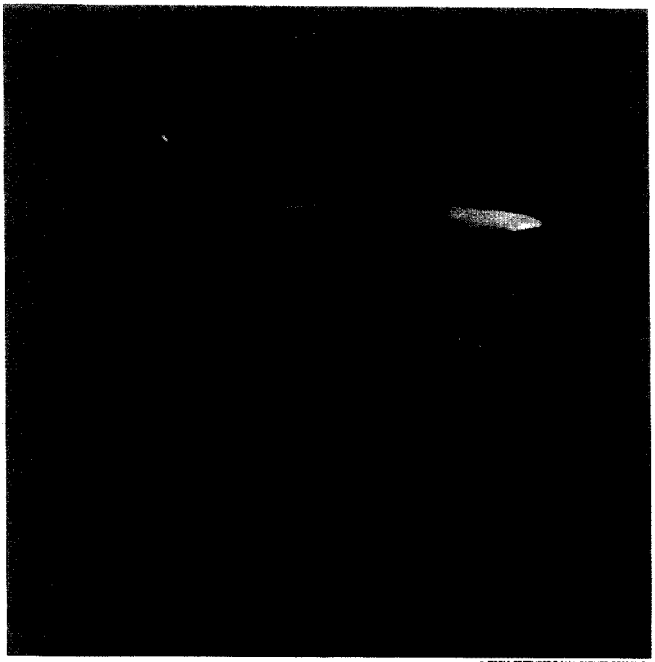
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Copyright, from page 1

Greenberg in the mid-1980s, said the photographer's longtime Miami attorney, Norman Davis of Squire, Sanders & Dempsey.

In 1997, when National Geographic developed "The Complete National Geographic," a CD archive of its entire magazine library, Greenberg attempted to negotiate a new publication contract based on the CD library. But National Geographic claimed the CD set did not infringe Greenberg's copyright, Davis said.

Since 2005, two federal appellate circuits, the 2nd in New York and the 11th in Atlanta, have agreed with National Geographic. In separate cases brought by freelance writers in New York and Greenberg in Florida against the National Geographic over the CD library, the appellate courts have held that publishing the magazine's archive on computer CDs does not infringe the copyrights of its freelance contributors.

Greenberg's appeal asks the Supreme Court to clarify Justice Ruth Bader Ginsburg's majority decision in the 2001 case of *New York Times v. Tasini*, 533 U.S. 483, which also sought to settle a dispute between freelance writers and publishers over the digitized use of the writers' works.

Greenberg's petition asserts that federal appellate copyright rulings by the 11th and 2nd Circuits citing *Tasini* have "warped" the Ginsburg majority opinion.

"We believe the Supreme Court would be interested in what has been done by two of the [federal appellate] circuits in the *Tasini* decision," Davis said. "The Supreme Court, I think, will agree that the *Tasini* decision has been wrongfully applied. In a very volatile copyright environment, that's not a good thing."

Tasini, named for lead plaintiff and freelance writer Jonathan Tasini, determined that publishers violated freelance writers' copyrights if they sold previously published freelance articles to online databases without securing new permission from the authors. The case provided guidance in interpreting and applying revisions made in 1976 to section 201(c) of the federal copyright laws in the context of the technological revolution that has created new avenues of publication.

The decision was considered a win for freelance writers who could then negotiate new permissions and monetary contracts with publishers for what the court majority held were new uses of previously published works.

Back-and-forth case

Greenberg's case began in Florida, where a federal judge originally found for National Geographic. Greenberg appealed to the 11th Circuit, which in 2001 reversed the district court and remanded the case, finding that National Geographic had infringed the photographer's copyright. The 11th circuit opinion was released shortly before *Tasini* was handed down.

The Florida district court subsequently found that National Geographic owed Greenberg $400,000 in damages. National Geographic appealed, and last year a new 11th Circuit panel—citing the intervening *Tasini* decision—reversed the first panel's ruling in favor of National Geographic. In June the 11th Circuit, sitting en banc, split 7-5 in favor of National Geographic. That decision was compatible with a 2005 finding by the 2nd Circuit of New York regarding virtually identical copyright questions.

The two appellate circuits' majorities adopted arguments by National Geographic and a coterie of amici publishers that Ginsburg's majority opinion in *Tasini*—while restricting the publishers from selling freelancers work to online databases such as Lexis and Westlaw without securing the authors' permission—allowed publishers to place entire publication libraries on CDs and then sell them without owing anything to the freelance authors and photographers whose works are reproduced in those collections.

The 11th Circuit's en banc majority decision, determined that because National Geographic's digital library reproduced complete magazine issues "exactly as they are presented in the print version," publishers retained the privilege of reproducing them under federal copyright laws without renegotiating contracts with their writers and photographers.

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The majority also decided that new elements such as the operating software and search engines that were added to the CD-ROM library—even if they carry copyrights—were not enough to make "The Complete National Geographic" a new collective work subject to copyright privilege.

"The addition of new material to a collective work will not, by itself, take the revised collective work outside the privilege," the majority opinion stated.

Interpreting Ginsburg

The 11th Circuit ruling turned on the definitions of an acceptable revision and a new work as determined by *Tasini*. Publishers, including National Geographic, have acknowledged that their arguments are not based on specific language in *Tasini* but rather on dicta—explanatory commentary included in the opinion that does not directly address the facts of the case under review.

In *Tasini*, Ginsburg wrote for the 7-2 majority that electronic and CD-ROM databases compiled of individual articles culled from periodicals could not be considered "revisions" or revised editions of previously published issues—such as revised editions of an encyclopedia or multiple editions of a daily newspaper. Therefore, publishers may not sell the rights to reproduce those articles to computer or online databases without contracting for the publication rights from the authors.

In deciding that the databases were not simply a revised edition, the Supreme Court focused on the articles' appearance in online databases without the graphics, formatting and layout that accompanied their original publication.

"Those databases simply cannot bear characterization as a 'revision' of any one periodical edition," Ginsburg wrote. "We would reach the same conclusion if the [*New York*] *Times* sent intact newspapers to the electronic publishers."

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"Microforms typically contain continuous photographic reproductions of a periodical in the medium of miniaturized film," Ginsburg wrote. "Accordingly, articles appear on the microforms, writ very small, in precisely the position in which the articles appeared in the newspaper."

As a result, a user views an article in context, Ginsburg wrote. In electronic databases, "by contrast, the articles appear disconnected from their original context.

"In short, unlike microforms, the databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any 'revision' thereof."

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Greenberg's petition to the justices states that his case "presents the question of whether a database aggregating many collective works constitutes a 'revision' of each of its constituent collective works."

What constitutes a revision is key to the ongoing legal debate because, according to the petition, the 1976 copyright revisions embodied in Section 201(c) were intended "to limit the ability of a publisher to republish contributions to collective works without providing compensation to the freelance artists who should benefit from the demand for their work after the initial publication."

That section is the backdrop against which freelance artists and publishers negotiate their contracts, the petition asserts.

Both the 11th and 2nd Circuits, Greenberg's petition says, "have held that a publisher can avoid paying the artist anything under *Tasini* by the simple expediency of creating 'context' by including a feature that allows users to 'flip' between the pages of individual magazines."

"So long as publishers use an image-based database with a flip function," the petition continues, "they can place their entire archive of magazines or newspapers on the Web for free, benefiting from advertising revenues or increased traffic. Yet the artist receives nary a penny. ... Publishers can sell access to individual articles, stories, or pictures, so long as the rest of the pages in the issue are a click away. Once a Google search can find it, the author's copyright for that individual text, picture or video is essentially worthless."

Finally, in urging the high court to hear the case, Greenberg's petition concludes, "[T]he outcome of this dispute will determine whether freelance artists will share in the benefits of modern technology. ... This Court should clarify that publishers cannot reap the benefits of appropriating the market for the freelancer's individual works without compensating the freelancer."

On Thursday, Terry Adamson, executive vice president of the National Geographic Society, said he was not surprised Greenberg asked the high court to take the case.

In an e-mail to the *Daily Report*, he said, "We are evaluating whether to respond, and, if we do, what to add for the Court's consideration whether to grant or deny certiorari. As the 11th and 2nd Circuits have both held, we believe that the Supreme Court has clearly outlined the parameters of the statutory 201(c) privilege when it spoke in 2001 in *Tasini v. The New York Times et al.* and that the CNG [Complete National Geographic] is well within those parameters."

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Jerry Greenberg sued the National Geographic Society for the use of this shark photo and others in a CD archive of its entire magazine library. He has petitioned the U.S. Supreme Court to hear his case.

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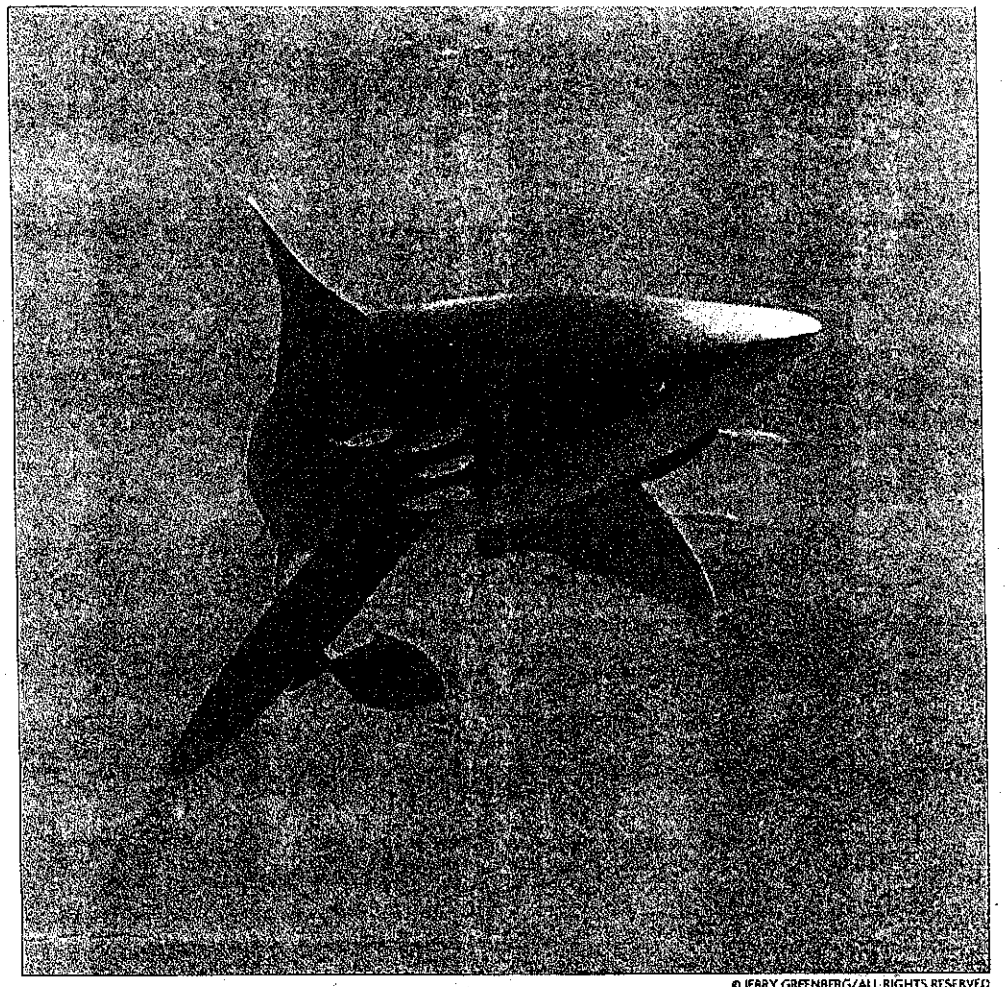
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