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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

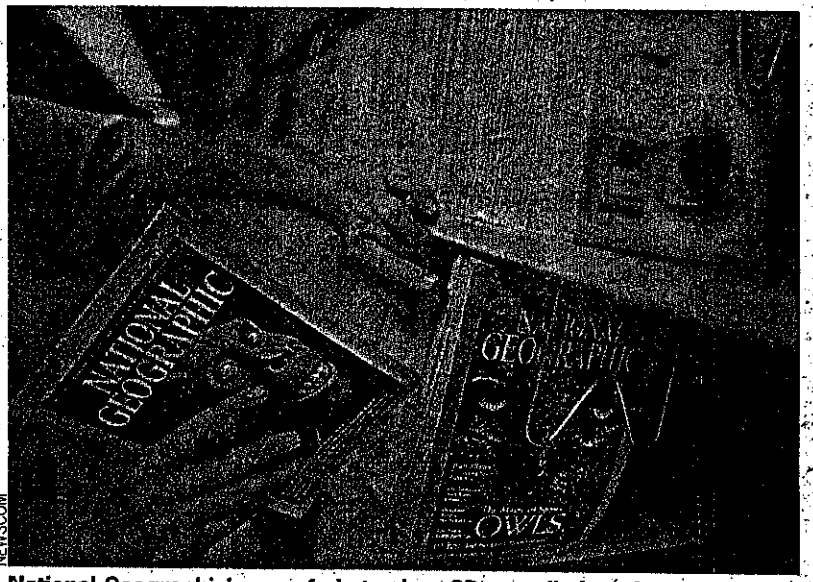
by **R. Robin McDonald**
robin.mcdonald@incisivemedia.com

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Greenberg's appeal asks the Supreme Court to clarify Justice

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CORPORATE FINANCE

Spanish Broadcasting denied funds in wake of Lehman Bros. collapse

by **Mike Seemuth**
Special to the Review

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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 Society

R. Robin McDonald

Fulton County Daily Report
October 17, 2008

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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.

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."

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PLEASE SEE IRS, 3C

ACTION LINE, 17A

Photographer can collect royalties

BY JOHN DORSCHNER

jdorschner@herald.com

A Pinecrest photographer won another major victory Tuesday for freelance journalists in the war over digital media rights when the U.S. Supreme Court refused to consider an appeal by National Geographic magazine.

At issue were four photo spreads by Jerry Greenberg that appeared in the magazine over three decades. In 1997, the magazine included Greenberg's photos in a $99.95 CD-ROM set that reproduced magazines from 1888 to 1996.

Greenberg claimed that the magazine needed his permission to use his work in a new medium and should have paid him an additional fee. U.S. District Judge Joan Lenard in Miami ruled against the photographer. The 11th Circuit Court of Appeals disagreed, saying the magazine had made an unauthorized use of his photos. The magazine appealed to the Supreme Court, which refused without comment to hear the case.

PLEASE SEE PHOTOGRAPHER, 8C

COURT REJECTS MICROSOFT APPEAL BID, 8C

support group

BY SHANNON TAN

stan@herald.com

Two days after Fort Lauderdale-based Renaissance Cruises suddenly went bust, Lesle Thomas, former coordinator of marine operations, pulled out her "disaster recovery book" and started calling her former co-workers.

After all, it was a disaster.

Three hundred and twenty shoreside employees were jobless as of Sept. 25. Not all received paychecks for that week. None were paid for vacation or sick time or severance. Benefits were up in the air. One employee had to postpone plans to get a new kidney.

"The company shut its doors, you're alone, you're abandoned," Thomas said. Several of her former co-workers were feeling depressed and paralyzed — after filing for unemployment online, what else could they do?

Sale of Telemu

From Herald Staff and Wire Reports

General Electric's NBC division continued "heated" negotiations Tuesday to buy the Spanish-language Telemundo network, with sources close to the situation reporting that a deal valued between $2.1 billion and $2.8 billion could be reached as early as today.

Although a higher bidder could surface and upend the deal, sources close to the talks say NBC has emerged as the front-runner to buy

Photographer wins digital fight

PHOTOGRAPHER, FROM 1C

"I'm just a dumb photographer, a David fighting Goliath," said Greenberg, 74. "If you're going to fight a battle like this, it takes cash, courage and the copyright law on your side."

Greenberg wouldn't say how much the fight has cost him, but when a reporter asked if it was as much as $30,000, he said simply, "It's *way* up there."

Judge Lenard will now conduct a trial to consider Greenberg's claims for payments, damages and attorney's fees.

"This is a major milestone," said Norman Davis, Greenberg's attorney. "Publishers are moving into the electronic era, and the courts are telling them what they can and can't do."

A spokeswoman for the magazine, Mary Jeanne Jacobsen, said the magazine was "disappointed" by the court's decision, but knew that the appeal to the Supreme Court was a "long shot."

She said the company stands by its original position, that it didn't need freelancers' consent because it was offering "the same product in a different medium, comparable to microfilm copies."

This is the second major victory this year for freelancers. In June, the Supreme Court ruled, in the case of New York Times versus freelance writer Jonathan Tasini, that journalists have rights when their creations are reproduced in electronic form, such as on websites.

Jacobsen says that the magazine has four similar lawsuits against it from other photographers, and plans to keep fighting those cases. "We believe in the correctness of our legal position," she said.

Davis said it wasn't clear to him how how many freelancers would be affected by Tuesday's ruling. In the 1980s, Greenberg asked the magazine to have the copyrights of his photos assigned to him, and National Geographic agreed. Those who don't hold copyright to their photos or words in the magazine might not be able to win in court, Davis said.

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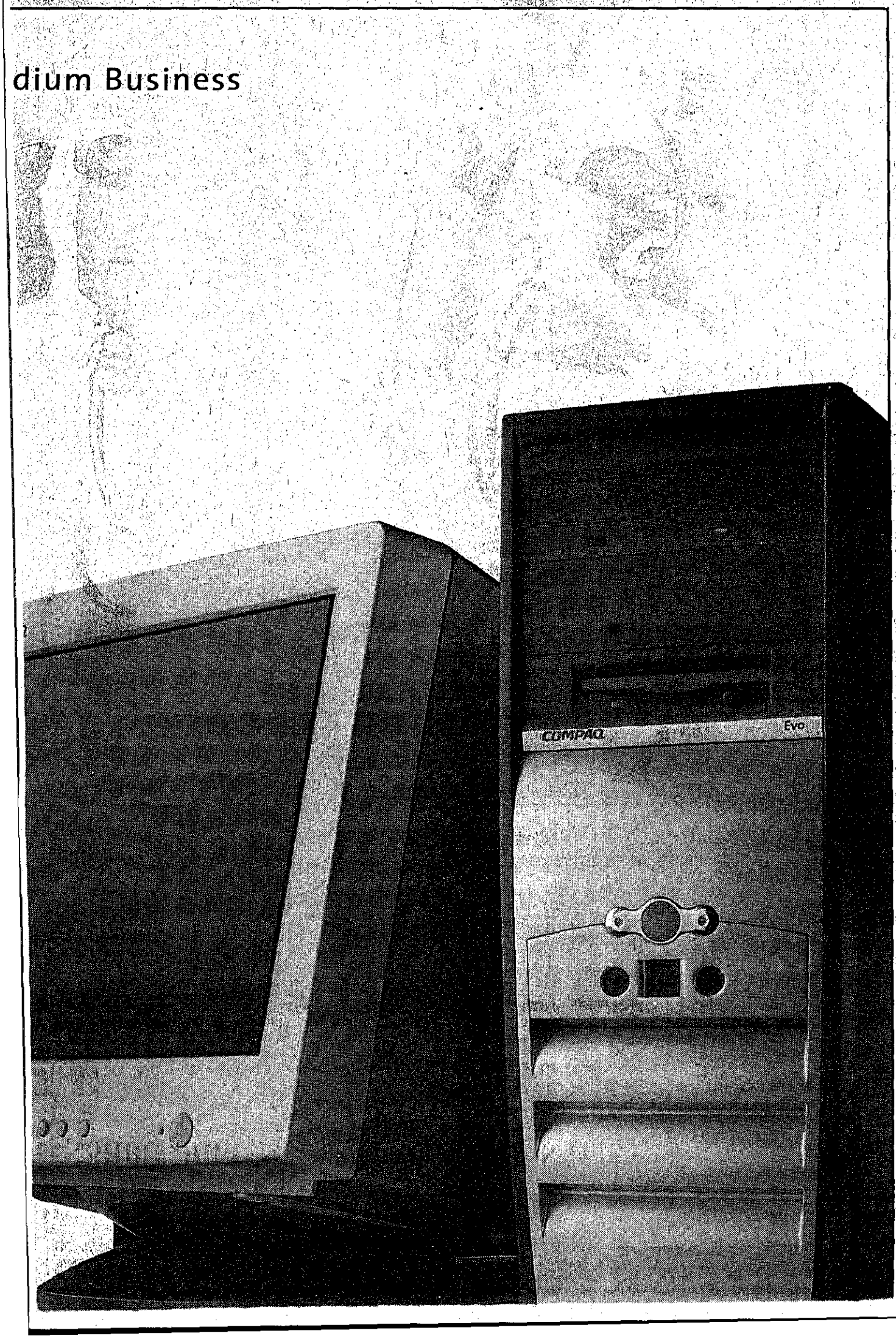
A key issue was the magazine's claim that copyright law should not be interpreted to hinder or prohibit the exploration of new media, and it warned that a negative ruling would dramatically increase costs to the public and libraries for archived information. The $99.95 CD stored the equivalent of $37,000 worth of microfilm.

"They've kept saying we want to prohibit new technology," Davis said. "That's total nonsense. We're just saying that it's a new medium and they need to get the approval of the photographers and writers."

Greenberg's four photo essays included two on John Pennekamp Coral Reef State Park, one on sharks and another on an island.

Greenberg and his wife, Idaz, run a small publishing company out of their home, producing such items as post cards of tropical fish.

Freelancers never have an easy time, he says. "It's a buyer's market. Creative people do it for love and a jingle in their pocket. And if you take the jingle out, it's tough."



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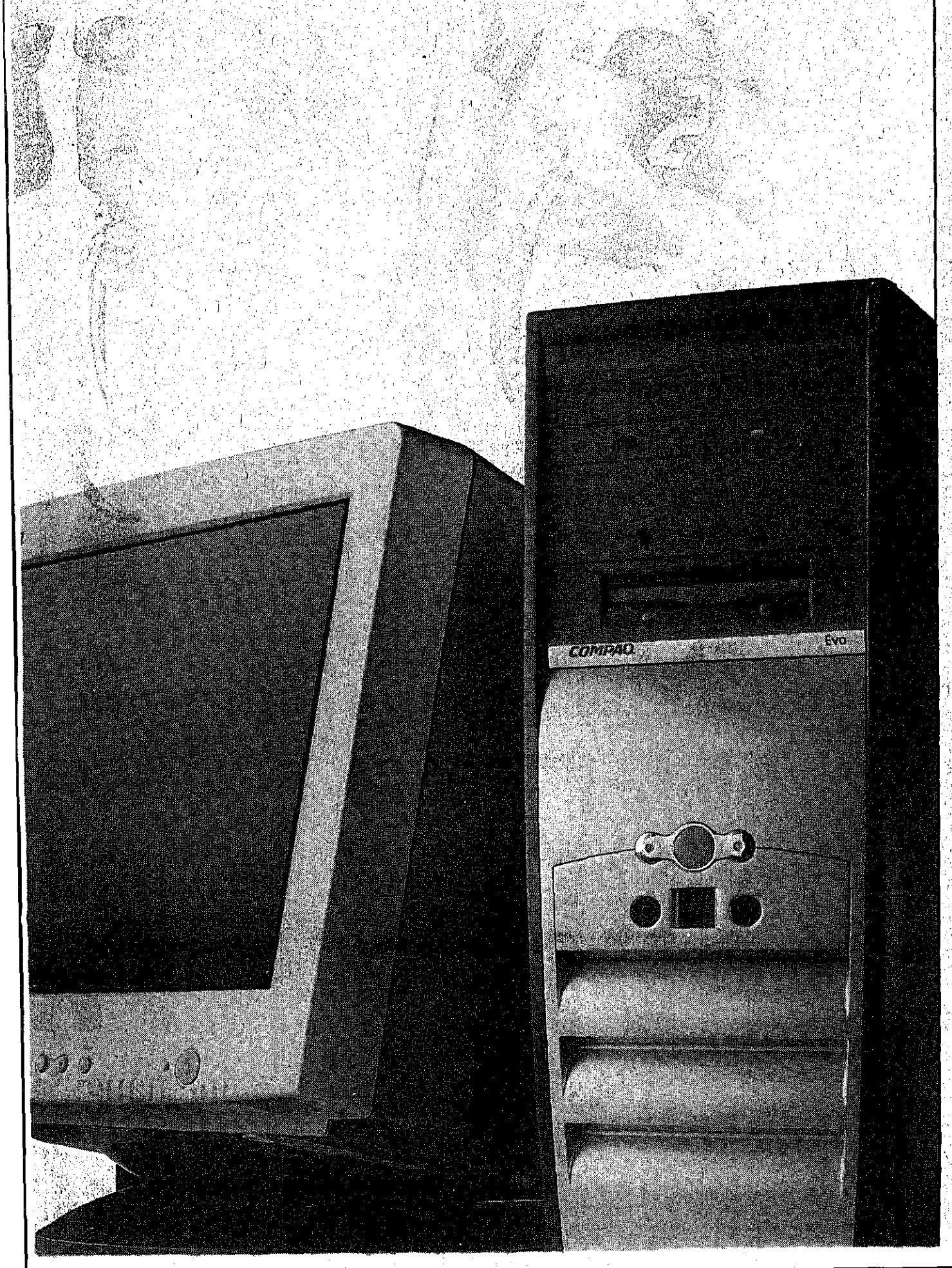
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NASDAQ STOCK INDEX	1,570.19	-35.76
BONDS U.S. 30-YEAR	5.37	+.05

BUSINESS

IRS targets Social Security

Deadbeats' checks will be docked 15%

BY MARK SCHWANHAUSSER
Knight Ridder News Service

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U.S. wants equity stake in airlines

BY BRAD FOSS
Associated Press

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

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

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

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

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

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

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

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TEN YEARS OF WRANGLING OVER A *NATIONAL GEOGRAPHIC* CD

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

1997

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

1998

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

1999

DECEMBER 1999
Photographers Fred Ward and David Hiser file two additional infringement claims against NGS in U.S. District Court in New York City.

2000

JUNE 2001
In ruling on an unrelated case called *Tasini v. New York Times*, the U.S. Supreme Court implies that publishers can re-issue collections of freelance works in electronic format without permission as long as those works appear in their original context.

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No. 07-

DATED SEPTEMBER 29, 2008

IN THE

Supreme Court of the United States

JERRY GREENBERG.

Petitioner,

v.

NATIONAL GEOGRAPHIC SOCIETY, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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**Counsel of Record*

QUESTIONS PRESENTED

The questions presented here split the *en banc* Eleventh Circuit by a 7-5 margin and carry wide-reaching consequences to the future applicability of Section 201(c) of the Copyright Act. This Court, in *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), explained that Congress intended, in promulgating that section, to enhance the ability of freelance artists to profit from further uses of their contributions to collective works. The questions presented are:

1. Whether, under *Tasini*, courts are limited to considering the context in which an individual contribution is presented to the user when determining if a collective work is a privileged revision under 17 U.S.C. § 201(c).

2. Whether, under *Tasini*, an aggregation of collective works, none of which has been modified, constitutes a revision of each of those works under 17 U.S.C. § 201(c).

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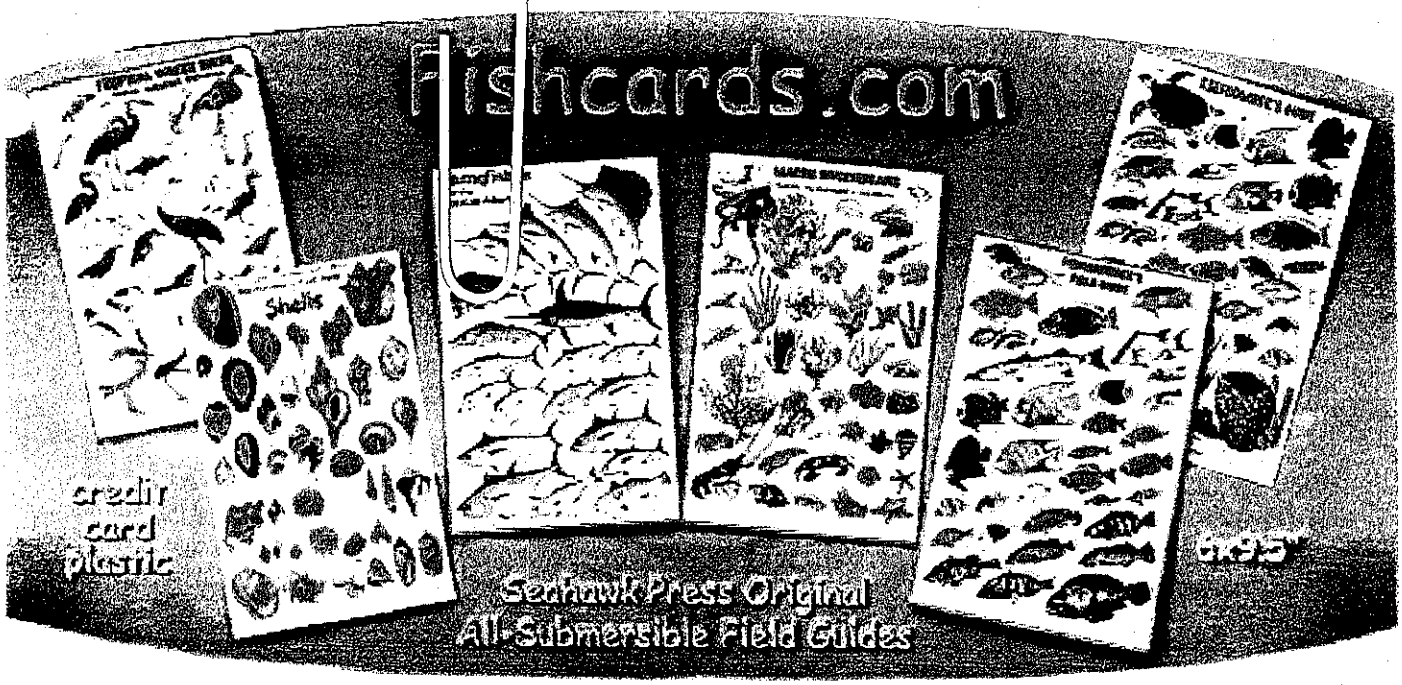
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I'm continuing to follow the case.

Robin McDonald

Friday, October 17, 2008

Photographer takes copyright fight to U.S. high court

His lawyers says 11th, 2nd Circuits misinterpreted Supreme Court ruling in their decisions favoring National Geographic

By R. Robin McDonald, Staff Reporter

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.

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 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.

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

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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."

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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.
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"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.

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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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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."
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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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Date: Thursday, October 16, 2008 7:00:10 PM [View Source]

Jerry's terrific photograph ran only in the print edition of the Daily Report. It has circle c, Jerry Greenberg, all rights reserved. Many thanks for allowing us the privilege. I just wanted to let folks know what this is all about.

Here's the story below. I've also sent you a link to our website where you should be able to access the story , at least for tomorrow.

Many thanks,

I'm continuing to follow the case.

Robin McDonald

Friday, October 17, 2008
Photographer takes copyright fight to U.S. high court
His lawyers says 11th, 2nd Circuits misinterpreted Supreme Court ruling in their decisions favoring National Geographic
By R. Robin McDonald, Staff Reporter

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.
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 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.

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Friday, October 17, 2008

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By R. Robin McDonald, Staff Reporter

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Thursday, October 16, 2008

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From: lulukiku@bellsouth.net [mailto:lulukiku@bellsouth.net]
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Subject: Re: shark photo

Thank you for your inquiry. No, we do not want the photo used on anything but the one-time newspaper article, with the copyright credit at the photo, ©Jerry Greenberg. All rights reserved.
Idaz and Jerry Greenberg

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If we do not hear from you by 5pm today, we will assume the answer is "no" and use the picture only in our print edition.

Thanks very much.

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Thursday, June 21, 2007

National Geographic finds a trail through the copyright jungle

By R. Robin McDonald, Staff Reporter

IN A DECISION called "curious" by an intellectual property expert, a federal appellate panel in Atlanta has reversed its circuit's six-year-old opinion in a major copyright case, declaring the ruling's mandate on behalf of freelance photographers to be "moot."

In doing so, the three-judge panel of the 11th U.S. Circuit Court of Appeals interpreted a landmark U.S. Supreme Court decision that expanded freelance writers' copyrights in a way that limited the copyright claims of freelance photographers.

The panel's June 13 ruling in *Greenberg v. National Geographic Society II*, 97-03924-CV, reversed a separate panel's 2001 opinion, *Greenberg v. National Geographic Society I*, 244F.3d1267. That decision had been authored by 11th U.S. Circuit Judge Stanley F. Birch Jr., a noted copyright expert whose formal 11th Circuit portrait depicts him holding a copy of "Nimmer on Copyright," the definitive work on copyright law. Judges Gerald B. Tjoflat and R. Lanier Anderson III joined Birch in the 2001 ruling.

In reversing *Greenberg I*, the second appellate panel sidestepped a precedent which binds panels to an earlier circuit decision addressing the same issue of law unless it has been overturned either by the entire 11th Circuit or by the U.S. Supreme Court.

By declaring *Greenberg I* moot, the new panel—Judge Rosemary Barkett, Senior Judge Phyllis A. Kravitch and David G. Trager, a visiting U.S. district judge from the 2nd Circuit in New York—also resolved a long-standing conflict with the 2nd Circuit created by the Birch opinion. Trager wrote the *Greenberg II* opinion for the new panel.

Both cases deal with The National Geographic Society's placement of its entire magazine library on CD-ROM and selling it as "The Complete National Geographic."

In the 2001 case, Birch found that National Geographic infringed the copyright of Florida freelance photographer Jerry Greenberg. Sixty-four of Greenberg's photos had appeared in issues of the National Geographic. One of those published photos also was included in an animated photo montage designed exclusively for the CD-ROM.

But in nearly identical cases in New York that were brought against National Geographic by other freelance writers and photographers, 2nd Circuit judges have taken the opposite tack.

In *Greenberg II*, Trager asserted that the new 11th Circuit panel on which he sat had authority to overturn *Greenberg I* if an intervening Supreme Court case overruled a prior panel decision, or if "the rationale the Supreme Court uses in an intervening case directly contradicts the analysis this court has used in a related area, and establishes that this Court's current rule is wrong."

The intervening ruling on which Trager rested *Greenberg II* was the Supreme Court's 2001 opinion in *New York Times v. Tasini*, 533 U.S. 233.

In *Tasini*, the high court found that the *Times'* sales of its published news articles to online databases such as Lexis and Westlaw infringed the copyrights of its freelance writers whose contracts had never contemplated the advent of digital databases.

This week, Lawrence Nodine, a partner at intellectual property boutique Needle & Rosenberg, called the Greenberg II ruling "curious" for several reasons.

"Leave out for a second, the sitting 2nd Circuit judge," he said. "The rule is that you are bound by previous panel decisions

of the circuit that should only be reversed *en banc*."

While an appellate panel would have authority to reverse a previous panel if there were a Supreme Court decision "on point," Nodine suggested that Tasini was based on a different set of facts.

And dicta—any explanatory commentary included in the high court opinion that does not directly address the facts of the case under review—"ought not entitle the panel [in Greenberg II] to disregard the previous decision," Nodine said.

"Whether or not the [Greenberg II] panel could reverse without an en banc [hearing] is a very interesting question."

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

As Birch noted in 2001 during oral argument in *Greenberg I*, "All this is about who gets the money, whether you [publishers] can get the money or have to share it with some author."

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A federal district court found for the defendant publishers but was reversed by the 2nd Circuit, which ruled in favor of the writers. In a 7-2 opinion issued June 25, 2001, the high court affirmed the 2nd Circuit's appellate ruling.

Writing for the majority, Justice Ruth Bader Ginsburg determined that electronic and CD-ROM databases containing individual articles from multiple editions of magazines, newspapers and other periodicals could not be considered "revisions" or revised editions of the previously published issues.

"[T]he Databases reproduce and distribute articles standing alone and not in context, not 'as part of that particular collective work' to which the author contributed, 'as part of ... any revision' thereof or 'as part of ... any later collective work in the same series,'" she wrote, citing federal copyright law.

Under the terms of Section 201(c) of the 1976 revisions to the Copyright Act of 1909, Ginsburg wrote, "A publisher could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from one edition of an encyclopedia in a later revision of it, but could not revise the contribution itself or include it in a new anthology or an entirely different collective work. ...

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"It would scarcely preserve the author's copyright in a contribution as contemplated by Congress," Ginsburg concluded, "if a print publisher, without the author's permission, could reproduce or distribute discrete copies of the contribution in isolation or within new collective works. The publishers' view that inclusion of the articles in the databases lies within the 'privilege of reproducing and distributing the [articles] as part of ... [a] revision of that collective work,' is unacceptable."

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Birch specifically dismissed arguments offered by National Geographic lawyers that the CD-ROM sets were merely a republication of a pre-existing work no different from converting the magazines to microfilm.

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"Under the *Tasini* framework, the relevant question is whether the original context of the collective work has been preserved in the revision," Trager wrote. "Clearly, the replica portion of the ["Complete National Geographic"] preserves the original context of the magazines, because it comprises the exact images of each page of the original magazines."

But in direct contrast to *Greenberg I* , the Trager opinion asserted that software programs embedded in the CD-ROM did not alter "the original context of the magazine contents."

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entire issue. On the other hand, "The National Geographic product added a number of bells and whistles," he said. "There was a basis for a holding that it was a new product, not just an alternative form of the magazine.

Post *Tasini* appellate court opinions suggest that, "As long as you reproduce the publication in the same form it was published you haven't infringed," Prutzman continued. "But if you disaggregate it into separate articles and make them separately available, then you have infringed."

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To reach the conclusion opined in Greenberg II, "You have to read a lot between the lines ... I don't think *Tasini* compels the result in this case." Because of that, Friedman said he suspects that the U.S. Supreme Court "would take that case" on writ of certiorari. After issuing *Tasini*, the high court denied cert in *Greenberg I*, which the Birch panel had published six days before *Tasini* was argued.

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Thursday, June 21, 2007

National Geographic finds a trail through the copyright jungle

By R. Robin McDonald, Staff Reporter

IN A DECISION called "curious" by an intellectual property expert, a federal appellate panel in Atlanta has reversed its circuit's six-year-old opinion in a major copyright case, declaring the ruling's mandate on behalf of freelance photographers to be "moot."

In doing so, the three-judge panel of the 11th U.S. Circuit Court of Appeals interpreted a landmark U.S. Supreme Court decision that expanded freelance writers' copyrights in a way that limited the copyright claims of freelance photographers.

The panel's June 13 ruling in *Greenberg v. National Geographic Society II*, 97-03924-CV, reversed a separate panel's 2001 opinion, *Greenberg v. National Geographic Society I*, 244F.3d1267. That decision had been authored by 11th U.S. Circuit Judge Stanley F. Birch Jr., a noted copyright expert whose formal 11th Circuit portrait depicts him holding a copy of "Nimmer on Copyright," the definitive work on copyright law. Judges Gerald B. Tjoflat and R. Lanier Anderson III joined Birch in the 2001 ruling.

In reversing *Greenberg I*, the second appellate panel sidestepped a precedent which binds panels to an earlier circuit decision addressing the same issue of law unless it has been overturned either by the entire 11th Circuit or by the U.S. Supreme Court.

By declaring *Greenberg I* moot, the new panel—Judge Rosemary Barkett, Senior Judge Phyllis A. Kravitch and David G. Trager, a visiting U.S. district judge from the 2nd Circuit in New York—also resolved a long-standing conflict with the 2nd Circuit created by the Birch opinion. Trager wrote the *Greenberg II* opinion for the new panel.

Both cases deal with The National Geographic Society's placement of its entire magazine library on CD-ROM and selling it as "The Complete National Geographic."

In the 2001 case, Birch found that National Geographic infringed the copyright of Florida freelance photographer Jerry Greenberg. Sixty-four of Greenberg's photos had appeared in issues of the National Geographic. One of those published photos also was included in an animated photo montage designed exclusively for the CD-ROM.

But in nearly identical cases in New York that were brought against National Geographic by other freelance writers and photographers, 2nd Circuit judges have taken the opposite tack.

In *Greenberg II*, Trager asserted that the new 11th Circuit panel on which he sat had authority to overturn *Greenberg I* if an intervening Supreme Court case overruled a prior panel decision, or if "the rationale the Supreme Court uses in an intervening case directly contradicts the analysis this court has used in a related area, and establishes that this Court's current rule is wrong."

The intervening ruling on which Trager rested *Greenberg II* was the Supreme Court's 2001 opinion in *New York Times v. Tasini*, 533 U.S. 233.

In *Tasini*, the high court found that the *Times'* sales of its published news articles to online databases such as Lexis and Westlaw infringed the copyrights of its freelance writers whose contracts had never contemplated the advent of digital databases.

This week, Lawrence Nodine, a partner at intellectual property boutique Needle & Rosenberg, called the Greenberg II ruling "curious" for several reasons.

"Leave out for a second, the sitting 2nd Circuit judge," he said. "The rule is that you are bound by previous panel decisions

of the circuit that should only be reversed *en banc*."

While an appellate panel would have authority to reverse a previous panel if there were a Supreme Court decision "on point," Nodine suggested that Tasini was based on a different set of facts.

And dicta—any explanatory commentary included in the high court opinion that does not directly address the facts of the case under review—"ought not entitle the panel [in Greenberg II] to disregard the previous decision," Nodine said.

"Whether or not the [Greenberg II] panel could reverse without an en banc [hearing] is a very interesting question."

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

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Wednesday, February 27, 2008

1976 copyright law meets 21st century

National Geographic and freelance contributors argue over how to apply three-decade old law to digital rights

By R. Robin McDonald, Staff Reporter



Kenneth Starr represented National Geographic in a copyright dispute with photographers.

Kenneth W. Starr, former independent counsel during the Whitewater investigation, had been addressing the 11th U.S. Circuit Court of Appeals en banc for less than a minute Tuesday morning when Judge Stanley F. Birch Jr. interrupted.

"Mr. Starr, we're familiar with the facts. Let's get to the heart of things," he chided.

Starr is representing the National Geographic Society in a nearly decade-long battle to market the National Geographic magazine archive as a CD-ROM library without having to pay royalties to the magazine's freelance contributors. The case is Greenberg v. National Geographic Society, No. 05-16964-U.

While the facts of the case may be known, courts have long wrestled with how to apply a 1976 copyright law to a medium that Congress couldn't have imagined at the time. Much of the argument in the case centers over comparing digital content on DVDs and computer screens to a medium that barely exists in today's world—microfilm. Central to the case is whether moving printed articles and photos onto an electronic format is just the modern equivalent of saving it on microfilm and constitutes an acceptable revision, or whether it becomes a new work.

Panel opinion:

• Vacated opinion in *Jerry Greenberg v. National Geographic Society* (June 13, 2007; pdf)

Related article:

• "Focus on copyright" (Oct. 30, 2007)

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In 2001, Birch authored an 11th Circuit opinion favoring photographer Jerry Greenberg that found the National Geographic's digital library was a new product and therefore infringed Greenberg's photo copyrights. One of those photos, originally printed as a magazine cover, was also included in an animated photo montage designed exclusively for the CD library. Fellow judges Gerald B. Tjoflat and R. Lanier Anderson III concurred in that opinion.

But last June, another 11th Circuit panel—revisiting a second appeal of Greenberg—reversed Birch. Judge David G. Trager, visiting from New York's 2nd Circuit, wrote that opinion in concurrence with 11th Circuit Judge Rosemary Barkett and Senior Judge Phyllis A. Kravitch, saying that the U.S. Supreme Court's 2001 ruling in New York Times v. Tasini, 533 U.S. 233, contradicted Birch's 2001 analysis and dictated a ruling that favored National Geographic.

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In reversing Birch, Trager also resolved a long-standing conflict between the 11th Circuit and the 2nd Circuit over the rights of National Geographic's contributors. The conflicting opinions stemmed from cases brought by writers claiming copyright infringement who had challenged National Geographic in the 2nd Circuit, and photographers in the 11th Circuit.

At stake are royalties and fees that publishers could be forced to share with freelance contributors whenever they reproduce and sell previously published works in merchandise designed for computer access.

On Tuesday, Birch—the 11th Circuit's resident copyright expert—repeatedly challenged Starr as National Geographic's executive vice president, Terrence B. Adamson, watched from the packed gallery with former U.S. Attorney General Griffin B. Bell. Adamson clerked for Bell when the latter was a federal appellate judge.

Starr argued that the CD-ROM digital library constitutes a permissible revision of the National Geographic magazine that would not require the publisher to pay new royalties to individual magazine contributors.

When the U.S. Congress revised federal copyright law in 1976, it required publishers to secure permission to use copyrighted contributions in new works, but not in revisions. Permissible revisions included the multiple editions of a daily newspaper, or updated editions of a particular collective work such as a dictionary or an encyclopedia.

On Tuesday, Starr argued that the U.S. Supreme Court's Tasini opinion expanded the definition of a revision to denote "a new version." The CD-ROM archive, he argued, was a new digital version that faithfully reproduced the published magazines and was "the modern version of microform."

As a digital replica, he said it did not infringe the copyrights of the contributors whose photographs had been previously published.

But Birch noted pointedly that the National Geographic had secured a new copyright for the CD-ROM library, called "The Complete National Geographic"—an indication that the National Geographic Society considered it to be a new work, not a reprint.

Starr responded, "It's a new copyrightable element, which is what makes this a revision."

The argument that the CD-ROM library is no different than microfilm has been one of the National Geographic's key arguments in the case because of language contained in the Supreme Court's Tasini decision.

In that case, Justice Ruth Bader Ginsburg wrote for a 7-2 majority that electronic databases, contrary to publishers' assertions, were not simply revised editions of previously published works and, as such, infringed writer copyrights.

PAGE 3

And federal copyright law allows the freelancer to benefit from new demands for articles either "standing alone" (in electronic databases) or as part of a new collection.

In Tasini, the court rejected that notion that digital databases were akin to microfilm and microfiche, writing that "The publishers' analogy between the databases and microfilm and microfiche is wanting."

But publishers latched on to Ginsburg's subsequent statement, "In the databases, unlike microfilm, articles appear disconnected from their original context. Unlike the conversion of newsprint to microfilm, the transfer of articles to the databases does not represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another. The databases offer users individual articles, not intact periodicals."

It was that dicta on which Birch's original opinion in Greenberg was overturned and on which the National Geographic has rested its current case.

On that basis, Starr asserted Tuesday that if previously published works are faithfully reproduced—much as they appear on microform—then Tasini does not find a copyright has been infringed.

"If Tasini does not approve of microform," Starr said, "I am misreading Tasini."

Tasini was one of the most widely watched copyright cases to reach the Supreme Court in years. Freelance authors of articles previously published in newspapers and magazines, led by writer Jonathan Tasini, brought claims of copyright infringement against publishers and owners of electronic databases who had made the articles widely available via the Internet, without paying additional royalties.

Said Barkett: "I think Tasini does say that."

Chief Judge J. L. Edmondson also weighed in, saying he was troubled that the digital library also contained computer code and software that made it different than old copies of National Geographic sitting in his father's closet.

"Here's the problem I have," Edmondson said. "This thing can do a lot of stuff that thousands of issues in my father's closet can't do. This thing is different. ... At some point, I have to ask, 'Doesn't something stop being a revision and become a new compilation?"

Edmondson also noted that the photo montage included in the digital set "seems to be a different thing" than faithfully reprinting the magazine.

Judge Stanley Marcus wanted to know how the CD-ROM library differed from microform. But Starr insisted that any difference in the two products "does not matter as long as there is contextual continuity."

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Using Ginsburg's dicta as his basis, Starr insisted that as long as what is presented to the user mirrors the previously published image, "regardless of the robustness of the [digital] search engine," it can be considered a revision acceptable under federal copyright law rather than a new work.

Greenberg was represented by Miami attorney Norman Davis, of Squire, Sanders & Dempsey, who argued that federal copyright law permits the reproduction of articles without infringement only in limited cases.

Like Marcus, Judge Susan H. Black pushed to know how microform and the CD-ROM library differed. When Davis suggested the CD-ROM library was more marketable and more lucrative, Black replied, "The money answer doesn't help alot."

When Davis insisted that "the money argument" was a relevant part of the debate, Birch suggested that the copyright publishing privileges must be balanced "relative to economic advantages. Its' kind of like the writer's strike," he said referencing the recent settlement between Hollywood writers and producers over additional royalties derived from digital libraries and Internet Web casts.

Birch also distinguished Greenberg from Tasini, calling Tasini a "disassembled case" where "they had taken apart the original work" and placed individual articles online. "We don't have that case," Birch said. "We have a different case." Greenberg, he said, "is an assembly case" where pieces have been added to a previously published work rather than having that work dissected for individual articles as was the case in Tasini.

Judge Charles R. Wilson appeared unconvinced by Davis' argument. "It's simply a digital version of microfilm," he said. "At least, it sounds like that to me."

And Anderson wanted to know whether a new collection of bound magazines as well as microfilm "would somehow violate your client's [copy]rights?... Is it your position that a bound volume is a new collective work?"

And he pressed Davis about Starr's argument: "Your opponent is suggesting strongly that the Supreme Court in Tasini held that microfilm of the entire National Geographic magazine is protected."

"I don't think [the Supreme Court] held that," Davis replied. "I think they suggested it."

During Starr's rebuttal, Birch suggested that a revision, under the federal copyright statute, had to be a revision of an individual issue, not an entire library of work.

Starr replied, "You have fallen into error," citing Tasini as "saying microform is a revision."

When Anderson noted pointedly, "That is dicta," Starr replied, "It is guidance that tells us the meaning of revision."

Staff Reporter R. Robin McDonald can be reached at rmcdonald@alm.com

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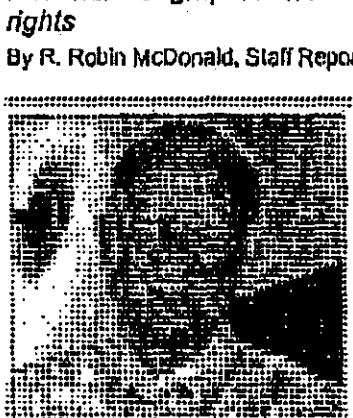
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1976 copyright law meets 21st century

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By R. Robin McDonald, Staff Reporter



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On Tuesday, Birch—the 11th Circuit's resident copyright expert—repeatedly challenged Starr as National Geographic's executive vice president, Terrence B. Adamson, watched from the packed gallery with former U.S. Attorney General Griffin B. Bell. Adamson clerked for Bell when the latter was a federal appellate judge.

Starr argued that the CD-ROM digital library constitutes a permissible revision of the National Geographic magazine that would not require the publisher to pay new royalties to individual magazine contributors.

When the U.S. Congress revised federal copyright law in 1976, it required publishers to secure permission to use copyrighted contributions in new works, but not in revisions. Permissible revisions included the multiple editions of a daily newspaper, or updated editions of a particular collective work such as a dictionary or an encyclopedia.

On Tuesday, Starr argued that the U.S. Supreme Court's Tasini opinion expanded the definition of a revision to denote "a new version." The CD-ROM archive, he argued, was a new digital version that faithfully reproduced the published magazines and was "the modern version of microform."

As a digital replica, he said it did not infringe the copyrights of the contributors whose photographs had been previously published.

But Birch noted pointedly that the National Geographic had secured a new copyright for the CD-ROM library, called "The Complete National Geographic"—an indication that the National Geographic Society considered it to be a new work, not a reprint.

Starr responded, "It's a new copyrightable element, which is what makes this a revision."

The argument that the CD-ROM library is no different than microfilm has been one of the National Geographic's key arguments in the case because of language contained in the Supreme Court's Tasini decision.

In that case, Justice Ruth Bader Ginsburg wrote for a 7-2 majority that electronic databases, contrary to publishers' assertions, were not simply revised editions of previously published works and, as such, infringed writer copyrights.

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1976 copyright law meets 21st century - Daily Report

And federal copyright law allows the freelancer to benefit from new demands for articles either "standing alone" (in electronic databases) or as part of a new collection.

In Tasini, the court rejected that notion that digital databases were akin to microfilm and microfiche, writing that "The publishers' analogy between the databases and microfilm and microfiche is wanting."

But publishers latched on to Ginsburg's subsequent statement, "In the databases, unlike microfilm, articles appear disconnected from their original context. Unlike the conversion of newsprint to microfilm, the transfer of articles to the databases does not represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another. The databases offer users individual articles, not intact periodicals."

It was that dicta on which Birch's original opinion in Greenberg was overturned and on which the National Geographic has rested its current case.

On that basis, Starr asserted Tuesday that if previously published works are faithfully reproduced—much as they appear on microform—then Tasini does not find a copyright has been infringed.

"If Tasini does not approve of microform," Starr said, "I am misreading Tasini."

Tasini was one of the most widely watched copyright cases to reach the Supreme Court in years. Freelance authors of articles previously published in newspapers and magazines, led by writer Jonathan Tasini, brought claims of copyright infringement against publishers and owners of electronic databases who had made the articles widely available via the Internet, without paying additional royalties.

Said Barkett: "I think Tasini does say that."

Chief Judge J. L. Edmondson also weighed in, saying he was troubled that the digital library also contained computer code and software that made it different than old copies of National Geographic sitting in his father's closet.

"Here's the problem I have," Edmondson said. "This thing can do a lot of stuff that thousands of issues in my father's closet can't do. This thing is different. ... At some point, I have to ask, 'Doesn't something stop being a revision and become a new compilation?"

Edmondson also noted that the photo montage included in the digital set "seems to be a different thing" than faithfully reprinting the magazine.

Judge Stanley Marcus wanted to know how the CD-ROM library differed from microform. But Starr insisted that any difference in the two products "does not matter as long as there is contextual continuity."

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Using Ginsburg's dicta as his basis, Starr insisted that as long as what is presented to the user mirrors the previously published image, "regardless of the robustness of the [digital] search engine," it can be considered a revision acceptable under federal copyright law rather than a new work.

Greenberg was represented by Miami attorney Norman Davis, of Squire, Sanders & Dempsey, who argued that federal copyright law permits the reproduction of articles without infringement only in limited cases.

Like Marcus, Judge Susan H. Black pushed to know how microform and the CD-ROM library differed. When Davis suggested the CD-ROM library was more marketable and more lucrative, Black replied, "The money answer doesn't help alot."

When Davis insisted that "the money argument" was a relevant part of the debate, Birch suggested that the copyright publishing privileges must be balanced "relative to economic advantages. Its' kind of like the writer's strike," he said referencing the recent settlement between Hollywood writers and producers over additional royalties derived from digital libraries and Internet Web casts.

Birch also distinguished Greenberg from Tasini, calling Tasini a "disassembled case" where "they had taken apart the original work" and placed individual articles online. "We don't have that case," Birch said. "We have a different case." Greenberg, he said, "is an assembly case" where pieces have been added to a previously published work rather than having that work dissected for individual articles as was the case in Tasini.

Judge Charles R. Wilson appeared unconvinced by Davis' argument. "It's simply a digital version of microfilm," he said. "At least, it sounds like that to me."

And Anderson wanted to know whether a new collection of bound magazines as well as microfilm "would somehow violate your client's [copy]rights?... Is it your position that a bound volume is a new collective work?"

And he pressed Davis about Starr's argument: "Your opponent is suggesting strongly that the Supreme Court in Tasini held that microfilm of the entire National Geographic magazine is protected."

"I don't think [the Supreme Court] held that," Davis replied. "I think they suggested it."

During Starr's rebuttal, Birch suggested that a revision, under the federal copyright statute, had to be a revision of an individual issue, not an entire library of work.

Starr replied, "You have fallen into error," citing Tasini as "saying microform is a revision."

When Anderson noted pointedly, "That is dicta," Starr replied, "It is guidance that tells us the meaning of revision."

Staff Reporter R. Robin McDonald can be reached at rmcdonald@alm.com

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National Press Photographers Association

Publishers Ask Court For Permission To File Briefs In Greenberg v. National Geographic

By Mickey H. Osterreicher, Esq.

BUFFALO, NY (November 2, 2007) - In a move that brings together some of the same actors from The New York Times v. Tasini case, a group of high-profile publishers and media corporations have sought permission from the 11th U.S. Circuit Court of Appeals in Atlanta to file amicus (friend-of-the-court) briefs in the case Greenberg v. National Geographic Society (NGS).

The group asking the court for amicus permission includes the Gannett Co. Inc., Hearst Corp., Time Inc., Newsweek Inc., The Washington Post, The Chicago Tribune Co., Forbes, Martha Stewart Living Omnimedia, Playboy Enterprises Inc., Duke University Press and Johns Hopkins University Press, The New York Times Co., along with a number of academic journals and national library associations.

The full 11th Circuit is scheduled to hear oral arguments between during the week of February 25, 2008. NGS had previously asked the United States Supreme Court to resolve conflicting opinions issued in the 11th Circuit (which ruled against NGS) and the 2nd Circuit (which ruled in favor of NGS) but the High Court refused to grant a petition for certiorari (review). That refusal let stand the two opposite rulings – one holding that current copyright law permits a publisher to create revisions of existing works and/or to reproduce a collective work in a new format (such as electronically or on a CD-ROM) even if some new material has been added to the product, without permission by (and compensation to) the freelance photographers and/or writers who created the original work – the other holding that a publisher must first obtain permission of those contributors before they can create such works.

The first suit was commenced in federal district court in New York in 1997 by photographers **Douglas Faulkner**, **Louis Psihoyos**, and **Fred Ward** (Faulkner v. National Geographic Association) after NGS produced and sold a 30-disc CD-ROM set called "The Complete National Geographic" (CNG) It was a digital version of all the past issues of National Geographic magazine going back 108 years. The CD-ROM's contained copies of the magazine's pages exactly as they were published in print, displayed two pages at a time and in the same order as the original magazine, along with a new introduction and a program that allowed users to search for specific content. The second case began in federal district court in Atlanta in 1998 and was commenced by photographer Jeffrey Greenberg (Greenberg v. National Geographic Society, et al) (referred to as Greenberg I) based on the same underlying facts.

In both cases, the plaintiffs alleged that NGS violated Section 201c of the Copyright Act because it did not obtain their permission to use these works other than in the original publication. The New York Court found for the defendant, NGS, holding that there was no copyright violation because it deemed the CNG compilation to be an allowable revision of the original printed publications in electronic format. The federal district court in Georgia also ruled in favor of NGS, relying on the 1997 decision in New York district court in the watershed case of Tasini v. New York Times Co. The Tasini lower court had held that the re-use of freelance writers' work on databases and CD-ROMs without their express permission did not constitute a copyright infringement. The rulings in both Faulkner and Greenberg I went up for appeal.

Greenberg I was heard first. In March 2001, a three judge panel of the 11th Circuit Court of Appeals in Atlanta, GA, reversed the lower court ruling that new content in the CD-ROM (including the introduction and the ability to search) did indeed infringe on the copyright of photographer Jeffrey Greenberg. It held that NGS had "created a new product, in a new medium, for a new market that far transcends any

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It is that evolving capability of digital reproduction and dissemination that is the underlying argument of the publishers' amicus briefs submitted in Greenburg. In Tasini the publishers first argued (and lost) that there was no difference between microfilm/microfiche copies and their searchable databases. Now they assert in their Greenberg papers that the CD-ROM compilation is an exact electronic replica of the original publications. So strongly do they believe in that analogy that many of them have created and marketed their entire collection on CD-ROM. It is no wonder that these groups are supporting NGS in its court case when they have "Playboy Cover to Cover" and "The Complete New Yorker: 80 Years of the Nation's Greatest Magazine" (to name but two) on sale for $100.00 and $125.00 respectively.

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It is important to note that the circuit court decision in Greenberg I was rendered shortly before the U.S. Supreme Court handed down its own decision in Tasini. That case was the result of a suit brought by of the National Writers Union against The New York Times Company, Newsday Inc., Time Inc., Lexis/Nexis, and University Microfilms Inc., claiming copyright violation regarding the electronic reuse of work produced and sold on a freelance basis. On appeal, the 2nd Circuit Court in New York in Tasini had overturned the 1997 federal district court decision, finding that the re-use of freelance writers' work on databases and CD-ROMs without their express permission constituted a copyright infringement.

The 2nd Circuit in Tasini held that the Copyright Act did not authorize the copying, reproduction and distribution of "articles standing alone and not in context" or "as part of that particular collective work to which the author (originally) contributed" or "as part of ... any revision" thereof, or "as part of ... any later collective work in the same series."

After the 2nd Circuit Court's ruling in favor of the writers, the same group of publishers that are now seeking to file briefs in Greenberg appealed Tasini to the Supreme Court which in June 2001 upheld the 2nd Circuit's ruling by a 7-2 majority. That decision meant that in the absence of a written contract, a freelancer automatically retains the electronic rights to their printed work under the Copyright Act of 1976.

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On March 4, 2005, following the same legal labyrinth as Tasini, the 2nd Circuit Court in New York upheld the district court ruling in Faulkner. Judge **Ralph K. Winter** found in favor of NGS because the "transfer of work from one media to another generally does not alter its character for copyright purposes."

This leads to the important distinction between Tasini and the cases of Faulkner and Greenberg. In Tasini the user of a database was presented with the authors' work one piece at a time – out of context from how it was originally published – and on a page by itself as a piece of material returned as the result of a database search; whereas the NGS CD-ROM set retains the material's original presentation page by page while staying in context and in sequence, being viewed as an electronic "replica" of the magazine.

Thus it can be suggested that, whereas the holdings in Tasini represent what is not allowable under copyright law, Faulkner sets forth what is allowable. A key factor and consistent with the 2nd Circuit Court rulings in both cases is that the standard for review centers around how the materials are "presented to, and perceptible by, the user;" whereas the Greenberg I court focused on how NGS put its new compilation together (e.g., containing separately copyrightable components, such as a moving image introduction, the digital replica of the magazines and software for search capabilities).

The 2nd Circuit's decision in Faulkner in favor of NGS was based on the court's view that the digital pages were displayed to viewers exactly as they had been displayed in print, without changes or modifications, and within the original context of each other, so that they were exact duplicates of the original magazines – and therefore amounted to being no more than a revision.

Conversely, the key to the 11th Circuit's 2001 decision in Greenberg I was the fact that the judges there viewed the CD-ROM as: (1) the original work of a new author (the act of compiling the issues into one venue, and adding new features), (2) that they were presented in a new medium (electronic instead of in print) and (3) were being sold to a different market, therefore making the set a "new product". Based on those findings the court found that NGS had indeed committed copyright infringement by failing to obtain permission for its digital use of the photographs in question. In 2004, pursuant to that ruling, a jury awarded Greenberg $400,000.00 in damages. Weighing that award against the $120.00 sale price of

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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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National Press Photographers Association

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BUFFALO, NY (November 2, 2007) - In a move that brings together some of the same actors from The New York Times v. Tasini case, a group of high-profile publishers and media corporations have sought permission from the 11th U.S. Circuit Court of Appeals in Atlanta to file amicus (friend-of-the-court) briefs in the case Greenberg v. National Geographic Society (NGS).

The group asking the court for amicus permission includes the Gannett Co. Inc., Hearst Corp., Time Inc., Newsweek Inc., The Washington Post, The Chicago Tribune Co., Forbes, Martha Stewart Living Omnimedia, Playboy Enterprises Inc., Duke University Press and Johns Hopkins University Press, The New York Times Co., along with a number of academic journals and national library associations.

The full 11th Circuit is scheduled to hear oral arguments between during the week of February 25, 2008. NGS had previously asked the United States Supreme Court to resolve conflicting opinions issued in the 11th Circuit (which ruled against NGS) and the 2nd Circuit (which ruled in favor of NGS) but the High Court refused to grant a petition for certiorari (review). That refusal let stand the two opposite rulings – one holding that current copyright law permits a publisher to create revisions of existing works and/or to reproduce a collective work in a new format (such as electronically or on a CD-ROM) even if some new material has been added to the product, without permission by (and compensation to) the freelance photographers and/or writers who created the original work – the other holding that a publisher must first obtain permission of those contributors before they can create such works.

The first suit was commenced in federal district court in New York in 1997 by photographers **Douglas Faulkner**, **Louis Psihoyos**, and **Fred Ward** (Faulkner v. National Geographic Association) after NGS produced and sold a 30-disc CD-ROM set called "The Complete National Geographic" (CNG) It was a digital version of all the past issues of National Geographic magazine going back 108 years. The CD-ROM's contained copies of the magazine's pages exactly as they were published in print, displayed two pages at a time and in the same order as the original magazine, along with a new introduction and a program that allowed users to search for specific content. The second case began in federal district court in Atlanta in 1998 and was commenced by photographer Jeffrey Greenberg (Greenberg v. National Geographic Society, et al) (referred to as Greenberg I) based on the same underlying facts.

In both cases, the plaintiffs alleged that NGS violated Section 201c of the Copyright Act because it did not obtain their permission to use these works other than in the original publication. The New York Court found for the defendant, NGS, holding that there was no copyright violation because it deemed the CNG compilation to be an allowable revision of the original printed publications in electronic format. The federal district court in Georgia also ruled in favor of NGS, relying on the 1997 decision in New York district court in the watershed case of Tasini v. New York Times Co. The Tasini lower court had held that the re-use of freelance writers' work on databases and CD-ROMs without their express permission did not constitute a copyright infringement. The rulings in both Faulkner and Greenberg I went up for appeal.

Greenberg I was heard first. In March 2001, a three judge panel of the 11th Circuit Court of Appeals in Atlanta, GA, reversed the lower court ruling that new content in the CD-ROM (including the introduction and the ability to search) did indeed infringe on the copyright of photographer Jeffrey Greenberg. It held that NGS had "created a new product, in a new medium, for a new market that far transcends any

privilege of revision or other mere reproduction envisioned in the" Copyright Act. With that reversal the 11th Circuit Court panel sent the case back to the lower court to decide how much Greenberg should be paid in damages. Legal analysts at the time noted that the fact that NGS had applied for, and received, a copyright for the CD-ROM – claiming it as new work – figured heavily in the 11th Circuit Court's written opinion.

It is important to note that the circuit court decision in Greenberg I was rendered shortly before the U.S. Supreme Court handed down its own decision in Tasini. That case was the result of a suit brought by of the National Writers Union against The New York Times Company, Newsday Inc., Time Inc., Lexis/Nexis, and University Microfilms Inc., claiming copyright violation regarding the electronic reuse of work produced and sold on a freelance basis. On appeal, the 2nd Circuit Court in New York in Tasini had overturned the 1997 federal district court decision, finding that the re-use of freelance writers' work on databases and CD-ROMs without their express permission constituted a copyright infringement.

The 2nd Circuit in Tasini held that the Copyright Act did not authorize the copying, reproduction and distribution of "articles standing alone and not in context" or "as part of that particular collective work to which the author (originally) contributed" or "as part of ... any revision" thereof, or "as part of ... any later collective work in the same series."

After the 2nd Circuit Court's ruling in favor of the writers, the same group of publishers that are now seeking to file briefs in Greenberg appealed Tasini to the Supreme Court which in June 2001 upheld the 2nd Circuit's ruling by a 7-2 majority. That decision meant that in the absence of a written contract, a freelancer automatically retains the electronic rights to their printed work under the Copyright Act of 1976.

The findings in Tasini also began to distinguish methods of reproduction (print, microform, electronic database). "Whereas microforms 'represent a mere conversion of intact periodicals (or revisions of periodicals) from one medium to another,' the databases offered users [in Tasini] articles in isolation absent their context in intact collective works."

On March 4, 2005, following the same legal labyrinth as Tasini, the 2nd Circuit Court in New York upheld the district court ruling in Faulkner. Judge **Ralph K. Winter** found in favor of NGS because the "transfer of work from one media to another generally does not alter its character for copyright purposes."

This leads to the important distinction between Tasini and the cases of Faulkner and Greenberg. In Tasini the user of a database was presented with the authors' work one piece at a time – out of context from how it was originally published – and on a page by itself as a piece of material returned as the result of a database search; whereas the NGS CD-ROM set retains the material's original presentation page by page while staying in context and in sequence, being viewed as an electronic "replica" of the magazine.

Thus it can be suggested that, whereas the holdings in Tasini represent what is not allowable under copyright law, Faulkner sets forth what is allowable. A key factor and consistent with the 2nd Circuit Court rulings in both cases is that the standard for review centers around how the materials are "presented to, and perceptible by, the user;" whereas the Greenberg I court focused on how NGS put its new compilation together (e.g., containing separately copyrightable components, such as a moving image introduction, the digital replica of the magazines and software for search capabilities).

The 2nd Circuit's decision in Faulkner in favor of NGS was based on the court's view that the digital pages were displayed to viewers exactly as they had been displayed in print, without changes or modifications, and within the original context of each other, so that they were exact duplicates of the original magazines – and therefore amounted to being no more than a revision.

Conversely, the key to the 11th Circuit's 2001 decision in Greenberg I was the fact that the judges there viewed the CD-ROM as: (1) the original work of a new author (the act of compiling the issues into one venue, and adding new features), (2) that they were presented in a new medium (electronic instead of in print) and (3) were being sold to a different market, therefore making the set a "new product". Based on those findings the court found that NGS had indeed committed copyright infringement by failing to obtain permission for its digital use of the photographs in question. In 2004, pursuant to that ruling, a jury awarded Greenberg $400,000.00 in damages. Weighing that award against the $120.00 sale price of

the CD-ROM NGS stopped selling it and appealed.

Confusing the matter even further is how a different three judge panel in 11th Circuit ruled in June of this year. Citing Justice **Ruth Bader Ginsberg's** language in her majority opinion in Tasini they reversed the Greenberg I ruling in favor of NGS in a decision now referred to as Greenberg II. In deciding Greenberg II the 11th Circuit panel adopted language similar to the 2nd Circuit decision in Faulkner, holding that the Supreme Court in Tasini had given "tacit approval" to microform-like (microfilm & microfiche) compilations and therefore "the relevant question is whether the original context of the collective work has been preserved [or not] in the revision." In a final legal twist, the full 11th Circuit vacated Greenberg II, agreeing to hear the case en banc (by the full court) next year.

Relying on the distinction made by the Tasini Court between the inter-active, searchable nature of an electronic database yielding stand-alone articles and photos versus the intact, original context of the collective work as preserved in microform; the publishers have asserted that a CD-ROM is nothing more than an electronic version of those traditional storage media, accurately and identically reproducing whole periodical libraries in their original form and context and thus not infringing on the copyrights of those contributors (photographers, writers, etc.) whose work was part of the original publication.

It is that evolving capability of digital reproduction and dissemination that is the underlying argument of the publishers' amicus briefs submitted in Greenburg. In Tasini the publishers first argued (and lost) that there was no difference between microfilm/microfiche copies and their searchable databases. Now they assert in their Greenberg papers that the CD-ROM compilation is an exact electronic replica of the original publications. So strongly do they believe in that analogy that many of them have created and marketed their entire collection on CD-ROM. It is no wonder that these groups are supporting NGS in its court case when they have "Playboy Cover to Cover" and "The Complete New Yorker: 80 Years of the Nation's Greatest Magazine" (to name but two) on sale for $100.00 and $125.00 respectively.

Because the court in Greenberg I found that the software (which is itself protected by copyright) used to create and access these electronic replicas was another factor in determining that the CD-ROM was a new work and not just a revision of an old one, the publishers also argue that as long as the software allows users to view the copyrightable work in its original context then the software is "irrelevant" to the copyright question.

The publishers also make the same economic argument that they did (and lost) in Tasini – that if required to re-negotiate rights and payment questions with the contributors to the original work – that they will be held up for ransom or otherwise have to redact the new compilation so as not to be in violation if they do not come to an agreement. In dismissing the parade of horribles outlined by the publishers in Tasini, Justice Ginsburg noted, "It bears reminder here and throughout that these publishers and all others can protect their interests by private contractual arrangement."

We must now wait to see how the entire 11th Circuit decides this very important copyright issue given that its smaller panels issued conflicting decisions. Considering the magnitude for improved or eroded copyright protection it will be interesting to see if this case makes its way to the Supreme Court given their refusal to grant cert on two separate occasions.

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. Another interesting note is that **Kenneth W. Starr** (formerly of the Office of the Independent Counsel, author of the Starr Report, which led to President **William Jefferson Clinton's** impeachment proceedings on charges arising from the **Monica Lewinsky** investigation) is the lead counsel for NGS.

Osterreicher is the general counsel for NPPA and a member of the New York State Bar Association Media Law Committee. He has been a photojournalist for over thirty years, having covered hundreds of court proceedings. Osterreicher helped draft the NPPA Amicus brief to the New York State Court of Appeals in support of cameras in the courtroom in Court TV v New York in 2005.

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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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MEDIA

FAIR USE REVISITED

DESIGN & NEW MEDIA

By Frank Martinez

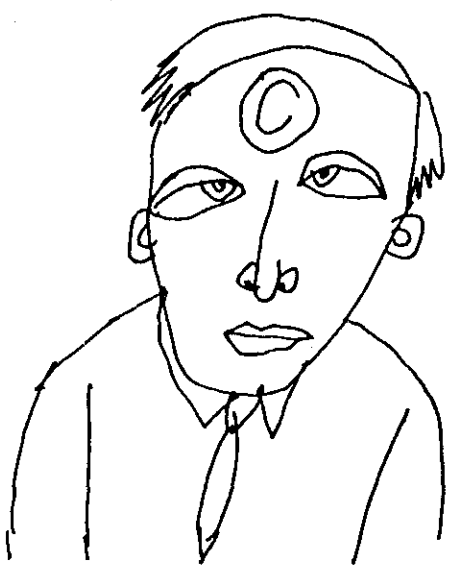
Every period has its symbols or icons that instantly communicate the look and feel of that particular time. More than anything else, the Internet is our of-the-moment symbol. The question for us is how to deal with and manage the Internet's impact on culture, social institutions, and the law—the latter being the glue that holds it all together.

Increasingly, the courts have been faced with cases that have forced them to consider the impact the Internet has on laws from an unwired age. The single biggest impact has been in the field of copyright. Rumors to the contrary, copyright is neither dead nor dying. It is merely adapting. Copyright law is founded on the constitutional principal that an artist or author should derive the benefits of his work by controlling the creation, publication, and dissemination of the work. The rights enumerated in the copyright statutes are the means by which those benefits are secured and protected.

Here's how the Constitution outlines the bargain. As an incentive to create, an artist or author receives a monopoly to his work for a limited period of time, after which the public receives the benefit of the work. Hence the term "public domain."

In one sense the Internet is irrelevant to any discussion of copyright, since it is the actions of people, not the medium they work in, that determine the outcome of copyright infringement suits. But the large issue the Internet has raised is whether the use of any copyrighted material on the Internet constitutes a fair use.

The fair use exception in modern copyright law recognizes that exceptions to exclusive or monopoly rights often result in a public benefit that far outweighs the rights of an author or artist without harming the value of the work. The fair use exception is one of the most litigated areas of copyright law. At the same time, fair use is one of the least understood defenses to a charge of copyright infringement, because the



statute has no identified or "bright line" rules. Instead, the statute provides a series of tests that a court must examine and then weigh in favor of the copyright owner or the alleged infringer.

A fair use of a copyrighted work is generally one that is used for the purposes of criticism, comment, news reporting, teaching, scholarship, or research. When hearing a copyright infringement suit in which fair use has been raised as a defense, a court must examine the purpose and character of the use, including whether the use is commercial in nature or is for nonprofit educational purposes. The nature of the copyrighted work is examined, as well as the amount and substantiality of the copied portion as used in relation to the copyrighted work as a whole. Finally, the effect of the copying upon the potential market for or value of the copyrighted work is examined and is often considered to be the most important factor weighed by the court.

The nature of the Internet makes the issue of fair use an everyday concern. All through the 1980s the courts placed new computer technology within the context of classic copyright law. Today, hardware and software copyright issues are well settled: We know whether the software code, menu structure, or the look and feel of a program are copyrightable. We are only now beginning to find out whether copying for digital sampling, fanzines, Webzines, or bulletin boards constitutes a fair use of copyrighted material.

In *Religious Technology Center v. Lerma*, a federal court in Virginia was pointedly asked to consider whether information posted on the Internet required special treatment under copyright law. Lerma defended his posting of Church of Scientology material on the Internet as intended criticism, comment, news reporting, and scholarship—and therefore a fair use exception. In rejecting Lerma's fair use defense, the court also explicitly considered the ephemeral nature of newsgroup postings. The court reasoned that if newsgroup postings contained unlicensed copyrighted work, it was the

character of use—not the method of transmission—that determined whether their use was a fair use.

In *Sega Enterprises Ltd. v. Maphia*, a federal district court in California determined that a bulletin board operator may not have direct liability for copyright infringement if his or her BBS receives unauthorized postings of copyrighted work. The court did find, however, that a BBS operator could be held as a contributory infringer if he had knowledge of the nature of the postings and actively facilitated or encouraged the unauthorized postings.

In an earlier Sega case, *Sega Enterprises Ltd. v. Accolade*, the court found that the reverse engineering of software was a fair use, if the reverse engineering was used to create an entirely new program. Here, the court found that the fair use exception worked as it was intended. Accolade's use of Sega's copyrighted computer code facilitated an entirely new creative expression, which did not harm Sega's market.

Whether or not fanzines' or Webzines' use of copyrighted work is considered a fair use is being resolved on a case-by-case basis. Because they are a relatively new phenomenon, the courts haven't yet been involved to any great extent. However, the main issue raised in any case where fair use is offered as a defense will be the familiar one: Copyright is intended to protect the expression of a creative thought or act. Since those expressions take form in many media, the doctrine of fair use as it relates to the work of designers and artists also applies in more traditional media such as film and television.

Lately, two producers have found that the fair use exception could not shield them against a charge of copyright infringement in instances where there was unauthorized use of an artist's works in film and television.

Traditionally, the use of an artist's or designer's work in these media was almost always considered a fair use of an otherwise protectable work. Recently, however, several cases were heard in the influential Second Circuit Court of Appeals in New York that may modify the longstanding notion that the minimal use of a designer's or artist's work in film or television is normally considered a fair use under copyright law.

In one case, the artist Faith Ringgold brought a suit alleging that Black Entertainment Television's use of a poster reproduction of her work *Church Picnic* was extensive enough to constitute a copyright infringement of her exclusive rights in the work—even though the original work is owned by High Museum of Art in Atlanta, which had a non-exclusive license to publish posters of the work. BET used *Church Picnic* during an episode of the television series "Roc," a sitcom depicting the lives of a middle-class African-American family.

Ringgold's case will probably have an impact on the copyright doctrine of fair use as it relates to the use of a designer's or artist's work in film, television, or new-media. In reviewing the facts of the case, the court examined the boundaries of the fair use defense as it relates to the use of artwork in television and helped clarify the definition of what constitutes a *de minimis* use of a copyrighted work. In addition, the court noted that a regulation established by the Library of Congress (the governing body for the Copyright Office) required the payment of a royalty for public broadcasts of published pictorial and visual works, whether used in a feature or as background display in a television program. In pointing to a regulation directed to public broadcasting, the court noted that the Library of Congress had concluded that even a background use of a copyrighted work in a television program normally requires payment of a license fee. The court concluded that the regulation could reasonably be interpreted to apply with equal force to commercial broadcasters.

Like many artists before her, Ringgold was faced with a two-pronged defense. Normally, if the use by another of a copyrighted work is *de minimis*, it is usually considered a fair use of the copyrighted work. In addition, since visual works of art are so different from film or television, it has traditionally been considered impossible for a movie or a film to erode or supplant the market for a visual work. Consequently, one of the most important tests an artist or designer must address in a copyright infringement case could almost never be proved using the traditional analysis applied to written works.

In the Ringgold case, the court found that the use was not *de minimis* because the work appeared substantially complete in sequences throughout the television episode for a total of 26.75 seconds. In addition, the court found that use of the copyrighted work to decorate a set was so closely related to the reason the original work was created that BET's use could not be considered a fair use within the normal context. The court noted that the use of Ringgold's work to decorate the set for the television episode was not even remotely similar to any of the uses normally associated with a fair use.

What makes this case particularly important for designers and artists is the court's novel application of the Library of Congress "background license fee" provision. The court's explicit recognition that works of art deserve greater protection when they are exploited in the television medium provides needed clarity to an important area of law.

In a second case, *Woods v. Universal Studios, Inc.*, the court awarded damages to a graphic designer whose work was the basis for one of the sets for the science-fiction film *12 Monkeys*. Prior to an actual finding of damages for copyright infringement, however, the court issued an injunction against the showing of the film. Traditionally, such injunctions are almost never issued since any delay in the release of a film almost always results in a loss of revenue. Normally, income lost as the result of an injunction is considered

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Fair Use Revisited

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punitive in nature. The injunction in this case represents one of only a handful ever issued in the entire history of film in this country.

The case is important from the perspective of defining the rights of a designer or artist because the court's decision illustrates the copyright principle that copying in a different medium can still be an infringement. Here, the producer of the movie used a set that was essentially a three-dimensional reproduction of a prior two-dimensional work by Lebbeus Woods. In this instance, the court noted that the movie producer's use of the work was not "transformative" under copyright law and since the set designer for the film had no authorship rights in the underlying work, the set design could not be considered a permissible derivative work under copyright law. In addition, the court found that Universal Studios' use was not an inconspicuous or background use of the artist's work, which would have weighed in Universal's favor.

In order for a work to be considered transformative, the single most important factor is whether the new work will supplant the copyrighted work. Stated simply, the work will not be considered transformative if the new work is merely a copy or a barely disguised copy. A transformative work is one where the creative portions contributed by an alleged infringer are such that a new work of art is created. This test cannot be reduced to mathematical pronouncements beyond the basic inquiry of the amount and substantiality of the portion used in relation to the copyrighted work as a whole.

These cases can be interpreted as broadening the rights of artists and designers since they identify factors that better determine when the use of a graphic work is or is not a fair use. However, the defense of fair use is always examined in light of the particular facts of each case and there are no rules or guidelines for artists who use the work of others in some appropriative manner. In such cases, however, a court will look to the distinctive nature of each of the works, how much was copied in the creation of the new work, and the purpose of the new work, as well as the entire look, feel, or sound of the new work as compared to the original.

The creative process is, in some ways, like the law. Artists and designers study and learn from the past. Each new work is judged on its own merits, and trusted concepts are adapted to new situations. Just as it is almost impossible to define a great work of art by category, the defense of fair use in copyright law also resists simple definitions.

What are these rights?

As explained in the landmark 1986 federal government book, *Intellectual Property Rights in an Age of Electronics and Information*, current thinking about intellectual property rights includes the right to:

- Possess or physically control something;
- Use or enjoy its benefits;
- Manage or decide how it is to be used;
- Receive income from it;
- Consume or destroy it;
- Modify it;
- Transfer it;
- Distribute it; and
- Exclude others from using it.

All of these rights are owned by the creator of a work, including the creator of an original graphic image.

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Washington Post
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NETWORKINGS

The Net Impact of the New Copyright Bill

By John Schwartz
Washington Post Staff Writer

There are so many battles going on about the Internet these days—control of privacy, sex and con artists, to name a few—that you might not have focused on one concerning copyrights. But a lot of other folks have, and their ongoing war has reached a crucial stage.

Last Thursday, by a 99-to-0 vote, the Senate approved the Digital Millennium Copyright Act, a bill that would implement two copyright treaties adopted in 1996 by the United Nations' World Intellectual Property Organization to cover property rights over written material, sound recordings and software in the online world. What's got some people upset are sections that they say would restrict access for private use to a whole range of material on the Net.

To explain: The notion of copyright in this country is as old as the Republic itself, with the Constitution giving Congress the power "To promote the Progress of Science and the useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. . . ."

But the Founders also wanted the marketplace of ideas to be an open-air bazaar, with plenty of wares on display. So over time, the copyright doctrines evolved into a system that gives great protection to those who create, but with a significant exception that allows others to make partial use of those works.

This exception is known as "fair use," the doctrine that says it's all right for me to quote a few insightful paragraphs from great works in my stories, and for teachers to present poetry, maps, photographs and other copyrightable material in the classroom. Copyright law represents a very delicate balance between the rights of creators and of the people who use their creations.

Creations on paper, at least. And on vinyl, and in film. But on the Internet? For the most part, legal scholars say, the protections in the rest of the world fully apply online. But the owners of copyrights aren't so sure, and they want to nail down their rights.

Publishers and other copyright holders say the principle of fair use becomes meaningless online, where anyone can send innumerable copies of a work around the globe by hitting a few keys. "Digital is different," says Carol Risher, vice president for copyright at the Association of American Publishers. "What we're trying to fight off is attempts to destroy copyright."

So, inserted deep in the bill are provisions that give legal oomph to high-tech schemes for protecting copyright holders' materials from unauthorized use. Want to download a photograph to reprint it in your magazine? Fine. Pay the copyright holder and get keys to "unlock" the protection.

Want to make "fair use" of the picture—to give it to your daughter for a school report, say? The copyright holder would have the right to insist that you come to him or her to get access. Create or sell a way to get around the protections, and you could end up paying $2,500 in civil fines for unauthorized unlocking—or face criminal charges and fines of $1 million.

Critics of the bill, and of a similar measure working its way through the House, say this is not a reaffirmation of copyright protection, but a major shift in the boundary lines of intellectual property law.

Adam Eisgrau of the American Library Association told me that he sees a "legal infrastructure being created out of whole cloth for the beginnings of a pay-per-use information universe."

The language of the Senate bill, S2037, explicitly states that "nothing in this section shall affect . . . fair use." But Eisgrau argues that in practical terms the new right to control access to information guts the principle of fair use. He compares it to someone on the one hand saying it's all right to borrow his car but on the other hand leaving it in a locked garage with signs posted stipulating that trespassers will be prosecuted.

Places to Go

Read about the online copyright debate—where else?—online! The copyright owners argue their case at *www.publishers.org*. The Creative Incentive Coalition is at *www.cic.org*. For critiques of the copyright bill, try the Digital Future Coalition at *www.dfc.org*.

The bill's fans, naturally enough, are holders of copyrights. At the front of their troops, placed for maximum visibility, are creative folks like singers Emmylou Harris and Steve Earle, who worked Capitol Hill last week and who justifiably argue that when someone makes unauthorized copies of their work to ship over the Net for profit, the pirate is taking cash right out of their pockets.

But farther back in the ranks are the businesses that are really funding this crusade: the publishers, movie studios and other employers of high-priced intellectual property lawyers.

On the other side of the battlefield are people like Eisgrau: librarians (who want to guarantee that the greatest amount of information gets out to the most people) and researchers, scholars and educators who could ill afford their calling if they have to pay for every paragraph they cite.

The big money on their side comes from the electronics manufacturers and computer industry types who foresee economic disaster if a new law forces them to hobble their products to prevent copying or exposes the companies to liability if their devices or software are used to defeat the "wrappings" around protected material.

Tom Bell of the Cato Institute warned listeners at a copyright forum last week that "legislation that bans whole classes of devices, that criminalizes entire areas of technological innovation, will impose certain and heavy harms in exchange for speculative benefits."

Both sides tend to paint the other in extremes. Risher says Eisgrau "thinks every publisher is greedy and trying to extract a penny for every word and lock up the information so nobody can get it." Risher says copyright owners would never go to that extreme, because they are in the publishing business. The market will fix problems, she said: Greedy publishers asking too much will see their profits dry up and will relax access.

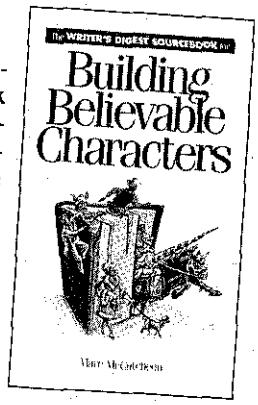
But Eisgrau says the copyright holders "are presuming everybody is going to be a crook" and want to restrict access for good people to keep out the bad.

Eisgrau also argues that lawmakers have punted on the crucial issue of distance learning—how to apply fair use to teachers whose students might be dispersed worldwide and connected via the Internet. After a deadlock in negotiations, the bill's drafters inserted a provision calling for recommendations on this issue within six months of passage.

In brief debate last week before the Senate vote, Sen. John Ashcroft (R-Mo.) called the copyright bill "one of the most important pieces of technology legislation in the 105th Congress." That's certainly true—and it underscores why this is such a controversial, and pitfall-filled, topic. I sure hope they get it right.

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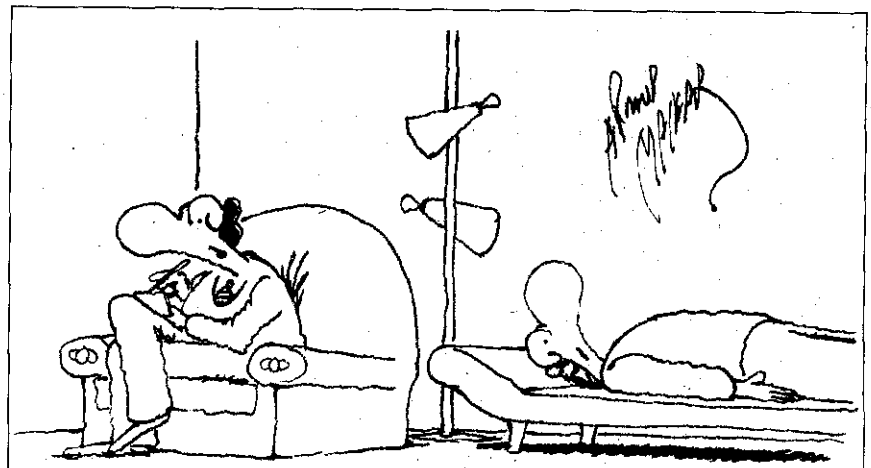
Kirsch's Handbook of Publishing Law, by Jonathan Kirsch, covers the full range of publishing's legal issues. Of particular interest is a clause-by-clause analysis of a standard book publishing contract. Sample contracts, deal memos, notices and other forms are included as well. $21.95 plus $3 shipping and handling. *Acrobat Books, Box 870, Venice, California 90294, tel. 310/578-1055.*



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Questions and Answers About Copyright

When you "sell" your words, you're actually granting a publisher the *right* to copy them. An intellectual-property attorney explains what a copyright is, and why it's important for you to guard yours.

BY HOWARD G. ZAHAROFF

As a writer, you are concerned with expressing your words. Publishers who want to publish your words, however, are concerned with your rights to them—that is, your copyrights. To protect yourself as you sell your words, you must know what copyrights are, how they are created, transferred and protected, and how such key concepts as "work made for hire" and "fair use" fit into the process. Understanding this form of "intellectual property" that writers create, license and sell will help you survive in this everchanging publishing world.

What Is a Copyright?

Copyrights arise under the federal law known as "The Copyright Act" (to be precise, Title 17 of the US Code). This act protects original "works of authorship," which can include virtually every type of creative output—from literature, music and drawings, to movies, choreography and computer programs. What copyright law protects is the way an author or artist expresses an idea or concept; it does not protect the underlying ideas or concepts themselves.

Actually, a copyright is not a single right, but a bundle of separate rights. The five basic, sometimes overlapping, rights are:

- *Reproduction*—the right to create identical or substantially similar copies of the work.
- *Adaptation*—the right to create "derivative works," such as abridgments, translations and versions in other media (book to motion picture to CD-ROM computer game).
- *Distribution*—the right to make the first sale of each authorized copy of the work.
- *Performance*—the right to recite, render, play, dance or act the work publicly.
- *Display*—the right to show the work publicly, directly or by means of film, slide, TV image or other device.

Thus, someone who wants to publish John Grisham's novel *The Client* needs Grisham's permission to reproduce and sell the work (reproduction and distribution), to make a movie version or use the story as the basis of a TV show (adaptation and performance), or even to take his well-defined character attorney Reggie Love and place her in an entirely different story. (Courts have extended copyright protection to original, well-defined literary characters.)

People in publishing and entertainment often purchase some, but not all, of these rights, using special terms to define the scope of their purchase. For example, publishing agreements may ask authors to license first serial rights, reprint rights, paperback print rights, foreign translation rights and TV adaptation rights. Before signing such a contract, writers must appreciate how their work could be used, and should be as clear as possible about the rights they are granting—and often, for clarity, the rights they are expressly retaining.

How Do I "Get" a Copyright?

Unlike patents, which must be applied for and granted, copyrights arise automatically, as soon as you put your ideas into tangible form. Thus, from the moment you express yourself on paper, canvas, video or computer disk, your expression is protected.

It follows that copyright protects people's online transmissions. Of course, many transmissions are often intended to be reproduced and quoted.

And when done with explicit or implicit permission, such quotings and retransmissions are fine. When done without authorization, however, they are *not* fine. Thus, in a recent case, it was ruled the operator of a computer bulletin board had infringed *Playboy*'s copyrights when he allowed subscribers to transmit copyrighted *Playboy* photos.

How Long Do Copyrights Last?

For works created or first published after 1977, a copyright generally lasts until 50 years after the author's death. However, for anonymous and pseudonymous works, and works made for hire (discussed below), copyright protection expires 100 years from creation or 75 years after publication, whichever is sooner. (The trend internationally is to lengthen these terms, and bills are pending in Congress to do so in the US.) These are fixed terms and may not be renewed. (For works published before 1978, different rules apply. For more information, see Section 303 of the Copyright Act.)

Must I Place a Copyright Notice on My Manuscript?

Although copyright is automatic, there are two measures authors can use to improve their rights. The first is including on the work a proper notice: the word *Copyright* or the international copyright symbol © (most publishers use both), followed by the year of first publication, and the author's name or a recognizable abbreviation (such as *IBM* for International Business Machines Corp.).

Notices are no longer mandatory, as they were for works published before March 1989. Still, including a proper notice alerts everyone to your claim and prevents an infringer from pleading that he had no idea your work was copyrighted. Thus, you should include notices on all published copies of your work and require your publisher to do so. (It is useful to include notices on your *unpublished* works, particularly if you are concerned they may be misused—for example, when you are circulating copies of your latest piece within your newly formed writers' group.)

Notices should be displayed prominently, preferably at the beginning of your work. If your piece will appear in an anthology, magazine or other collective work, a single notice in the publisher's name preserves your rights. However, including a separate copyright notice in your own name will clarify that you alone, *not* the publisher, have the right to authorize further uses of your work.

The second measure that improves your rights is registration. Registration is not required for a copyright to exist, but it is a prerequisite to a suit for infringement of US works.

The Copyright Act also adds a special incentive for registration: If someone infringes your work, you may recover both your actual damages (that is, lost sales) and the infringer's profits. However, if your work is infringed *after* you register it, you may also recover your attorney's fees (often the largest part of the award) and you may elect, in lieu of receiving actual damages and profits, to receive "statutory damages." These are monetary damages awarded at the court's discretion without regard to your actual loss. For "willful" copyright infringements, statutory damage awards may run as high as $100,000 per infringement, an amount in excess of the actual losses typically caused by infringement.

You may register your copyrights at any time during the term of copyright. However, registration within three months of publication generally preserves your right to all infringement remedies, including statutory damages (even if the infringement occurred before registration), and registration within five years of publication provides special benefits in legal proceedings.

How Do I Register My Works? Should I Bother?

The registration process is fairly simple: Use Copyright Form TX to register nondramatic literary works. Use Form PA to register works of the Performing Arts, including plays and movies. These two-sided forms are relatively easy to complete—provided you read the instructions. Your application must include a $20 fee plus one copy of your work if unpublished, or two copies of the "best edition" of the work if published. (Only one copy of the best edition is required when registering contributions to collective works.) The "best edition" is the published edition of highest quality, determined by paper quality, binding and other factors listed by the Copyright Office (see Circular 7b).

Registration is critical for publishers, but of limited importance for freelance writers. Most writers don't earn enough to justify the cost of registration for articles, poems and other short works. If you work in longer media, such as novels and plays, and succeed in getting these published, your publisher will normally attend to registration. Moreover, because failure to register only loses you statutory damages and the ability to file your lawsuit immediately, only authors with bountiful time and money, or with special reasons to fear infringement of their works, should choose to register on a regular basis.

Besides, infringement is the exception. Where it occurs, it usually can be settled without lawsuits or registration.

Who Owns the Copyright?

The rules of copyright ownership are relatively straightforward: The creator of the work generally owns the copyright unless he or she assigns it in writing to another party. The primary exception is *works made for hire*, where the party who commissions and pays for the work, rather than the creator, owns the copyright.

There are two types of works made for hire. The first type includes all works created by employees within the scope of their employment (unless expressly excluded by contract). This normally will not include works created on your own time that are unrelated to your employment, but will include works within the scope of your job and, often, other works you create on company time or using company resources. So if you are employed by a newspaper to write articles, or by a software publisher to write manuals, your employer owns the copyrights for those articles or manuals. If you were to reproduce those works at your next job, you would be infringing your former employer's copyrights.

The Copyright Act also identifies nine categories of works, including translations, compilations and parts of audiovisual works, that are considered for hire if they have been specially commissioned and a signed written agreement identifies them as for hire. Recent court decisions have generally taken a strict view of these requirements, such that if the work doesn't fall within one of the nine categories, or if the agreement to treat these as for hire occurs *after* the work was created, it will not be considered a work made for hire.

Thus, if you aren't an employee and you haven't agreed in writing that your work is for hire or otherwise assigned your rights, you will continue to own the copyright, even if someone paid you to create the work. Of course, those paying you are buying something. If you don't want to guess what that something is, you and your publishers should state your agreement in writing.

As you prepare or negotiate that agreement, keep these three rules in mind:

First, carefully read the terms of

any written agreement offered by the publisher. Be sure you understand and agree with the terms before signing. In general, you should *not* accept work made for hire agreements. (I discuss this point further in my article "Fighting Tooth and Clause," which appeared in the June 1992 WD.)

Second, if your publisher hasn't stated the terms in writing, consider doing so yourself. The best form is probably a short letter describing the terms of your engagement (for instance: "I will deliver a 3,000-word introduction to copyright law by Dec. 29, 1995; upon acceptance you will pay me $500") and the rights you are granting ("You will have first North American serial rights for one-time use, and the right to reprint the material in any form for resale for 25% of the original purchase price").

Third, the Copyright Act helps writers by specifying that when you submit a piece for publication in a magazine or other collective work and there is no written agreement, your publisher acquires only the right to publish your piece as part of that collective work, of any revision of that work, and of any later collective work in the same series. You retain all other rights, and are free to revise or remarket your piece. As publishers in this digital world grab for more and more rights from authors, this legal definition of the rights these publishers acquire (absent a written agreement) is often a better deal than writers receive in publishers' written contracts. Therefore, although as a lawyer I prefer written agreements to unwritten understandings (which often turn out to be *mis*understandings), if you suspect your publisher will demand more rights than those granted under the above rule, you may be better off leaving the grant of rights unspoken.

What About Collaborations?

Under the Copyright Act, when two or more persons contribute *copyrightable* material with the intent their contributions be merged into a unitary whole, the product is a joint work and the contributors jointly own the copyright. However, if one collaborator's contribution is not itself copyrightable (for example, uncopyrightable ideas and suggestions rather than words, lyrics or tunes), that contributor is not a joint author and has no copyright claim. Similarly if two or more authors contribute copyrightable material without intending that their contributions merge (for instance, a composer sets, with permission, a copyrighted poem to music), the end result is not a joint work and the authors merely own the copyright in their separate creations.

Under the law, *each* joint owner of the copyright may grant nonexclusive licenses to the work, but must share any money earned with the co-owners. Each joint owner may also prepare and publish revisions of the original work. If a co-owner dies, his interest passes to his heirs—unlike many forms of co-ownership, where the deceased's interests belong automatically to the surviving co-owner.

Although the law will answer the most critical questions about joint ownership, there are many questions it does not answer (such as whose name will appear first) and many answers are not ideal (for example, it is often better for one co-owner, or all by consensus, to control licensing of the copyright). Therefore, before you engage in any serious collaboration, you should first put together a written agreement that addresses such issues.

What Is "Fair Use"?

As you create your own works, you will occasionally need to consult, quote or otherwise use another author's work. The Copyright Act permits the *fair use* of portions of others' work for research, teaching, news reporting, criticism and similar purposes. Although the Copyright Act never defines fair use, Section 107 of the act lists four factors that must be considered in determining whether a use is fair:

- *The purpose and character of the use.* People who use another's copyrighted work for certain favored purposes—including nonprofit educational use, noncommercial research, news reporting and criticism—are given wider latitude for copying. On the other hand, pure commercial use of a copyrighted work generally weighs against a finding of fair use. (However, even commercial uses must be distinguished. For example, one court allowed a competitor to reproduce several *TV Guide* covers, deeming "truthful comparative advertisement" a favored commercial use.) Courts may also consider the user's conduct, so that if a work was acquired by theft or trickery, its use is less likely to be considered fair. In the 1994 Supreme Court *Acuff-Rose* case involving 2 Live Crew's parody of Roy Orbison's song "Oh, Pretty Woman," the court indicated that if the use made is not passive reproduction, but actually transforms the original work into a creative new work that "adds something new, with a further purpose or different character," the alleged infringer has a better chance of proving fair use.
- *The nature of the copyrighted work.* Works of fiction receive greater protection than works of nonfiction. This makes sense in light of the principal purpose of the copyright laws, namely, dissemination of information to the public. Whether a work is published is also critical: Until recently, courts generally refused to permit any copying of unpublished works. Although recent cases, and a 1992 amendment to the Copyright Act, make unpublished works subject to fair use, any copying or paraphrasing from an unpublished work must be done with extreme caution. You should consult a copyright lawyer before proceeding.
- *The amount and substantiality of the portion used.* Most courts will consider first the amount of the work used. For example, in two cases, uses of 1% and 4.3% of the copyrighted works were found acceptable. However, courts consider not only the quantity of the use, but the quality as well. If the user copies the critical heart of the work, this is probably unfair even if the number of words copied is insignificant in relation to the whole. For example, one case held that copying less than 1% of the copyrighted letters of Julius and Ethel Rosenberg was substantial.
- *The effect of the use on the potential market for or value of the copyrighted work.* Courts generally view this as the most critical factor in determining whether a use is fair. Obviously, quoting substantial portions of a work, such as a poem, even for purposes of legitimate criticism, provides readers with a copy of the work without payment to the poet. On the other hand, creating a parody of a poem or other work will probably not diminish the market for the original and so may be deemed a fair use. In this regard, 2 Live Crew benefited from the Supreme Court's perception that no one interested in Roy Orbison's song would accept 2 Live Crew's parody as a substitute.

Some commentators recommend that authors attempting to decide whether a proposed use is fair should apply the Golden Rule: If you would be upset to find another writer using *your* work this way, it is probably unfair and should be avoided. But there is surprising variation in the amount of copying of their works that authors will tolerate. So the safest course of action is to seek permission. Lacking it, limit yourself to brief quotations or paraphrasings that convey information that cannot easily be communicated in another way and

Continued on page 57

LETTERS

Continued from page 4

Write Right" (The Writing Life, Feb.). Stafford puts into words what I witness daily as an editor and and a writing teacher. Those few who actually make it to publication are seldom the ones who stroll in flaunting profound ideas and PhDs. Like Stafford, the ones who succeed write from their hearts, souls and maybe their guts, but certainly not from their heads. While they may not impress their English teachers, they touch their readers, and touching—connecting—is what real writing is all about.

So, here's to Linda Stafford and all of us who learn by simply *doing*. That one acceptance, one small check, one published *anything* in our hands means more than a hundred doubts—spoken or implied—by those who profess to know more than we do.

The proof is in the publishing. Writers like Linda Stafford will continue to do just that long after the wannabes who tried to stop them are reciting grammar lessons to themselves and their audiences of none.

Bonnie Hearn
Special Sections Editor
The Fresno Bee
Fresno, California

Like Stafford, I wrote while my daughter napped, edited during ballet practice and revised during long trips in the car. I worked full-time as a nurse and double-full-time as a wife and mother. Through it all I've managed to write and have published numerous short stories and two children's books. I've had no formal training as a writer, but like Stafford, I write what I know, what I like and what I like to read. I have a feeling there are more writers like Stafford and me out there than people realize.

M.M. Jaeger
Keene, New Hampshire

Corrections

The correct address for *Inklings*, the electronic newsletter covering online resources for writers, is majordomo@samurai.com.

The correct address for Voyager Publishing (not *Press* as listed in the Jan. Markets) is Box 2215, Stillwater, Minnesota 55083-2215. The address for Voyageur Press is 123 N. 2nd St., Stillwater, Minnesota 55082.

The correct address for the Emily Dickinson Award in Poetry is Box 697, Williams, Arizona 86046-0697.

Address your letters to WD at 1507 Dana Ave., Cincinnati 45207 or Writers Dig@aol.com.

COPYRIGHT Q&A

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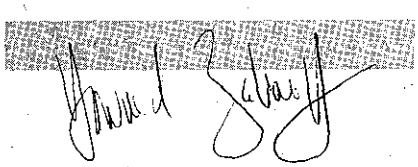
that do not simply liven your text by displaying the author's style. (For a more detailed discussion of fair use, see my "Your Best Defense" in the October 1993 WD.)

Of course, these suggestions focus on US copyright law. Foreign laws and international treaties generally are similar, but there are differences. Also, I'm dealing with new works—first published or created after March 1, 1989, the date of the last major revision of the Copyright Act.

Copyright law can be complex at times, and it sometimes seems as if the more you know about it, the more questions arise. While the Copyright Office does not provide legal advice, its Circulars and Public Information Office can provide guidance on many issues. For more information, contact the Copyright Office Recorded Information line at 202/707-3000; for forms and circulars, call the Coppyright Hotline Recorder at 202/707-9100.

There are also many excellent books available, including Ellen Kozak's user-friendly *Every Writer's Guide to Copyright & Publishing Law* (Owl) and *The Rights of Authors, Artists and Other Creative People: The Basic ACLU Guide to Author and Artist Rights*, by Kenneth Norwick and Jerry Chasen (American Civil Liberties Union). WD

They are the hottest—and, it seems, the most intractable—copyright issues writers have yet confronted: electronic rights, new technologies and the Internet. Even as the digital revolution promises writers great benefits, it also creates enormous risks. Howard G. Zaharoff examines in next month's WD how the new electronic media challenges copyright laws and how you can protect your work.





Howard G. Zaharoff is an attorney who writes frequently on copyright issues. His articles have appeared in *Folio:*, *The Boston Globe*, *Computerworld* and elsewhere. This article also appears in WD's latest special publication, *The Basics of Selling and Protecting Your Writing*. Look for it on newsstands beginning May 7, or order your copy by sending $5.25 ($6.25 outside US) to WD, 1507 Dana Ave., Cincinnati 45207.

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TIP SHEET

GRAMMAR GRAPPLER

Breaking Old Rules for New Reasons

by Richard Lederer

Attention readers:

✓ Anyone who wants to be labeled as sexist please raise *his* hand.

✓ Anyone who wants to be labeled as tedious please raise *his or her* hand.

✓ Anyone who wants to be labeled as ungrammatical please raise *their* hand.

Can't we write a simple sentence without being labled "sexist, "tedious" or "ungrammatical"?

Anyone is a singular pronoun. Traditionally it has been followed by the masculine pronoun *he* when it applies to either male or female, as in the first of the sentences above. But in modern society a writer who adheres to this tradition is subject to being labeled as sexist.

Language has the power to shape our world even as our world is shaping language. Among the personal pronouns—first-, second-, third-person singular and plural—only one, the third-person singular, identifies the sex of the individual. Among the candidates proposed to displace the third-person, gender-specific pronouns are *co, et, han, hesh, jhe, person, s/he, thon, ti* (an inversion of the letters in *it*) and *ws*, but none has caught on.

Many reputable studies indicate that *man* as the inclusive noun and *he* as the inclusive pronoun create images of males to the exclusion of females. The *his-or-her* solution is a safe answer, but it's the first step on the road to gracelessness and tedium. Writers who stuff several pairings of *his or her, him- or herself*, and the like into a sentence are not just flouting grace, they're flaunting the tedium.

Let the word go out that *anyone . . . their* is destined to become good, idiomatic English. It already pervades the speech of educated Americans, and daily it grows more common in writing. In his delightful little book *Fumblerules*, William Safire derides that kind of construction on one page but uses it unself-consciously on another: "Here's the best way to proofread copy: Get *somebody* else to do it. If necessary, do it with *them*, reading aloud to each other." (The italics are mine.) The grammatically conservative *New York Times* allowed the following sentence on its pages: "But *everyone* seemed too busy with *their* oral sneers and jousts to pay much attention to his pleas." (The italics are mine.)

The third edition of England's classic *Copy Editing: The Cambridge Handbook for Editors, Authors and Publishers* announces, "An example where *they* provides the simplest, clearest solution is 'Each author presented an evening of readings from their work.' " Similarly, the *Columbia Guide to Standard American English* supports the sentence "Each person must bring their own calculator."

That's fine with me. For centuries the plural pronoun was perfectly acceptable after *everyone*. Even without the useful advice from the Cambridge and Columbia elbow books, some of our greatest writers—Chaucer, Shakespeare, Swift, Goldsmith, Fielding, Thackeray, Byron, Austin, Shaw, Auden, Orwell and the translators of the Authorized Version of the Bible—have been committing this supposed solecism for centuries.

This shouldn't surprise you if you open yourself to the true pluralism of the pronoun *everyone*. Fill in the blank in the following sentence: "Everyone in the building attended the party, and _____ had a wonderful time." I trust you agree that most English speakers would supply a *they*.

Once you set yourself to it, you will soon find it quite natural to use *humankind* in place of *mankind, letter carrier* in place of *mailman*, and *they* in place of *he* or *he or she*. Your mind will naturally slip into a mode that will allow you to recast your statements judiciously, even elegantly, and to avoid sexism.

Richard Lederer *welcomes questions on language, usage and grammar from everyone. They can reach him at 5 Merrimack St., Concord, New Hampshire 03301 or at rlederer@tiac.net. His latest book, co-written with Richard Dowis, is* The Write Way *(Pocket).*

THREE WAYS THE VCR WILL IMPROVE YOUR WRITING

Some writers feared the VCR represented the triumph of the couch potato. But inventive writers have found they can harness the hard-to-program gadget to make their jobs easier.

Here are some tips for using videotapes to help your writing process.

● *The Video Reference Source.* Recently, when I was writing about a playwright, he handed me videotapes of all his former plays. I'd read the works, but plays are living things; it was a great help to see how they were directed, how they came to life. When I wrote a profile about an actress in a new sitcom, her producers furnished me tapes of the pilot before it aired. The article was more fun to write because I could discuss fresh material.

When you start a project, ask your subject if there's a videotape of his or her work, or if any newscasts are planned. (Relatives are often more likely to have made videotapes than the actual subjects. Such was the case with a 91-year-old rural pediatrician I profiled recently. Her cousin had kept tapes of news broadcasts, in which I found some wonderful quotes.) Watch videos of a subject before you meet face to face, and you'll get a psychological leg up. You'll know the person's speech patterns and quirks. And you may be able to identify topics that rile, amuse or fascinate the person—allowing you to frame better questions. Consider reviewing a videotape *with* your subject; people's responses to seeing themselves can be illuminating.

● *The Video Idea-Generator.* When I was asked to write an article on how fiction has shaped women's lives, I had a wonderful time watching tapes of such movie classics as *Wuthering Heights* and *Gone With the Wind*—all in the name of research.

Scan the television listings for the topics to be covered on the morning programs (such as *Today* and *CBS Morning News*) and the afternoon talk shows (such as *Sally Jessy Raphael* and *Oprah*); then tape those that promise to be relevant to your work. You'd be surprised how often writers find nuggets of ideas on these programs. It's a fast, easy way to hear how people actually talk and, perhaps, to allow your imagination to veer off into interesting tangents. After all, Neil Simon got the idea for *The Odd Couple* somewhere.

With all their charts and graphs, these shows can also save you library time. Keep a pad of paper by your televi-

Illustrations by Jim Benton

Artistic couple demands and gets credit for work

▶ GREENBERGS, FROM 11

together on Seahawk Press for almost as long. She does most of the writing and layout; he generally handles the business end.

Their specialty is publishing his photos and her illustrations of underwater life. *Guide to Corals and Fishes* sold 250,000 copies in a regular format, and another 250,000 in a waterproof version.

Even bigger sellers are the illustrated color cards, "made of the same material as credit cards," says Jerry, suitable for divers and snorkelers to take underwater, to identify fish, shells and plant life.

Since starting the cards in 1979, they have sold more than three million copies of the five domestic cards and seven others for the rest of the world, including the Red Sea and the Indian Ocean. The Greenbergs charge about $2 for the cards, which generally retail for $5.50 to $6.

The key to their success is that they ignore all the traditions of publishing. "When I stopped reading Publisher's Weekly," says Jerry, "I started doing quite well in the book business."

Virtually all bookstores and wholesalers follow the custom of sending unsold books back to publishers, who bear the cost of the left-over books.

To Jerry, that doesn't make sense. He recalls one time getting back a dog-eared book that had sat on a bookstore shelf for a year. The store wanted $1.50 returned. "What the hell is this?" Jerry asked.

Since then, the Greenbergs sell directly to distributors. No remainders. That means their books are rarely, if ever, in bookstores, which is fine with them, because they have realized they do much better by getting their material into dive shops, tourist locations and cruise ships.

"We do everything ourselves," says Idaz. "We don't even have a shipping clerk."

The defense of their copyrights is more a matter of principle than money. "These things are not cost-effective," says Idaz.

But they get upset because they see their photos and illustration being stolen all over the place. During a three-day trip to Key West, Idaz says, "it seemed like every store had something of ours," from T-shirts to illustrations in books.

Their routine is first to send a letter seeking "a small payment" and demand that the thievery stop. If that doesn't work, they prepare an exhibit book, often using overlays, showing how the copied work compares to their own. "This is usually so effective that they stop," says Idaz. Only as a last resort do they file a lawsuit.

A few cases pay off well. Their biggest victory was against Stanley Michaels Inc., a North Dade firm, which ended up paying $100,000 in damages, $30,000 for court costs and $65,000 for their lawyer.

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news maker



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GREENBERGS, FROM 11

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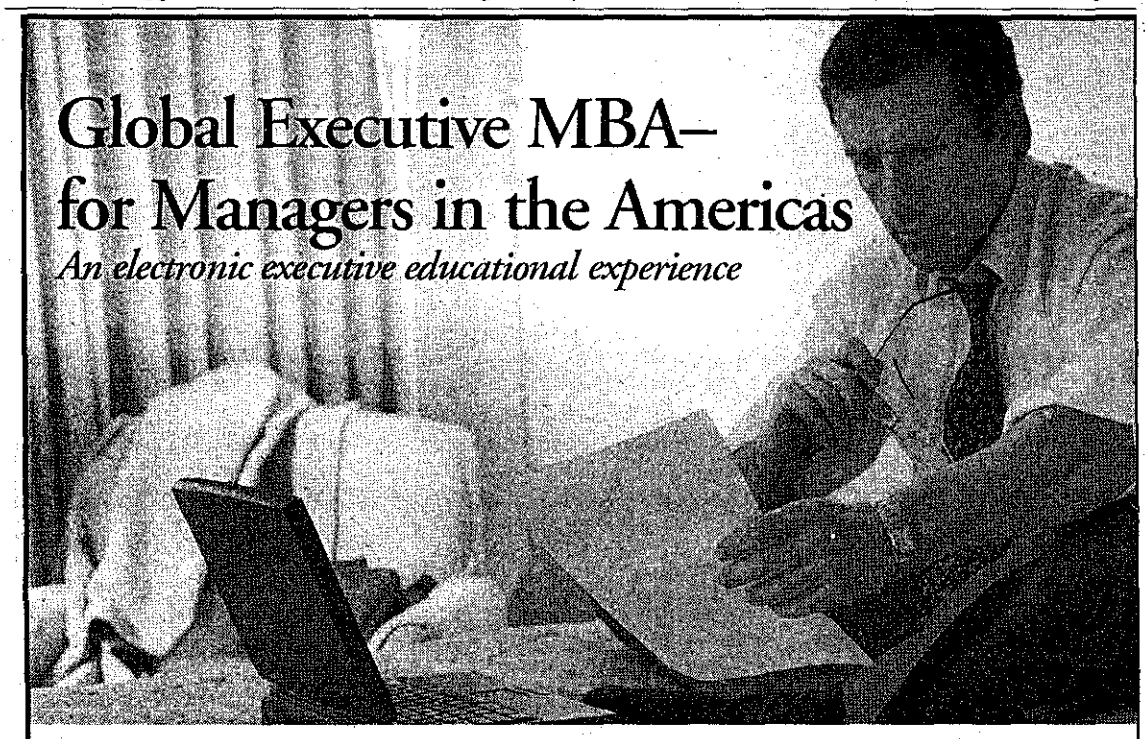
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MIAMI-DADE

Conroy Communications, an 11-year-old public relations and marketing firm in Coral Gables, has changed its name to The Conroy Martinez Group, reflecting the addition of **Jorge Martinez**, who will serve as principal. He was manager, public relations for Norwegian Cruise Line.

Nikol Solares has joined Dezer Properties in Miami Beach as vice president of sales and marketing at Ocean Grande Resort Hotel and Condominium, a resort and residential community in Sunny Isles. Before joining Dezer she was sales manager for Cervera Real Estate at Yacht Club of Portofino in Miami Beach.


SOLARES

BROWARD

Lynn DeLorenzo has joined The Duncan Companies to head operations at its new Plantation office. She specializes in commercial land sales and acquisitions and has spent 16 years with Gulfstream Land & Development Corp. The Duncan Companies provide corporate services and assignments within the commercial real estate industry.

Send typed announcements to Angel L. Doval, Business Monday, 1 Herald Plaza, Miami, FL 33132.

news maker



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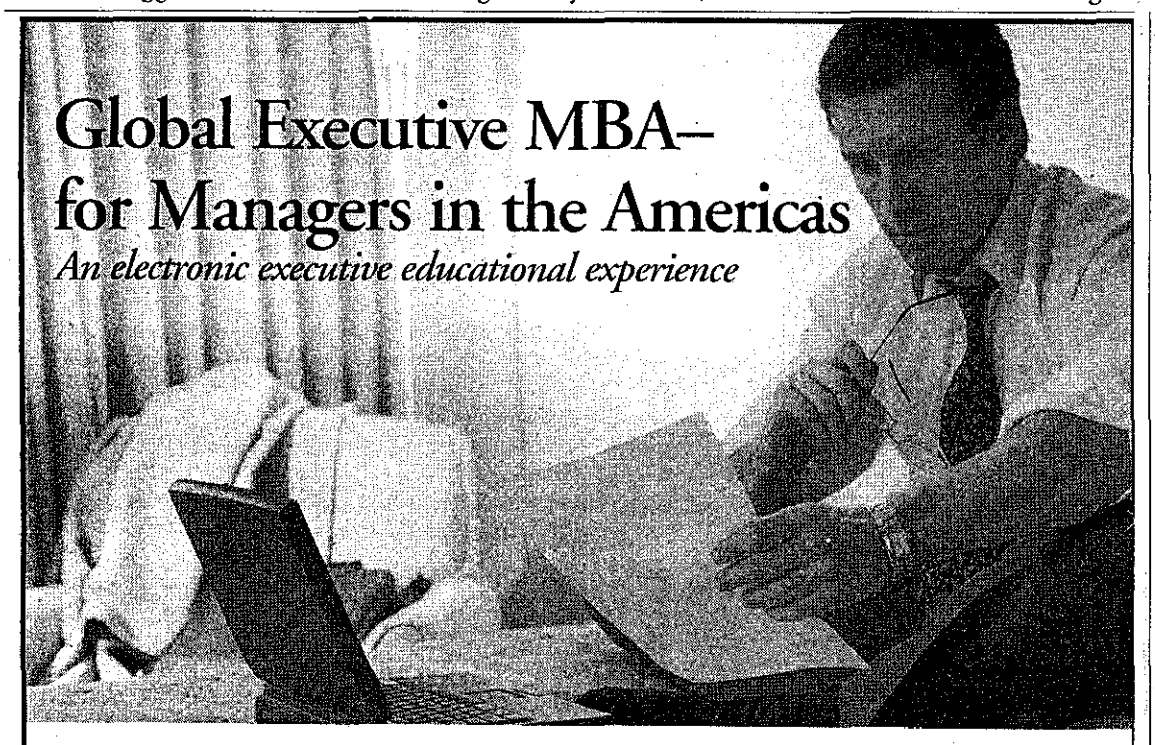
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That copyright became crucial when the magazine put out the CDs of past editions. Jerry and Idaz say they didn't hesitate for a second before deciding to file a lawsuit. For virtually all the photos and articles on the CDs, National Geographic owned the copyright, but because Jerry owned his work, the appeals court ruled that the magazine should have gotten his permission before using the photos in a new medium.

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MIAMI-DADE

Conroy Communications, an 11-year-old public relations and marketing firm in Coral Gables, has changed its name to The Conroy Martinez Group, reflecting the addition of **Jorge Martinez**, who will serve as principal. He was manager, public relations for Norwegian Cruise Line.

Nikol Solares has joined Dezer Properties in Miami Beach as vice president of sales and marketing at Ocean Grande Resort Hotel and Condominium, a resort and residential community in Sunny Isles. Before joining Dezer she was sales manager for Cervera Real Estate at Yacht Club of Portofino in Miami Beach.


SOLARES

BROWARD

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Send typed announcements to Angel L. Doval, Business Monday, 1 Herald Plaza, Miami, FL 33132.

Artistic couple demands and gets credit for work

GREENBERGS, FROM 11

together on Seahawk Press for almost as long. She does most of the writing and layout; he generally handles the business end.

Their specialty is publishing his photos and her illustrations of underwater life. *Guide to Corals and Fishes* sold 250,000 copies in a regular format, and another 250,000 in a waterproof version.

Even bigger sellers are the illustrated color cards, "made of the same material as credit cards," says Jerry, suitable for divers and snorkelers to take underwater, to identify fish, shells and plant life.

Since starting the cards in 1979, they have sold more than three million copies of the five domestic cards and seven others for the rest of the world, including the Red Sea and the Indian Ocean. The Greenbergs charge about $2 for the cards, which generally retail for $5.50 to $6.

The key to their success is that they ignore all the traditions of publishing. "When I stopped reading Publisher's Weekly," says Jerry, "I started doing quite well in the book business."

Virtually all bookstores and wholesalers follow the custom of sending unsold books back to publishers, who bear the cost of the left-over books.

To Jerry, that doesn't make sense. He recalls one time getting back a dog-eared book that had sat on a bookstore shelf for a year. The store wanted $1.50 returned. "What the hell is this?" Jerry asked.

Since then, the Greenbergs sell directly to distributors. No remainders. That means their books are rarely, if ever, in bookstores, which is fine with them, because they have realized they do much better by getting their material into dive shops, tourist locations and cruise ships.

"We do everything ourselves," says Idaz. "We don't even have a shipping clerk."

The defense of their copyrights is more a matter of principle than money. "These things are not cost-effective," says Idaz.

But they get upset because they see their photos and illustration being stolen all over the place. During a three-day trip to Key West, Idaz says, "it seemed like every store had something of ours," from T-shirts to illustrations in books.

Their routine is first to send a letter seeking "a small payment" and demand that the thievery stop. If that doesn't work, they prepare an exhibit book, often using overlays, showing how the copied work compares to their own. "This is usually so effective that they stop," says Idaz. Only as a last resort do they file a lawsuit.

A few cases pay off well. Their biggest victory was against Stanley Michaels Inc., a North Dade firm, which ended up paying $100,000 in damages, $30,000 for court costs and $65,000 for their lawyer.

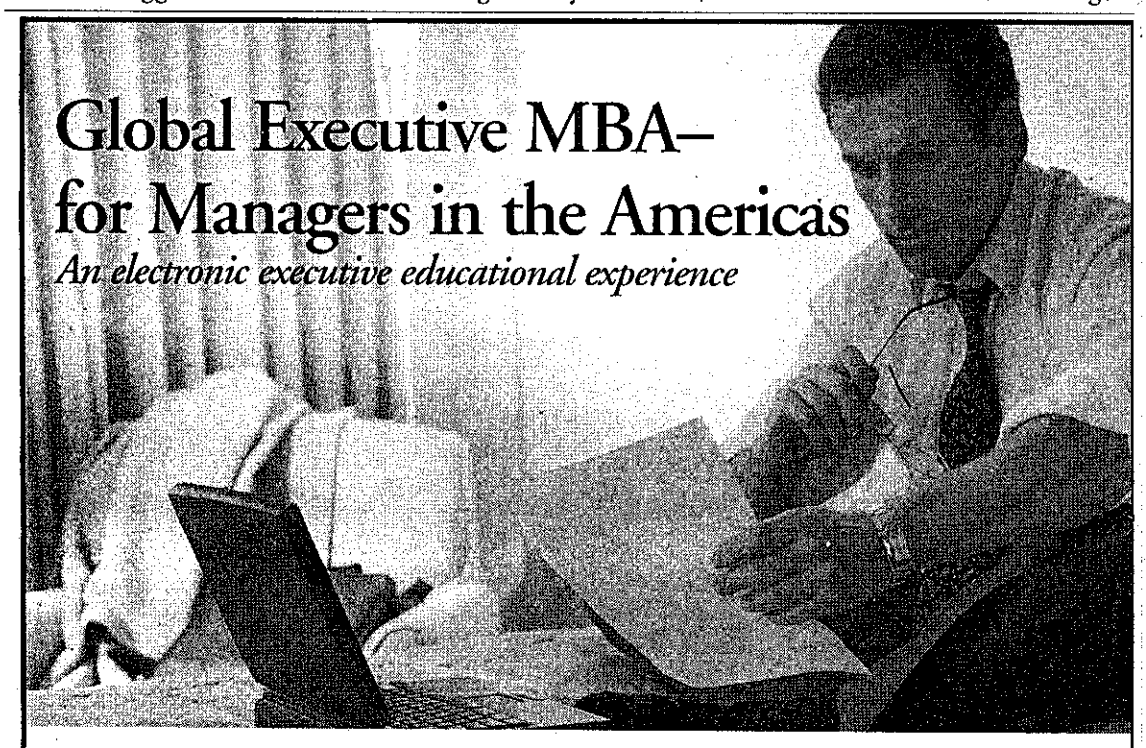
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news maker



Precedent-setting artists

BY JOHN DORSCHNER

Whether the culprit be a big publication like National Geographic or a little T-shirt manufacturer, Jerry and Idaz Greenberg believe in fighting back.

Operating what they call "a mom and pop publishing business" out of their home in Pinecrest, they don't like anyone using their photos or illustrations for free.

When they saw actors in the movie *Jaws* flipping through a book that showed one of Jerry's photos of a shark, they wrote the film company, demanding to be paid. "We made it clear it was only for the movie rights," says Idaz. "If it appeared on TV, they would have to pay us extra."

The film studio paid, says Idaz, for the movie rights only. When the film appeared on TV, with the Greenberg photo still there, they wrote another letter, and again they were paid.

About 200 times, Jerry and Idaz have gone after people whom they have accused of stealing their work. Sixteen times, says Jerry, they have filed federal lawsuits. Four have gone to trial. Idaz says they have never lost.

Their most publicized case is their still-continuing lawsuit against National Geographic, which put four of Jerry's magazine photo spreads on a CD set of the magazine's issues from 1888 to 1996.

Greenberg claimed the CDs were a new medium, and he was entitled to an additional fee. U.S. District Judge Joan Lenard in Miami ruled against him, but the 11th Circuit Court of Appeals disagreed, saying the magazine had made an unauthorized use of his copyrighted photos. The magazine appealed to the Supreme Court, which refused without comment to hear the case, which means the 11th Circuit's decision stands.

For decades, Jerry and Idaz Greenberg have fought for credit — and pay — for their work. Their most famous lawsuit is against National Geographic.



PHOTOS BY RICHARD PATTERSON/HERALD STAFF

THE GREENBERGS relax at home with family dog Jocko, top, and work in their office, above.

The case has attracted widespread publicity because it determined a key issue in the world of changing media. National Geographic — and other publications — have insisted that a digital- or Web-based reproduction is simply an extension of the print publication and needs no extra payment or granting of rights.

The appellate court disagreed, deciding that the CDs were "a new product. . . in a new medium for a new market that far transcends any privilege" of traditional copyright.

Because of the Greenberg and similar cases, many publishers now insist that free-lancers sign agreements specifically allowing digital or Web versions of their work.

The case is back before Judge Lenard, to decide how much Jerry should get paid in damages and attorney's fees. On instructions of their attorney, Norman Davis, Jerry and Idaz won't talk directly about the National Geographic case, but they say it's only the latest example of their career-long legal battle to protect their work.

"I get fired up," says Idaz, an artist who does illustrations. "There is a great altruism in what we do. We believe in artists getting their rights."

Jerry doesn't believe in standing up for other photographers, because "anyone who puts on a camera is a dumb photographer, and some of them are even dumber photographers, because they don't protect their copyrights."

Married for 46 years, they've been working

▸ PLEASE SEE GREENBERGS, 12