3/27/2001

Court rules against magazine

BY CATHERINE WILSON
Associated Press

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Court Upholds $1 Million Infringement Award

Even if it's delayed, justice is still sweet. That's what Mark Payden, a former custom screen printer/embroiderer, learned after nearly a decade of pursuing a copyright infringement case.

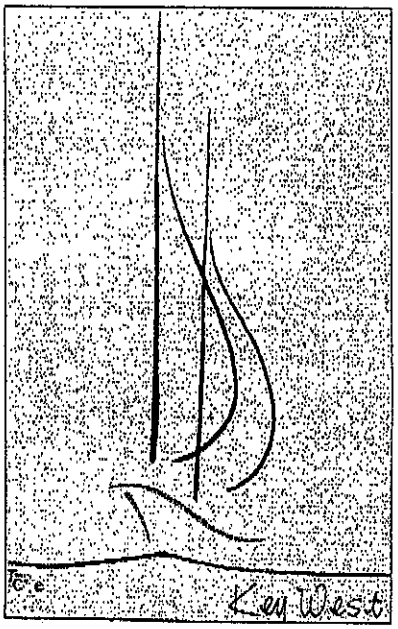
Payden, the former owner of Rhode Island-based Two's Company, embarked on a legal odyssey in the spring of 1990 when, following an investigation and subsequent raid of several stores in Key West, Fla., he discovered his copyrighted sailboat transfer design was being counterfeited. This past September, after Payden initially settled with the defendants, then went after one of them for contempt of court, the 11th Circuit Court of Appeals upheld a district court's 1997 decision awarding Payden $936,000 for damages, plus attorneys' fees.

The defendant, L&L Wings, filed for a rehearing in the 11th Circuit in October, but if denied the next step would be the U.S. Supreme Court—and, since this is not a constitutional matter, that is highly unlikely. In the meantime, the judgment accumulates roughly $5,200 in interest monthly.

"They never took me seriously," Payden says of his courtroom adversaries. "They thought I was going to go away, but I didn't."

Payden, who sold his business a couple of years ago, says he regrets agreeing to an out-of-court settlement in the original case, but felt pressured by all sides to do so. "Back in '90, the courts really didn't want to deal with a copyright infringement case. At one point, the judge stated in court that this case was the bane of his existence."

When he discovered in April 1995 that Wings was still selling the design, Payden filed suit alleging contempt of court and resolved to pursue it to the end. In October of that year, a federal judge ruled in Payden's favor, but the hearing on sanctions didn't occur until more than a year later, following an unsuccessful appeal by Wings.



Mark Payden says the sailboat design was "a lesson in creativity." He asked his artist to practice his brush strokes, then asked him to design a sailboat using his seven best strokes. "This is what we came up with," Payden says.

Still, the legal atmosphere in the mid-1990s was more receptive to this kind of litigation, Payden found. "There are more of these cases in our industry and other industries now, and the courts are more familiar with them. The courts are realizing that, when products are counterfeited, it costs jobs."

Payden, now working in sales for Cyrk, Gloucester, Mass., was adamant about pursuing justice in this case because the sailboat design was—and still is—so successful. "When I sold the business, we had more than 600 designs in our repertoire. Very seldom do you get one that's so hot. There was a time when I was selling 100,000 transfers a year in Key West alone."

The design itself is simple, he says. "It's a brush-stroke design, seven lines representing a sailboat. The staying power of this design is unbelievable. Most designs last one or two tourist seasons and that's it." But the sailboat design remains popular after 13 years on the market.

Payden says the decision may give bootleggers reason to think twice about copyright infringement. He also hopes it will encourage small decorators whose work is being counterfeited. "We wanted to make the statement, 'You may be next because we'll go after you,'" Payden says. "If it's a big enough infringement, it's worth going after. Maybe counterfeiters will be a little more cautious, with the possibility of a huge damage award. A $1 million judgment could put some companies out of business."

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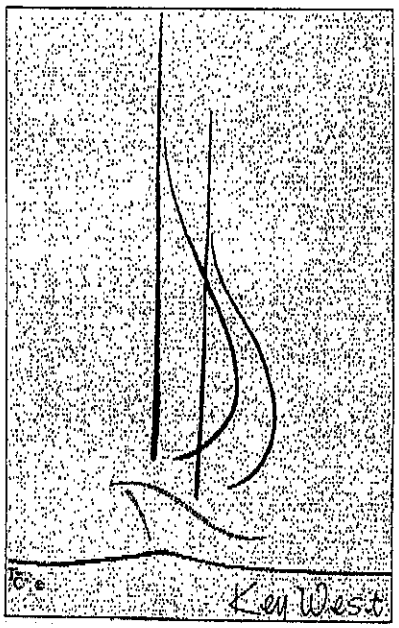
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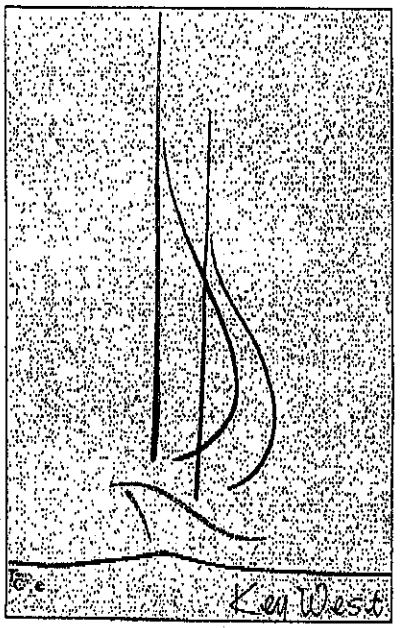
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Stopping Online Copyright Infringement

Taking Advantage of the Notice and Takedown Provisions of the DMCA

by Garry Berger



Much has been written about the Internet and its effect on business. Arguably, one of the most positive impacts of the Internet has been the opportunity it has provided to individuals and organizations to quickly deliver information to an intended audience. By providing this means of instant communication, however, the Internet has also opened the door to participants who fail to understand—or intentionally disregard—their obligation to comply with U.S. copyright law.

The not-too-surprising result is the increasing number of instances of copyright infringement in the electronic medium. Yet all too often the actual damage to the copyright owner is too minimal to justify the substantial litigation costs necessary to obtain an injunction. In many situations, the "notice and takedown" provisions of the Digital Millennium Copyright Act (DMCA) offer an inexpensive and frequently satisfactory solution to this recurring problem for copyright owners.

The Statutory Scheme

Congress enacted the DMCA in 1998 in an effort to bring copyright law into line with the new reality of the online distribution of content. Under the DMCA, service providers are insulated from copyright infringement liability in certain circumstances under a series of "safe harbor" provisions (see 17 U.S.C. § 512(a)-(d)).

Section 512(c) of the DMCA provides that service providers are immune from monetary liability "by reason of the storage at the direction of the user of material that resides on a system or network controlled or operated by or for the service provider," so long as the provider:

(a) does not have "actual knowledge" that the material in question is infringing,

(b) is not aware of any facts or circumstances which makes it "apparent" that the material is infringing, and

(c) upon obtaining knowledge of infringement, acts expeditiously to remove or disable access to the material.

In addition, in circumstances where the service provider may exercise control over the activity, the provider must not receive a financial benefit directly related to the infringement. (17 U.S.C. § 512(c)(1)).

In order to qualify for the safe harbor provision, the service provider must also register with the Copyright Office the name and contact information of an agent designated to receive notices of claimed infringement. The Copyright Office maintains a directory of all such agents; a copy is maintained on the agency's Web site (http://www.copyright.gov/onlinesp/list/).

Under Section 512(c)(3), a copyright owner (or authorized representative) may seek the removal of infringing material by providing notice to the service provider's agent. The notice takes the form of what is essentially a "cease and desist" letter an attorney ordinarily might send to the infringing party. The statute provides that in order for such notice to be effective, it must be in writing and include "substantially" the following:

- A physical or electronic signature of the copyright owner or a person authorized to act on behalf of the copyright owner.
- The identification of the infringed work.
- An identification of the allegedly infringing material along with reasonably sufficient information to enable the service provider to locate the material.
- Contact information of the complaining party.
- A statement that the complaining party has a good faith belief that the use of the material has not been authorized by the copyright owner.
- A statement that the information is accurate and, under penalty of perjury, that the complaining party is authorized to act on behalf of the copyright owner. (17 U.S.C. § 512(c)(3)(A)).

In order to remain eligible for the safe harbor provision, in addition to the requirements described above, upon receipt of a proper notification the service provider must respond "expeditiously" to remove or disable access to the offending material. (17 U.S.C. § 512(a)(1)(C)). The prospect of losing safe harbor immunity often renders this option preferable to a standard cease and desist letter to the infringing party or the more costly option of litigation.

Judicial Interpretation

Because the DMCA was enacted relatively recently, there is little case law interpreting its provisions. Two recent court decisions, however, are informative to help practitioners to

Continued on page 6

"Online Copyright Infringement" continued from page 3

ensure that their clients provide proper notification in order to trigger the service provider's obligation to expeditiously take down infringing works.

In ALS Scan, Inc. v. RemarQ Communities, Inc. (239 F.3d 619 (2001)), the Fourth Circuit rejected a service provider's argument that a copyright owner's notification letter was not sufficiently detailed to trigger a take-down obligation under the DMCA. Plaintiff ALS Scan was in the business of creating "adult" photographs, which it displayed to the public on the Internet and sold in the media of CD-ROMs and videotapes. ALS Scan sent a letter to defendant RemarQ, an online service provider with some 24,000 subscribers, stating that two of its Web sites were displaying its photographs without permission. When RemarQ refused to comply with the take-down demand, ALS Scan filed suit.

RemarQ argued that ALS Scan's notice was defective because it failed to include a list of the infringing works, and failed to identify the specific works in sufficient detail to enable RemarQ to locate and disable access to them. The Fourth Circuit disagreed, pointing out that the letter did identify two Web sites on its system, including their specific Web addresses, and asserted that virtually all of the images contained in those Web sites were its copyrighted material. The court concluded that this information "substantially complied" with the notification requirement of identifying the infringing material, and therefore the service provider was no longer entitled to the DMCA's safe harbor protections.

In another recent case, online auction service eBay was successful in asserting safe harbor protection under Section 512(c) in defending a copyright infringement action arising out of the sale of pirated copies of a documentary film on its Web site (Hendrickson v. eBay Inc., 165 F. Supp. 2d 1082 (2001)). In Hendrickson, the district court ruled that the copyright owner had failed to "comply substantially" with the DMCA's notification provisions in that:

(a) the notice did not contain a statement "under penalty of perjury" that the information in the notice was accurate and that the writer was authorized to act on behalf of the copyright owner;

(b) the notice did not include a "good faith belief" that the use of the materials was unauthorized; and

(c) the copyright owner refused to comply with eBay's request that he identify the listing numbers of the offending material (as opposed to listings which may have contained authorized copies).

The copyright owner's failure to provide proper notice relieved eBay of any take down obligation, and because eBay met the remaining prongs of Section 512(c) (no actual or constructive knowledge independent of plaintiff's attempted notification and no right and ability to control the infringing activity), the court granted summary judgment in favor of eBay.

Conclusion

Copyright owners can benefit from the notice and take down provisions of the DMCA. A notification to the service provider serving as the conduit for the infringer is often more effective than a standard cease and desist letter, and is certainly less expensive than litigation. But, as demonstrated by recent case law, practitioners should be careful to craft letters that comply with all statutory notification requirements.

Garry Berger is an attorney in New York. His practice includes corporate and intellectual property matters. He can be reached at garry@bergerlegal.com.

The opinions expressed in this article are those of the author and are not necessarily the views of Thomson & Thomson.

NATIONAL GEOGRAPHIC BEATS INFRINGEMENT RAP IN NEW YORK

In a stunning rejection of the *Greenberg v. National Geographic Society* decision, a federal District Court judge in New York has ruled that *The Complete National Geographic* CD does not violate the copyrights of several freelance photographers.

The photographers—Douglas Faulkner, Fred Ward, David Hiser, Louis Psihoyos and others—filed infringement claims alleging that the National Geographic Society (NGS) used their work on the CD without permission. The CD reproduces back issues of *National Geographic* page by page.

The infringement claims filed in New York were similar to those filed several years ago in a Miami federal court by photographer Jerry Greenberg. Greenberg recently won a $400,000 jury award for unauthorized use of his images on the NGS CD.

Greenberg won that award after the 11th Circuit Court of Appeals in Atlanta ruled in March 2001 that the CD was not a revision, but a "new product, in a new medium, for a new market" since it contained a search engine and other features the magazines do not have.

Copyright law allows publishers to issue revisions of published works without permission from contributors, but not new works. The distinction is at the heart of all the NGS lawsuits.

The photographers who sued NGS in New York argued that the CD is a new work, not a revision, and noted that the 11th Circuit ruling on Greenberg already determined that.

But the New York District Court, which is under the jurisdiction of the 2nd Circuit Court of Appeals, isn't bound by 11th Circuit decisions. And the New York judge, Lewis Kaplan, said that a Supreme Court ruling that came after the *Greenberg* decision—*Tasini v. New York Times*—cast doubt on the validity of the *Greenberg* decision. (The *Tasini* ruling was handed down in June 2001, several months after the *Greenberg* decision.)

Kaplan refused to rule automatically in favor of the photographers, and considered the merits of arguments on both sides instead.

NGS has argued all along that its CD is a revision of its magazines since it reproduces articles and photos in their original context. Therefore, says NGS, it doesn't need the permission of freelancers to put their works on the CD. NGS has also maintained that the *Tasini* ruling supports its arguments. Kaplan agreed.

Specifically, the *Tasini* ruling barred publishers from reproducing (without permission) freelancers' works in electronic databases or CDs that strip those works out of their original context. Such uses are not revisions, the court said.

Tasini allows reproductions in electronic media as long as the original context of those works is preserved, Kaplan reasoned. And, he said, "[the NGS CD] is precisely comparable to the microforms to which the Supreme Court referred approvingly in Tasini."

He went on to reject the photographers' arguments (and the 11th Circuit's finding) that a search engine on the NGS CD carried it over the legal line from a revision to a new product. Kaplan said the search engine is just a technological improvement, not unlike compiling back issues of NGS in a stiff-bound volume with a searchable index.

"No one here suggests that the NGS's bound volumes and its addition of indices infringe the copyrights of individual contributors," he wrote. "The material fact is that the content of the product, whether the [CD] or the indexed bound volumes, that users wish to see is identical to the original print versions."

Kaplan added, "The fact that more purchasers may be interested because the package is more attractive than a library full of more than 112 years of monthly copies of the magazine is immaterial."

Through a spokesperson, NGS praised Kaplan's decision as an exoneration of its position.

The photographers were stunned. Photographer Fred Ward called the decision "chilling," and vowed to appeal.

Accusing Kaplan of bias and having conflicts of interest, Faulkner and his attorney—Stephen Weingrad—filed a motion for reconsideration. But Kaplan was unpersuaded. "[Faulkner and Weingrad] simply disagree with the decision," he wrote. "That is a basis for appeal but not for reconsideration."

Joel Hecker, an intellectual property attorney who is not involved in the case, said Kaplan "is on tenuous ground" with the ruling. "He went through machinations to give himself the right to disagree with the 11th Circuit," Hecker says.

He continues: "It is some comfort to photographers that the Supreme Court refused to hear an appeal on the 11th Circuit *Greenberg* decision. If the Supreme Court thought the *Greenberg* ruling was wrong in light of Tasini, they might have taken the *Greenberg* case." (The Supreme Court decided not to hear the *Greenberg case* on October 8, 2001.)

Hecker notes that if the 2nd Circuit upholds Kaplan's decision, then two circuit courts will be in conflict about whether the NGS CD is a revision or a new product under copyright law—and the Supreme Court may be forced into the fray after all.

Stay tuned.

—David Walker

THE FIGHTS OVER THE NGS CD-ROM: A TIMELINE

DECEMBER 1997 In *Greenberg v. NGS*, photographer Jerry Greenberg sues National Geographic Society for unauthorized use of his photos on a boxed set of CD-ROMs that re-create every issue of *National Geographic*. The federal court for the Southern District of Florida rules in favor of NGS on two counts of copyright infringement pertaining to the CD-Roms and grants summary judgement. Greenberg appeals.

MARCH 2001 The 11th Circuit Court of Appeals rules that the NGS CD-ROM is not a revision as defined by copyright law but "a new work," and therefore infringes the copyright of photographer Jerry Greenberg.

JUNE 2001 In *Tasini v. The New York Times*, the U.S. Supreme Court rules that New York Times Online, LexisNexis and other online databases of newspaper articles are new works, not revisions, and their unauthorized use of articles infringes the copyrights of freelance authors.

OCTOBER 2001 NGS appeals *Greenberg* case to the U.S. Supreme Court, but the Court refuses to hear case. *Greenberg* victory stands.

FEBRUARY 2003 After a ruling by the 11th Circuit Court of Appeals in 2002 sends Greenberg's case back to the lower court, a jury awards the photographer $400,000 for copyright infringement. NGS files a motion for retrial which is still pending.

DECEMBER 2003 Judge Kaplan rejects photographers' claim, rules that the NGS CD-ROM is a revision, and cites Supreme Court ruling in *Tasini*.

To Jerry, From Fred

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Back to Article

On the Record: Terry Adamson, National Geographic Society

Legal Times
12-23-2002

Terry Adamson is executive vice president of the National Geographic Society, one of the world's largest not-for-profit educational and scientific organizations. He also manages operational aspects of the society's international publishing growth.

What's top of mind for you in your job right now? What's in those folders piling up on your desk?

The global nature of our activities has expanded fast, dramatically impacting the legi team and the business units. We have five magazines, over 100 book titles a year, documentaries, a Web site, merchandise licensing, school publishing, cartographic ar mission programs such as scientific, expedition and educational grants and projects. We've created a fund for urban education to honor two employees who were on the Pentagon plane on Sept. 11, and an Afghan Girls Fund for girls denied education by the Taliban.

We now have 21 local-language editions of *National Geographic* magazine, which was only in English a few years ago. We should have editions in Russian, Hungarian and Romanian next year. Our National Geographic Channel is now seen in some 150 million homes in many languages, which adds a distribution medium to the documentary production for which National Geographic has long been known. We also make large-format films and have entered the feature-film market.

This rapid increase in markets around the world has changed the way we do legal anc business work, and even impacts the way we create editorial matter. This growth involves a huge number of transactions, alliances and partnerships.

The legal staff invests much time in relations with photographers and filmmakers wh are the best in the world at what they do. One example is our standard free-lance assignment contract, one of our most important documents. It is photographer-friendly, but also serves to protect the society's interests.

It is frustrating that the most visible and vexing litigation against the society is from handful of former photographers. Out of thousands of photographers who have work

with us, several have sued National Geographic over "The Complete National Geographic on CD-ROM," an image-based reproduction of every page of every magazine since 1888. The society believes that this use -- this exact reproduction of the collective work, whether on paper or electronically on CD-ROM -- was authorized b Congress by the 1978 Copyright Act, an approach seemingly approved by the Supren Court opinion last year in *Tasini v. New York Times*. Yet we had a decision before *Tasin* against us in the 11th Circuit, reversing a summary judgment in our favor. The regist of copyrights promptly called the 11th Circuit "wrong" in public forums, and based on *Tasini* and the statute, we continue to fight for the right to reproduce our archive as a exact reproduction of our collective work.

Describe your nonlegal or administrative duties. How much time do you spend as a manage of lawyers and staff? What are the top issues and challenges you face in that area?

About a quarter of my time is spent as a manager of our 11 lawyers and other legal staff. Our international growth in publishing also takes a significant amount of my tin in terms of management and relationships and internal coordination among product groups, as we partner with media organizations around the world. I help create and sustain good relations with organizations and governments around the globe. I spen time as the coordinating link to members of our board of trustees. I serve on the boards of our taxable subsidiaries that manage our television and Web activities, whose net revenues go to the mission of the society.

And there are a number of issues, legal and otherwise, that must be worked through with National Geographic Channel entities in which we have significant investments an involvement. Much of this time is spent working in concert with our president, John Fahey, on the many managerial and strategic issues facing an organization like ours -- some legal, some business, aspects of communication, and some simply matters judgment.

What kind of work do you send out? What do you keep in-house?

We use outside counsel in all litigation. Our lawyers have a variety of personal specialties, from TV production to entertainment industry labor issues to employment law, complex corporate transactions, litigation, contracts and intellectual property, but they are extensively engaged in the course of any litigation. For example, we are presently concluding an estate contest in Tennessee arising from a 1927 will naming the society as a beneficiary of a trust. And one of our attorneys has been working for five years with Knoxville counsel on very complex issues of estate law. She has done independent research and written our briefs and arguments, although skilled local counsel was essential.

We are very cost-sensitive and seek to form relationships with firms that recognize o not-for-profit mission in pricing and commitment.

Which law firms do you or your department regularly turn to in various substantive areas?

We generally seek to retain specific lawyers for particular matters from a handful of firms with whom we have developed strong relationships. Just to name a few, Steve Weiswasser and a team at Covington & Burling have represented us in National Geographic Channel matters, and Anthony Herman at Covington is handling a technology litigation.

David Hensler at Hogan & Hartson has handled several business litigation matters. H

just resolved an insurance coverage issue on behalf of six students and teachers who were on the plane that crashed into the Pentagon en route to a National Geographic expedition in California.

Patricia Ambrose of Hogan & Hartson counsels us on employment issues, and Emily Yinger and Bill Nussbaum are handling an employment litigation.

Kerry Scanlon at Kaye Scholer just concluded an employment litigation for us, and Steve Glickstein and Christopher Brewster from there have worked with us on product issues.

Boies, Schiller & Flexner is currently counseling us with respect to a possible litigation matter, as is Stephen Zachs in Miami on the CD-ROM litigation. Bob Sugarman at We Gotshal is lead on the CD-ROM litigation.

Paul Kilmer at Holland & Knight handles our trademark work.

Celia Roady of Morgan Lewis and Suzanne McDowell of Steptoe advise on not-for-pro tax matters.

PDNEWS

BY DARYL LANG AND DAVID WALKER

Appeals Court Reverses Greenberg Decision

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

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

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

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

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

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

PDNewswire Digest

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



© ROGER LEMOYNE/REDUX PICTURES

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

Lange-Taylor Prize Goes To Lemoyne And Pitzer

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

Influential Photo Curator John Szarkowski Dies

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



© LEE FRIEDLANDER/COURTESY MOMA

John Szarkowski in 1992.

Corbis Finally Enters Microstock Business

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

Photographer Byli Strike At Baltimo Bears Little Fruit

Management at *Th Sun* succeeded in d clause from its emp contract that prohi reporters and phot from doing each ot Photographers had four-day byline stri protesting the mov ment said it neede to assign reporters ally take basic phot meet reader demar images and video o

Getty Diversifies

Dissatisfied with la image sales and an growing demand fo multimedia conten acquired music lice service Pump Audic $42 million. CEO Jo Klein told investors company also plan launch an unspecifi consumer business summer or early fa

Photographer Ber Becher Dies

Bernd Becher who, wife Hilla, shot me large-format studie trial buildings that exhibited around t died June 22 at age teachers at the Dus Academy, the Bech enced such photog as Andreas Gursky, Struth and Thomas

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

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

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

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

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

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

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

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

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

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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.

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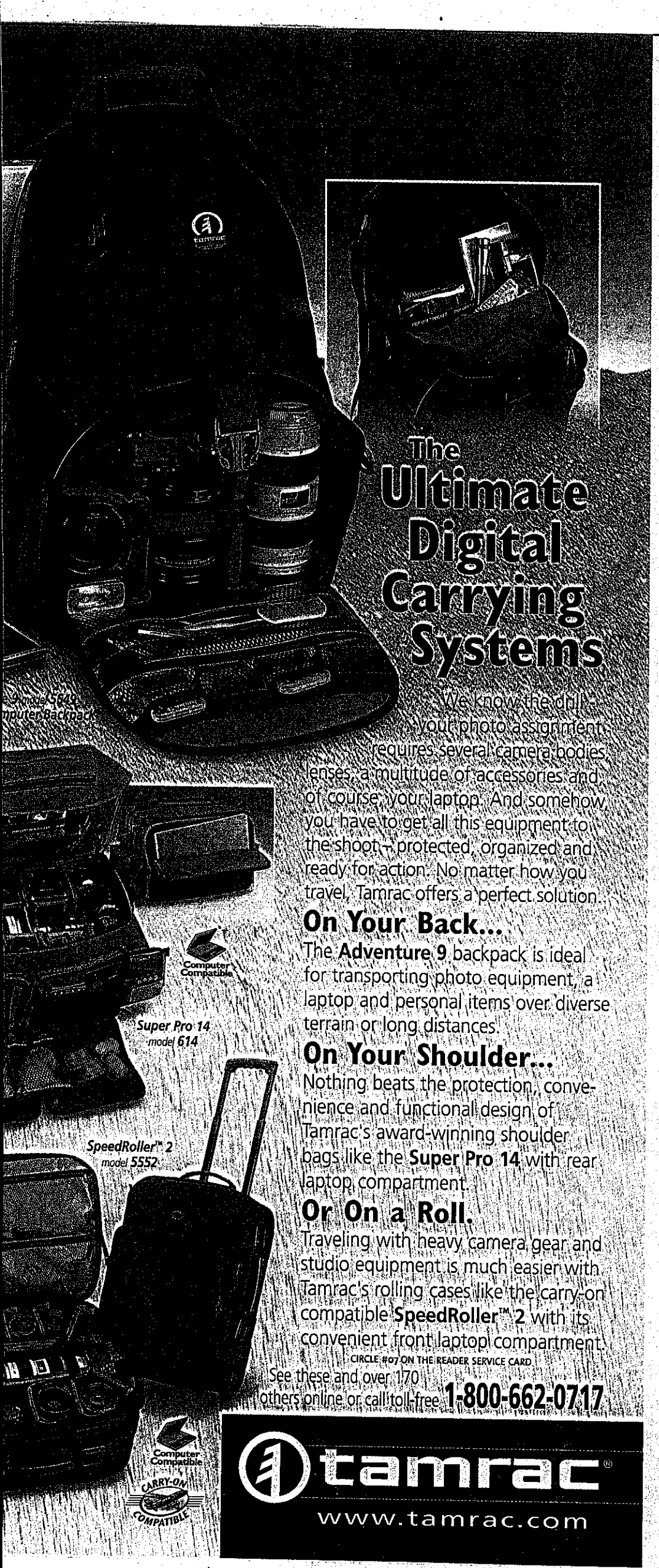
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Q&A: ATTORNEY NANCY E. WOLFF

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

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

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


COURTESY NANCY E. WOLFF

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

NW: Yes, those cases as well as *Tasini*, which went to the Supreme court and applied in those cases. Previously, there were no cases addressing limits of what publishers could do under section 201(c) of the Copyright Act. [Editor's note: section 201(c) allows publishers to issue revisions of collected works. See the article and timeline on page 16 in this month's PDNews section for more information about the *National Geographic* cases]. Certain publishers took a risk, and in pursuing it to the Supreme Court, have really shaped the law in that area. Of course, after the *Tasini* ruling, publishers modified their contracts to cover those rights.

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

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

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

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

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

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

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

NW: If you want to pursue a claim, you can't even go to court until your work is registered. But there are a lot of benefits to registration. If your work is registered [before the infringement occurs or within three months of first publication of the infringed image] you don't have to rely on actual damages, which most courts have interpreted as a license fee. You can seek statutory damages, and the court can award at its discretion any amount between $750 and $30,000 per infringement. If you can establish that the infringement was willful, damages can go up to $150,000, but that's really rare. Another benefit to registration is that you can recover attorneys' fees.

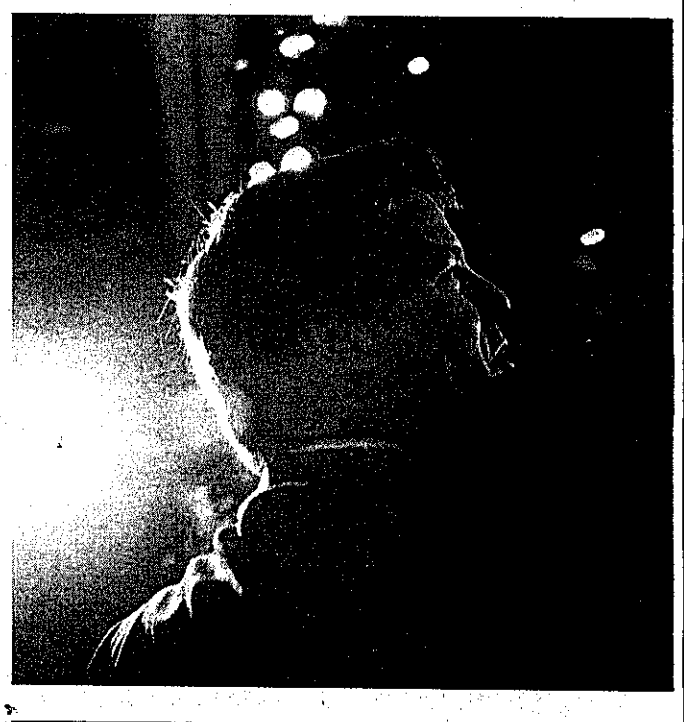
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PDN: If you haven't registered your work before the infringement, are you at a disadvantage?

NW: Yes. The cost of going to court can exceed what your potential recovery is. If you can't resolve a claim by telephone calls and letters, it's not cost effective [to take it to court].

Read an excerpt from Wolff's new book, The Professional Photographer's Legal Handbook, *in the Features section of PDNOnline.com*





ALL PHOTOS © DAI SUGANO/*MERCURY NEWS*

PICTURE STORY

On Assignm

A newspaper photographer returns f
California Democratic convention wi
multimedia show covering the cov

DAI SUGANO'S MULTIMEDIA JOURNAL OF THE CALIFOR convention, called On Assignment, is an unconventiona journalism. The project appeared on the San Jose *Mercu* right after the convention in late April. With masterfu editing, Sugano wove hundreds of still images and a fe a fast-paced cinematic narrative.

Sugano occasionally presents his state politics covera dia slideshow, superimposing a reporter's narrative ove the Democratic Convention was shaping up to be a mec

Subj: to print and fax to Jerry
Date: 5/18/2005 9:20:45 AM Eastern Daylight Time
From: Frinkphoto
To: Waterhouse

Key Words: National Geographic | Appeals | Jerry Greenberg | Revision | Copyright | Film Developed | Corbis | Getty | Search Engines | Source | Way Less | Stiffener | Google Images | Price | Concessions | That Refund | Thievery | Virus | Cell Phones | Photo-Share | Color Correction | Art Marketing 101 | Spreadsheets | Talents | Keyword Help |
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National Geographic Society - Second Circuit Upholds Dismissal

by Joel Hecker, Esq

As I previously reported in PhotoStockNOTES in January 2004, Judge Lewis Kaplan of the Southern District of New York decided that, in his opinion, the Eleventh Circuit Court of Appeals confirmation of the Miami verdict of $400,000 in favor of Jerry Greenberg against National Geographic Society was wrong. As a result, he upheld the determination that National Geographic's use of photographs, which appeared in various issues of its magazine, was not a revision of the original issues, but rather a new product in a new medium for a new market. Accordingly, Judge Kaplan rejected similar arguments presented by plaintiffs Douglas Faulkner, David Hiser, Fred Ward and other photographers in the New York case.

The Second Circuit Court of Appeals, covering New York, Vermont and Connecticut, has now affirmed Judge Kaplan's decision and rejected the reasoning of the Eleventh Circuit Court of Appeals in the Greenberg case.

The Second Circuit Court concurred with Judge Kaplan that the intervening New York Times v. Tasini decision by the United States Supreme Court raised questions as to the continued validity of the reasoning behind the Greenberg decision. Accordingly, it upheld the District Court's ruling that it had the authority to consider the merits of the cases before it even thought the same issues had already been determined adversely to National Geographic Society in the Miami case. The Second Circuit then reached the same result as Judge Kaplan, that the National Geographic Society search engine was just a technological improvement, similar to a compilation of back issues in a stiff-bound volume with a searchable index, and therefore a permissible use of the photographs at issue. It declined to follow the Eleventh Circuit opinion in Greenberg because of the Second Circuit's interpretation of the Supreme Court decision in Tasini.

The plaintiffs plan to seek re-argument before the Second Circuit, and if unsuccessful, since there is now a split among the Circuits as to the interpretation to be given to the Supreme Court's decision in Tasini, to petition the Supreme Court to hear the case. Thus we may have yet another Supreme Court consideration of the continuing effect of new technology on photographic copyright issues.

Attorney Joel L. Hecker lectures and writes extensively on issues of concern to the photography industry. His office is located at Russo & Burke, 600 Third Ave, New York NY 10016. Phone: 1 212 557-9600. E-mail: HeckerEsq@aol.com.

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

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

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

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

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

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

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

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

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

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

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

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

—*David Walker*

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WEDNESDAY, OCTOBER 10, 2001 › FINAL EDITION

Photographer wins digital fight

Photographer can collect royalties

BY JOHN DORSCHNER
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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.

› 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.

Because of the crucial issues in the case, National Geographic had an impressive array of supporters in court briefings, including The New York Times, Time Warner and the Magazine Publishers of America. The magazine's appeal to the Supreme Court was prepared by Ken Starr, the famed special prosecutor in the Monica Lewinsky case.

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."

Harlen Brown
News Editor

A Key Largo photographer took on the National Geographic Society, which was backed with "A Friend of the Court Brief," from Time Warner, the New York Times and the Magazine Publishers of America in a copyright infringement case before the Federal Appeals Court in Atlanta, and won.

Jerry Greenberg who spends his time between a home in South Miami, and Key Largo, took on the National Geographic magazine and got a precedent-setting decision on March 22, 2001 from the 11th U.S. District Court of Appeals in Atlanta for unauthorized use of copyrighted photographs in the "The 108-Years of National Geographic On CD-ROM", and a moving cover sequence.

"It took four years and a lot money," Greenberg said, "before I was able to get copyright infringement judgments against the National Geographic.

Five charges were initially brought against The National Geographic Society in 1997. Before going before Judge Joan A. Lenard in the Southern District of Florida in Miami in June of 1999 Greenberg reduced that to four charges. One was for copyright violation in the publication of illustrations in an Education Insight product; two was for use of a photograph in "The Jason Poster Project" a membership thing they used without Greenberg's consent. The Third was on the 108-Years CD-ROM, the fourth count was dropped and the fifth was for, a moving cover sequence, for the CD-ROM.

Greenberg's attorney, Norman Davis of Miami, and the attorneys for National Geographic agreed to divide the issues one and two from three and five.

Judge Lenard found National Geographic guilty of copyright infringement on counts one and two. During legal discovery it was found that the artist of the Education Insight product Walter Cutler utilized photos from books produced by Greenberg and his wife Idaz and in doing so had noted page numbers containing those photos in making his illustrations so that National Geographic editors could verify their source and accuracy.

Judge Lenard issued a summary judgment at that time in favor of National Geographic on the other two counts, "108- Years of National Geographic on CD-ROM" and The Moving Covers a 25 second opening sequence which includes 10 covers from National Geographic magazine including a 1961 cover photo of a diver taken by Greenberg.

Judge Lenard's decision was based on the "John Tasini One" lawsuit, which dealt with contracts between authors and publishers for specific purposes, like first rights and a bundle of other rights, but not copyrights. When the papers started to use the author's material electronically the lawsuit was filed. A Federal Court Judge in New York ruled for the publishers and against the writers.

Renamed "Tasini Two" the case was heard by A New York Appelate Court and the decision was reversed. The Publishers have appealed to the U.S. Supreme Court.

In the meantime, National Geographic was pulling a new Visual Arts Copyright, which was discovered before the case went before the Appelate Court. Their contention was their use was only a reprint of some old magazines, according to Davis.

The Appelate Court ruled that the National Geographic Society used copyrighted photos from it's magazine in violation of Section 201-(c) that allows a publisher to reprint photographs without additional compensation to the creators so long as it is only a reprint of the magazine.

The court in their opinion noted "that a publishing company could reprint a contribution from one issue in a later issue of its magazine but could not revise the contribution itself or include it in a new anthology or an entirely different magazine or collective work."

"But it was the act of a new visual arts copyright by National Geographic that was the nail in the coffin that helped us to win the case," Greenberg said. "That left us with the option to appeal the summary judgment against us on count three and five and take it to the Appelate Court in Atlanta."

Following the appeals court order that National Geographic was guilty of two more counts of copyright infringement, the case was ordered returned to U. S. District Judge Lenard in Miami to enter a judgment in favor of Greenberg, to assess damages and attorney's fees.

It was also suggested by the court that Greenberg be awarded "mandatory license fees," so it would not stop the distribution of the CD-ROM and take away the public's "computer-aided access to this educational and entertaining work"

Despite the win in the lawsuits, Greenberg still expressed a feeling of sadness that it all had to come down to this.

"I still think the National Geographic is a great made in America publication. I always loved the magazine. But when they transferred from a not-for-profit to profit mode in 1995 they changed a lot.

"I use to hero worship that publication and when I was 14-years-old I found a bundle of Geographics in our apartment. That was in 1942. In 52' when I left the University of Miami I wanted to do stuff for the Geographic and found the only opening was in the darkroom there and by gosh 10 years later, 1962 I had my first photo essay in the January issue. It consisted of two different stories. So I have a lot of fond memories to look back on .... Happy memories in dealing with people that I really enjoyed working with."

Many of the photos Greenberg has taken over the years, were underwater photos of the reefs off Key Largo and the mangroves surrounding the islands.

Presently he and his wife are working on a new book, which will have a panorama format portfolio. They are designing it to be a 64-page book, with a series of 'cells', 10-16 pages, and a break for copy about the photos with thumbnail prints, "to break it up."

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Photo Caption

Key Largo photographer Jerry Greenberg, at work in the mangroves around Largo Sound.

Harlen Brown photo

PH: 1-305-451

FAX: 1-350-451-7066

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The court ruled that the National Geographic Society used copyrighted photos from it's magazine in violation of Section 201-(c) that allows a publisher to reprint photographs without additional compensation to the creators so long as it is only a reprint of the magazine.

The court saw it differently and in their opinion noted "that a publishing company could reprint a contribution from one issue in a later issue of its magazine but could not revise the contribution itself or include it in a new anthology or an entirely different magazine or collective work."

The appeal came after Greenberg had won two counts of a four-count suit against the magazine in June of 1999. At that time, Greenberg sued National Geographic for copyright violations in the publication of illustrations in an Education Insight product, that were taken directly from books produced by Greenberg and his wife Idaz. The illustrator, Walter Cutler, noted the page references from the Greenberg's magazine that referred to photographs he had copied so the National Geographic editors could verify their accuracy. Another count on which they also won a judgment from Federal Judge Joan A. Lenard in the Southern District of Florida in Miami, was for "The Jason Poster Project" a membership thing they used without Greenberg's consent.

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Since that time, the "Tasini Two" was taken before an appellate court in New York, which reversed the lower court's decision. Now it is before the U.S. Supreme Court.

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"That action by National Geographic was the nail in the coffin that helped us to win the case before the Appelate Court in Atlanta," Greenberg said. "That left us with the option to swallow the summary judgment against us on count three and five or take it to the Appelate Court in Atlanta." They chose the latter.

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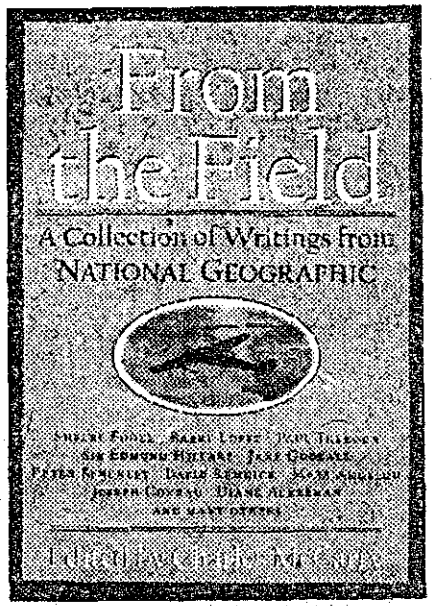
SNIPPETS

From earliest childhood, we have known we are in for adventure on the day National Geographic turns up in our mailbox. Who knows where we might be heading this month: To the ancient Roman necropolis under Vatican City? To the forests and marshes of the last island of North Carolina's Outer Banks? To the World Potato Collection high in the Peruvian Andes? To listen to snakes barking in Ecuador? To sleep on the heated brick bed of a trader in the Manchurian backwoods? In fact, where we go never much matters. Neither does why. As editor Charles McCarry helps us understand right away in ***From the Field: A Collection of Writings from National Geographic*** (National Geographic, $25), what fuels us is more than the magazine's often spectacular color photos. We also thirst for fascinating facts, for the assurance that the people and places we encounter in its pages arrive via writers blessed with wide-ranging curiosities and a fascination for the unexpected and exotic. McCarry has divided the more than 75 selections of his anthology into evocative categories (The Back of Beyond, Dark and Bloody Ground, Destinations, Nature Itself) and thoughtfully includes works from Geographic staffers (including former Miami News writer Cathy Newman) along with pieces from Barry Lopez, Willie Morris, Joseph Conrad, Theodore Roosevelt, Amelia Earhart, William O. Douglas, Maya Angelou, Alexander Graham Bell and Paul Theroux. And, thank goodness, here is Shana Alexander vividly writing in the May 1986 issue about that quintessential Geographic setting, the Serengeti Plain. Off we go:

In inky darkness, hyenas barked and laughed. . . . Then the sun seeped over the horizon, turning the morning from lavender to pink to the flame blue of African daylight. Now thousands of moving beasts shimmered at the rim of the sky like a heat mirage — the multitude of wildebeests flowing westward at the end of the rainy season.

In a single sweep of the eye, one could see 5,000 living creatures. At my feet a family of spur fowl — red-masked, huge-footed — scurried across the track. Fat elephant dung, still steaming, lay on a papyrus-edged dam. In distant, pied tree shadow, giraffes fed.

Gazelles abounded. Serengeti has a quarter of a million of the most numerous species, Thomson's gazelle — the beloved little "Tommy" with ever flagging black tail — and many thousands of the larger Grant's gazelle, lilac fawn color with white backside. Kopjes, huge tree-tufted piles of boulders, rose like islands in the sea of grass. The nearest was overrun with rock hyraxes and bright orange-and-blue lizards. A



pair of dik-dik antelopes, the size of tomcats, browsed nearby. Two female lions lay belly up on the flat topmost stone. . . .

In a meadow of purple wildflowers plump zebras grazed among the wildebeests like glass beads on a black necklace. We came up from the rear on a herd of Loxodonta africana, *70 elephant rumps in baggy trousers. With trunks upraised, they moved off, trumpeting, the infant elephants barely visible in the great forest of legs. Two incandescent rainbows of birds — blue, green, orchid — whirred out of a bush to devour insects kicked up by the herds. In a yellow fever tree a vervet monkey was stealing eggs. Eight or nine Fischer's lovebirds — small vivid jade parrots — darted into the tree. Beyond them a pair of large topis stood as if carved in wood, each atop its own termite mound to gain a better, slightly elevated view of the lion-haunted landscape. . . .*

At high noon my binoculars strayed to a stout sausage tree. In a light-dapple fork 15 feet above the wildflowers lay a perfectly camouflaged leopard. Minutes passed before the big cat stretched its muscular neck down the trunk, extended a thick foreleg and paw, and slithered away like a great snake into the grass, raising a cloud of white-and-yellow butterflies.

In late afternoon two big, steely gray rainstorms moved in fast from the east. Seventy white-backed vultures and a pair of hideous pink-necked marabou storks roosted in a dead tree or huddled by the putrid puddle beneath. One hunched a scraggly neck down into lousy shoulders and turned his back, as if ashamed to face us. . . .

The rainstorms merged and produced a double rainbow, one inside the other. Seven lionesses and three young males rested together in the soft rain, beneath the iridescent halo of pearl pink and surrounded horizon-to-horizon by dark blue sky.

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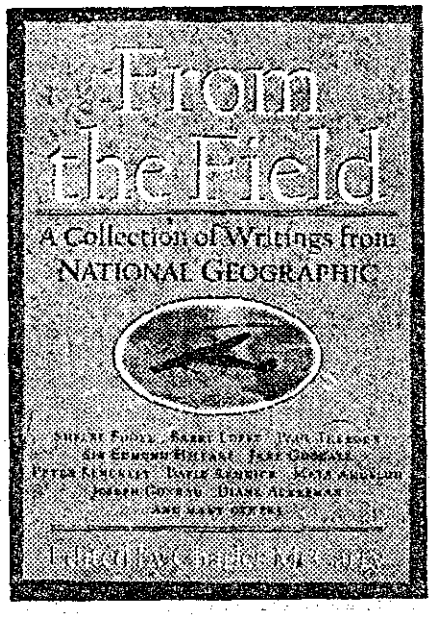
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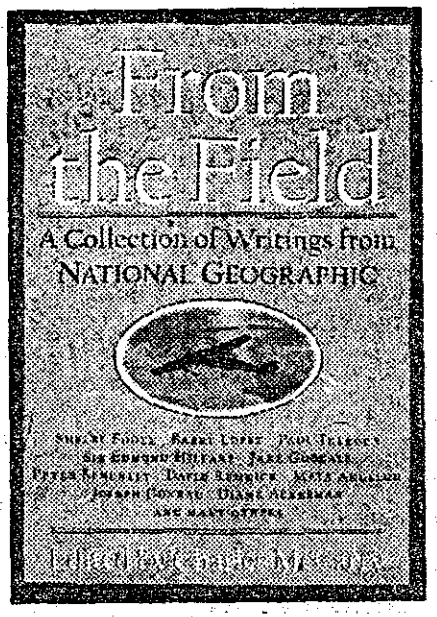
Snippets is a regular feature previewing new books.

From earliest childhood, we have known we are in for adventure on the day National Geographic turns up in our mailbox. Who knows where we might be heading this month: To the ancient Roman necropolis under Vatican City? To the forests and marshes of the last island of North Carolina's Outer Banks? To the World Potato Collection high in the Peruvian Andes? To listen to snakes barking in Ecuador? To sleep on the heated brick bed of a trader in the Manchurian backwoods? In fact, where we go never much matters. Neither does why. As editor Charles McCarry helps us understand right away in ***From the Field: A Collection of Writings from National Geographic*** (National Geographic, $25), what fuels us is more than the magazine's often spectacular color photos. We also thirst for fascinating facts, for the assurance that the people and places we encounter in its pages arrive via writers blessed with wide-ranging curiosities and a fascination for the unexpected and exotic. McCarry has divided the more than 75 selections of his anthology into evocative categories (The Back of Beyond, Dark and Bloody Ground, Destinations, Nature Itself) and thoughtfully includes works from Geographic staffers (including former Miami News writer Cathy Newman) along with pieces from Barry Lopez, Willie Morris, Joseph Conrad, Theodore Roosevelt, Amelia Earhart, William O. Douglas, Maya Angelou, Alexander Graham Bell and Paul Theroux. And, thank goodness, here is Shana Alexander vividly writing in the May 1986 issue about that quintessential Geographic setting, the Serengeti Plain. Off we go:

In inky darkness, hyenas barked and laughed. . . . Then the sun seeped over the horizon, turning the morning from lavender to pink to the flame blue of African daylight. Now thousands of moving beasts shimmered at the rim of the sky like a heat mirage — the multitude of wildebeests flowing westward at the end of the rainy season.

In a single sweep of the eye, one could see 5,000 living creatures. At my feet a family of spur fowl — red-masked, huge-footed — scurried across the track. Fat elephant dung, still steaming, lay on a papyrus-edged dam. In distant, pied tree shadow, giraffes fed.

Gazelles abounded. Serengeti has a quarter of a million of the most numerous species, Thomson's gazelle — the beloved little "Tommy" with ever flagging black tail — and many thousands of the larger Grant's gazelle, lilac fawn color with white backside. Kopjes, huge tree-tufted piles of boulders, rose like islands in the sea of grass. The nearest was overrun with rock hyraxes and bright orange-and-blue lizards. A



pair of dik-dik antelopes, the size of tomcats, browsed nearby. Two female lions lay belly up on the flat topmost stone. . . .

In a meadow of purple wildflowers plump zebras grazed among the wildebeests like glass beads on a black necklace. We came up from the rear on a herd of Loxodonta africana, *70 elephant rumps in baggy trousers. With trunks upraised, they moved off, trumpeting, the infant elephants barely visible in the great forest of legs. Two incandescent rainbows of birds — blue, green, orchid — whirred out of a bush to devour insects kicked up by the herds. In a yellow fever tree a vervet monkey was stealing eggs. Eight or nine Fischer's lovebirds — small vivid jade parrots — darted into the tree. Beyond them a pair of large topis stood as if carved in wood, each atop its own termite mound to gain a better, slightly elevated view of the lion-haunted landscape. . . .*

At high noon my binoculars strayed to a stout sausage tree. In a light-dapple fork 15 feet above the wildflowers lay a perfectly camouflaged leopard. Minutes passed before the big cat stretched its muscular neck down the trunk, extended a thick foreleg and paw, and slithered away like a great snake into the grass, raising a cloud of white-and-yellow butterflies.

In late afternoon two big, steely gray rainstorms moved in fast from the east. Seventy white-backed vultures and a pair of hideous pink-necked marabou storks roosted in a dead tree or huddled by the putrid puddle beneath. One hunched a scraggly neck down into lousy shoulders and turned his back, as if ashamed to face us. . . .

The rainstorms merged and produced a double rainbow, one inside the other. Seven lionesses and three young males rested together in the soft rain, beneath the iridescent halo of pearl pink and surrounded horizon-to-horizon by dark blue sky.

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Users can search across the CD-ROMs through every issue by criteria such as title, subject, keyword, place, name, contributor and date. Ads can also be searched for separately by subject and date.

"We were very fortunate to find Ledge," says Stanton. "They were able to integrate the scanning with the index table from the magazines. They also integrated our own index material consisting of tens-of-millions of individual words or phrases derived from our Library Sciences Group who carefully indexed all of these pages for years. It was a major boost to the project that this in-depth index for the text already existed. We were also able to have a hyper index for related subject or contributor."

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National Geographic also considered publishing on the Web. They looked at what it would take to download an entire article which would typically be about 20 pages long. That would be half to three-quarters of a megabyte to look at one article. "We thought CD would be a perfect medium," says Stanton. "The only downside is the 30 CDs. We're looking into DVD to reduce this.

"We are very pleased with Ledge. They will do other projects for us in the future. We were relieved to find a team of solid engineers with a great approach. They are a sophisticated group which had experience with commercial CD-ROM publication. They really cared about the work they were doing and they fell they in love with the project without any seduction from us." ■

The Following Pages Are Poor Quality

PUBLISHING

Imaging Takes Publishing to New Territories

IDAZ

Imaging is taking publishing where it's never gone before. Gutenberg's introduction of moveable type has progressed to computers and on to today's electronic, or paperless,

BY LIZ LEVY

With imaging and electronic publishing we have a variety of ways to save and present our ideas without using paper. Publishing isn't just in print houses anymore. The Internet and CD are the new media becoming more used by everyone.

The type of electronic publishing that may be more obvious to some is the work being done in publishing houses. The digital press has found its place as the offset press alternative. It has become the ideal way to handle high-quality, small-volume printing jobs in a more cost-effective way.

The use of digital printers lets customers send documents to be printed electronically on Zip disks or over the Internet to printers. There is no film involved. A single printed copy can be produced to let customers approve the finished product. Another kind of paperless publishing is taking place with the use of imaging. Large and small businesses are publishing documents on the Web. Many libraries publish their archives on the Web for public consumption. Their information is made more accessible to the public than ever.

Internet publishing is different from the usual Web page creation. Publishing is about volume and can also involve more sophisticated indexing and search engines. Publishing on the Internet can be a large conversion of legacy printed documents.

Publishing also plays a part in CD-ROM, CD-R, CD-RW and CD-DVD creation. Thousands of document images can be held on a single CD. The quality can be very high. This makes it ideal for holding image archives. CDs have also become a new way to distribute large amounts of information on an affordable

Take A Look

Take a look at two new desktop electronic publishing products being offered. These do-it-yourself systems make publishing an out-of-the-box reality for everyone.

Microboards Technology (Chanhassen, MN 612-470-1845) puts a CD-R publishing system on your desk for $5,700. Their Desktop CD-R Publisher system includes one 4X CD-Recorder, Cedar Technology's Autoloader, two CD holders, Cedar CD Face label editing software, Prassi CD-Rep premastering software for Windows 95 or NT and Prassi Robo Rep duplication software. For $300 more the system includes the Fargo Signature CD Color Printer. Print full-color, high resolution images on printable-surface CD-R media. For more demanding applications get the system configured with two CD-Recorders.

Enigma (Waltham, MA 617-290-0080) makes Insight into Information 4.0 ($7,500) desktop electronic publishing software. Publish professional-quality, full text retrieval applications for distribution on CD-ROM, the Internet, an intranet or network simultaneously. The software uses wizards to guide you through the step-by-step process.

Publish 250 to one million pages of documents, with full text and hypertext navigation. Use it to publish periodical documents and distribute your info on multiple forms of media. The software automatically creates a table of contents. Integrate multiple-source formats including SGML, XML, HTML, RTF and Microsoft Word.

The application has a familiar Windows 95/98 look for ease of use to the end-user. You need a Windows 3.1, 95 or NT compatible with at least 8 MB of RAM. End users can run applications created with Insight on various platforms including Windows and Mac. Web and intranet applications are installed on Windows NT Web servers. These can be accessed using any standard Web browser.

out the shipping cost of heavy paper packages.

The publishing can be done easily in house with a robust scanner, a CD-Recorder, or the right size Web server for Internet publishing. The conversion work can also be sent to service bureaus and electronic publishing houses. Many service bureaus offer Adobe PDF file conversion and electronic publishing services. PDF plays a big part in the electronic publishing arena. The PDF format makes documents viewable on any platform while keeping all of the original document elements including layout, fonts, imbedded video and audio.

Another purpose to electronic publishing, besides distribution, is being able to preserve old and fragile paper documents safely. This gives access to the public without worrying about the wear and tear to irreplaceable documents.

National Geographic Publishes 108 Years On CD-ROM

National Geographic completed a project last fall to publish the magazine's first 108 years on CD-ROM entitled, *The National Geographic Society's First 108 Years*. The 30-CD collection spans over 10 decades. It includes the magazine's first issue in October of 1888 and continues up to the December issue of 1996. National Geographic published their issues to CD-ROM with the goal of preserving the information and making it available to the public.

Every page from some 1,235 issues was scanned — more than 190,000 printed pages in total. This included text, graphics, photography and advertisements. National Geographic started the testing for the project and coming up with requirements in February 1996. The work began in September and the CDs began shipping in August 1997.

"The approach was to scan the page and treat it as electronic microfiche. We looked to preserve the actual page image and all the photos," says Tom Stanton, director of CD-ROMs for National Geographic Interactive.

National Geographic created the CD collection for consumers. The CDs had to be able to run on a 486 66 PC with 8 MB, running Windows 3.1. "We created the product without high requirements realizing that not all users can afford to upgrade to Windows 95 or the latest thing," says Stanton.

"We went out locally to find a scanning service bureau in DC. Most companies were doing work for government applications, primarily a black and white science. We wanted to scan 24-bit color at a minimum with high photo quality. Creating a consumer product, we saw no need to use a very high resolution because of the limits of display." National Geographic came across Ledge Multimedia, a division of **Dataware Technologies** (Cambridge, MA 617-621-0820).

Ledge Multimedia also worked with **Document Automation Development** (Overland Park, KS 913-663-4323), a provider of document automation services including electronic publishing and scanning. Document Automation Development (DAD) had the monumental task of scanning all 1,235 original issues. From there the scanned images would go to Ledge Multimedia for merging the scanned material and multiple indexes. Each image is a two page spread from the magazine.

The two companies developed a unified standard for use throughout the project. Test pages were scanned at various settings until they found the right settings to optimize the magazine's pages including photographs and images.

DAD used a collection of five software applications created in-house, collectively called DocuTrak. DocuTrak has a proprietary process for workflow management that allowed DAD to accurately index and track some 300 total GB of images and information. Three complete sets of the magazine were delivered on three forklifts direct from National Geographic. The first set was the master set. The second was a safety set, in case any pages in the master set were unusable with folds or stains. The third set was a back-up in case of a total catastrophe in the process.

"We used DocuTrak to index every page of every issue from front cover to back cover, including foldouts," says Vince Pingel, president of DAD. "An operator turned the pages of each issue and entered the information into the index format by hand. Once every page was indexed, the information went into a database."

The binding was cut off the master set and DAD began scanning the issues. DocuTrak gives on-screen prompts to the scanner operator that tell the person exactly what pages they should be scanning. DAD reviewed every scanned image as part of their control on the scanning process.

DAD's use of DocuTrak in their work with National Geographic let them eliminate a lot of the manual work and minimize the risk of human error. One of DocuTrak's five components is an indexing module that drives the scanner and assigns the images file names. Another is the workflow component that drives the entire process. A third is a quality control piece that does a page by page check of every image burned to CD-R against

the original index. A report generator itemizes the entire product and database in a spreadsheet fashion. This gets passed on to Dataware for them to build on.

To automate the process of giving the images file names, DAD had to create a structural index, assigning page numbers to all the pages that were numbered and unnumbered, including foldouts and ads. "We took a page-by-page account from all the issues to figure out how to fit this into a file naming scheme," says Pingel. "This is where DocuTrak came in. We created our structural index of the magazine and put that into DocuTrak. DocuTrak drove the scanning process and guided the operator."

DocuTrak gave prompts to the scanner operator, automatically named the file according to the structural index and placed the file in the proper directory. DAD automated the entire scanning process down to one person. They used one operator running two scanners at a time. The operator was freed up to do this because Docutrak automatically set all the scan settings.

File compression, image rotation, moving the files across to the network to the burner and staging of the CD-R was all done automatically by DocuTrak.

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DAD created about three GB of scanned images a day. These were compressed using Pegasus Software and staged for CD mastering. Two complete sets were created, one for Ledge Multimedia and one for DAD's backup. There were 644 CDs per set — 1,288 CDs in total were authored in house. One CD holds two issues in uncompressed BMP format and JPEG compressed format. To record the issues onto CDs, DAD used a Panasonic CD-recorder, an HP CD-recorder, Sony CD-R media and Adaptec CD creation software.

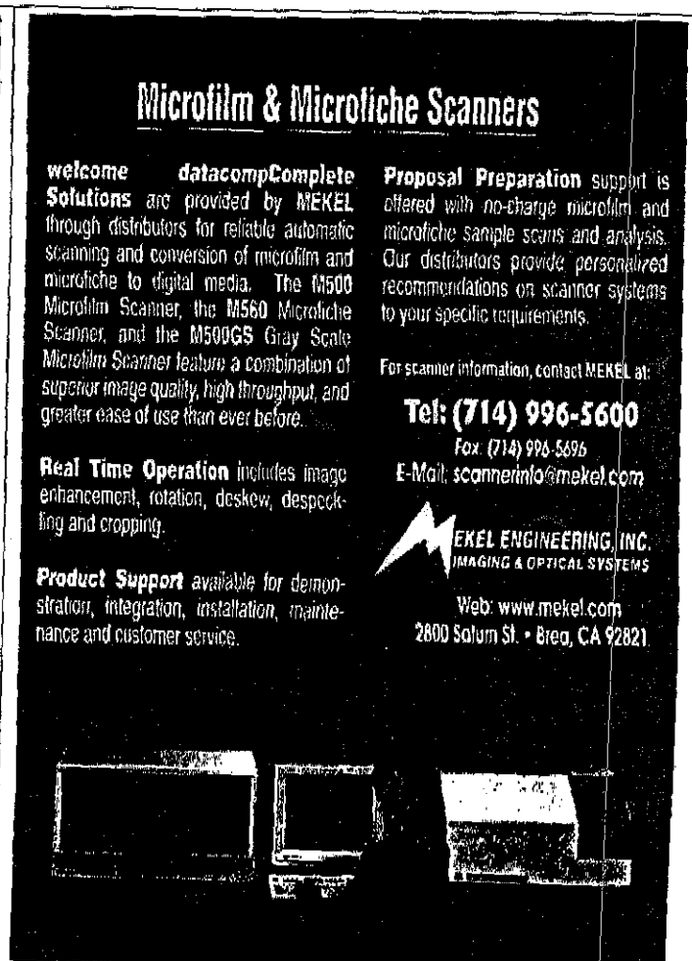
After mastering, each CD was checked again for errors by physically comparing each scanned image with the original page from the safety set of magazines. "We did everything we could to make sure every page was accounted for and the scanned pages were error free," says Pingel.

The complete set of images on CD was sent to Ledge Multimedia to be merged with the vast index created by the Library Science Group at National Geographic and Ledge's index search database and image navigation database format.

"We worked closely with National Geographic on the design of the project," says Lisa Kryger, executive producer from Ledge Multimedia. "We helped them come to terms with what they could and could not do. They wanted all the documents kept in the same format they originally appeared in with the same index used in the magazine."



Circle reader service card number 34



Circle reader service card number 11

The Benefits of Electronic (Paperless) Publishing

1. Transmit documents to your next door neighbor around the world in minutes. Your audience is anyone with access to a computer.
2. Update documents as often as you like. There's no need to republish all your information, making many versions of the same document easy.
3. Save some trees. A vast amount of information can be stored on a single disk rather than stacks of paper. Recycle the disks by reusing them. Print what you need from your own printer and reduce waste.
4. Publish yourself. Everyone can become a published writer. You don't need anyone else to produce your work. Get your ideas across the globe while sitting at your desk.

Ledge used Dataware's proprietary ADL database. The database is invisible on CD format. Their index search database was used to create a data retrieval library which sits on every CD.

Each CD also contains its own navigation database of all the images, giving related pages and articles. They are all in directory structures based on month and year. Each image is identified by type and by page number. The database tells the user what CD to insert in a search.

The images that were sent on CD from DAD were scanned for millions-of-colors display. Because this is a consumer product National Geographic wanted the images to also be made viewable for a 256 color display. To do this a second version of the images had to be made with a specific color palette for each set of images (each two page spread). This second palette is invisible to the user. If their monitor has a 256 color display the user doesn't know the difference. This display feature was written specifically by Ledge for National Geographic.

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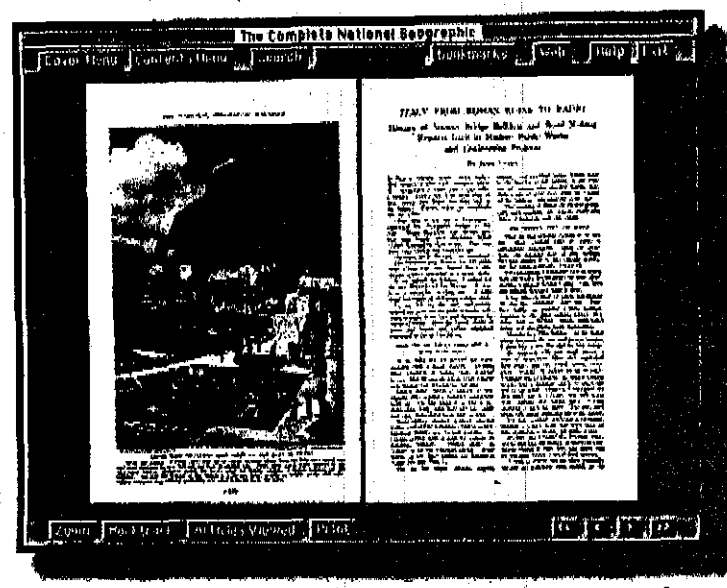
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"The project was reasonably cost effective," says Stanton. "Our biggest trade off was the compression which had to be tight. We used JPEG which worked the best on images and not the text. The text is not very sharp in black and white with some halo around it. This is especially true in the older documents, scanned from yellowed paper. We did as much as we could to correct this. The purpose was to create a consumer product which forced us to make compromises in quality."

National Geographic decided against full-text search. "We thought it was overkill for the average user," says Stanton. "We had an index in the library where they looked at every page and assigned five key terms to every page. They did this by hand. Blessed with this in-house index, we thought it would more than suffice.

"We considered OCRing all the text but we needed 100% accuracy. Having 99% wouldn't be up to National Geographic standards. National Geographic wanted to preserve the look, feel and style of the magazine. Having the page image did the best job."



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work in the same series, unless such rights are directly granted elsewhere in this document. . . ."

It also specifically states that future technological inventions do not change the terms. "Among those usage rights excluded by this provision are rights of publication, display and transmission in electronic and digital media, as well as in media not yet known," says the clause.

The other option outlined by ASMP is to eliminate *all* re-publication rights, not just electronic. The recommended language says, "All rights granted under this document for publication in a collective work exclude all usage rights for any revision of that collective work or in any later collective work in the same series." This option uses the same exclusion clause as the other one, including "traditional print, electronic and digital media, as well as in media not yet known."

What will the long-term effects of the Tasini decision be? Many in the creative community are hoping there won't be any, and that the decision will be reversed on appeal. ASMP is committed to supporting the appeal effort, through its Legal Action Fund; Crawford believes that reversal is "likely." He says, "It's a matter of definition. In my opinion, when you change from print to electronic media, then it is *not* a revision."

For information on Business and Legal Forms For Photographers, *call Allworth Press at (800)491-2808. <http://www.allworth.com>.* □

PHOTOGRAPHERS SUE NATIONAL GEOGRAPHIC OVER CD USAGES

Six photographers and a picture agency have filed two separate copyright infringement claims in New York and Miami against the National Geographic Society. Both claims dispute the Geographic's right to re-use photographs in a CD compilation of back issues of *National Geographic* magazine without the photographers' permission.

Photographer Jerry Greenberg and his wife, Idaz, are seeking an injunction in U.S. District Court in Miami barring the *Geographic* from distributing his photographs as part of the compilation. The Greenbergs are also seeking unspecified damages.

In U.S. District Court in Manhattan, photographers Douglas Faulkner and Louis Psihoyos, along with Matrix International, filed a similar action. Matrix is acting as agent for photographers Roger Hutchings and Rick Rickman in the action.

National Geographic Ventures, a for-profit subsidiary of the non-profit National Geographic Society, began distributing "The Complete National Geographic: 108 Years of *National Geographic Magazine* on CD-ROM" last fall. Most photographers were not paid for the re-use of their pictures in the 30-disc set.

The Society asserts that it did not need the photographers' permission because the new product was not a reuse, but a simple revision of the magazine in a new format. The Society has cited the case of Tasini et al. vs. *The New York Times* to defend its position. That federal court decision said publishers can re-distribute printed articles on CD and on databases, provided the articles are unchanged from their original print versions.

The Greenbergs argue that *National Geographic* had no right to re-use their work without prior permission because the CD compilation "is not a 'further use' or a 'revision' of a pre-existing collective work. [It] is a new collective work, by virtue of the collection, selection, arrangement and assembly of materials...some entirely new—in a product that as a whole constitutes an original authorship of work."

A similar argument was rejected by the judge in the Tasini case, which was heard in a New York federal court. The Miami federal court is not bound by the Tasini decision, however.

The plaintiffs in the New York case take a different tack, arguing that the National Geographic Society had no right under the original contracts to transfer the license to its subsidiary, National Geographic Ventures, to create for-profit products. "...The original agreements [were] made at a time when it was not in the contemplation of the parties that the images would be used for profit and commercial use in a *National Geographic* magazine on CD-ROM; the intent was only educational and/or non-profit use," the plaintiffs assert.

Matrix contends that "the original license agreements provided for one-time print on paper rights only," according to Matrix co-owner Jonathan Wells. Wells also says he has those terms in writing.

Moreover, he adds, *Geographic* had approached Matrix earlier, offering to pay $75 per picture for a 20-year additional license—and Matrix refused the offer.

One of the Matrix photographers named in the original suit, Sarah Leen, withdrew from the suit in January. She is the only one who is still active with *National Geographic*.

Court dates for the two cases have not been set.

—David Walker

An Enlarger Like No Other!

Jerry - FYI

SELLINGSTOCK

September 1997
Volume 8, Number 1

Dedicated to encouraging communication among photographers

NEW NAME

As we move into our eighth year of publication it is time for a name change that better reflects what this newsletter is all about. As we look at the issues we've dealt with in the last few years it is clear that the focus of this newsletter has revolved more around marketing stock photography, than the issues of how to take good stock pictures.

Clearly, a lot of care must be given to what you shoot if you expect to be able to market the images effectively. **SELLING STOCK** will continue to deal with those issues.

But, it does little good to produce great pictures for which there is little or no demand. Potentially, this kind of activity will hurt the photographer most because the photographer must absorb all of the production costs, as well as a large portion of the marketing costs.

Thus, in the future, the focus of this newsletter will be to supply photographers with the information they need to more effectively SELL the images they produce.

Some in the industry still maintain that all a photographer needs to do to be successful is keep shooting and produce better and better images. We don't think so. We have seen too many cases in recent years, where experienced photographers, as well as those just getting started, produce outstanding, top quality images, and have tremendous difficulty getting them seen in the marketplace.

In today's market, photographers must give a great deal of attention to how they are going to SELL their production, before they rush out to spend huge amounts of time and money TAKING pictures.

We will trumpet this message over and over.

A secondary reason for the name change is that there is a West coast stock agency with a similar name. Neither I, nor the owner of that agency, want anyone to think the two organizations are related.

DIGITAL RE-USE

On August 13, 1997 in New York, federal judge Sonia Sotomayor in *Jonathan Tasini et.al. vs. the New York Times et.al.* found in favor of five publishers and allowed them to make Internet and CD-ROM re-use of articles previously published in their print publications without checking with or compensating the writers in any way.

Because this is a federal court decision supporting positions taken by major publishers - New York Times, Sports Illustrated and Newsday - it is likely to have a major impact on the stock photography business.

The plaintiffs, were writers Jonathan Tasini, Mary Kay Blakely, Barbara Garson, Margot Mifflin, Sonia Jaffe Robbins, and David S. Whitford, and they brought suit against The New York Times Co., Newsday, Time Inc., The Atlantic Monthly Co., Mead Data Central Corp. (Lexis/Nexis) and University Microfilms Inc. (The Atlantic Monthly settled with the plaintiffs prior to this decision.)

The publishers had re-published the contents of their print publications on-line and on CD-ROM in a format that differed greatly from the way the articles originally appeared. The writers argued that the publishers should have first obtained permission from the freelance writers and in addition compensated them for this use. The publishers argued that their "collective works" copyright gave them broad rights to re-use the material without providing any additional compensation to the writers.

The writers claimed that the publishers were reaping a financial windfall from new media - one that Congress never intended when it formulated the copyright law.

Contracts

Most of the articles were produced as a result of verbal agreement with very little, if any, paperwork.

However, it was acknowledged that Whitford had a decidedly more formal relationship with *Sports Illustrated*. His contract with SI granted the following rights:

> (a) the exclusive right first to publish the Story in the Magazine:
>
> (b) the non-exclusive right to license the republication of the Story whether in translation, digest, or abridgement form or otherwise in other publications, provided that the Magazine shall pay to you fifty percent (50%) of all net proceeds it receives for such republication: and
>
> (c) the right to republish the Story or any portions thereof in or in connection with the Magazine or in other publications published by The Time Inc. Magazine Company, its parent, subsidiaries or affiliates, provided that you shall be paid the then prevailing rates of the publication in which the Story is republished.

One of the many strange things about the decision is that this contractual arrangement, while mentioned in describing the relationships of the parties in the suit, appears

to have been given no weight whatsoever by the Judge in making her overall decision in the case.

If publishers "collective works" rights exist only when there is no formal contract to the contrary, this case is much less worrisome than if the "collective works copyright" somehow takes precedence over formal contracts. Several questions remain unanswered:

- Is the language of the Whitford contract somehow not specific enough to cover the rights granted?
- To exclude rights, is it necessary in a contract to itemize every right that is excluded, or do contracts normally only cover those rights which are specifically granted?
- Does a publisher of a "collective work" have certain rights that take precedence over the right specified in formal contracts the publisher has signed?

None of these issues are clearly answered in Judge Sotomayor's decision. There are rumors that the plaintiffs' lawyer may not have sufficiently emphasized the contract point in her argument, and thus the judge ignored it when making her ruling. The fact that the contract was mentioned in Judge Sotomayor's decision may present problems when the Tasini case is cited as precedence in future cases.

After the decision, lawyers told "Contracts Watch," an on-line publication of the American Society of Journalists and Authors, that a written agreement overrides any statute-based presumption that a publisher may take certain electronic rights for free. If a contract specifies payment for electronic rights--as many do--or grants serial rights or publication rights "in print only," the free ride given publishers by the court decision doesn't hold.

In a letter from PACA to National Geographic Interactive, after the decision and relative to another matter (see PACA letter on page 5), PACA Attorney, Robert M. Cavallo of Cavallo & Wolff, said:

> PACA anticipated the problems of electronic copying years ago and that is why in the suggested terms of delivery and invoice language which appear in the PACA Legal Handbook, language was included to prevent the users from electronically using stock photos without permission.

How contractual rights relate to "collective works copyrights" should be further clarified in the appeals process.

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What Is A Revision?

For Judge Sotomayor, the key copyright question in this action hinges around Section 201(c) of the U.S. copyright law.

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

In her 56 page decision Judge Sotomayor upheld the rights of the "collective works" publisher to do several things:

1 - Make very extensive revisions in a work, including eliminating large sections and focusing on small elements of the whole work. A revision doesn't have to be even close to the original.

2 - It can be altered to the point of having a new title and being a part of a larger work (such as *General Periodicals OnDisc*), but Judge Sotomayor also says, "Defendants are not permitted to place plaintiffs' articles in 'new anthologies' or 'entirely different magazines or other collective works,' but only into revision of those collective works in which the plaintiffs' articles first appeared."

3 - The *New York Times* was allowed to put the Sunday Magazine and Book Review on CD-ROM and distribute them separate from all the rest of the editorial content of the paper. Thus, very small portions of the whole "collective work" are permissible.

4 - The privilege of making a revision is transferable to another company. Practically the only limitation, according to Judge Sotomayor, is that the revision must be made by the publisher or the publisher's agent. Thus, a third party would not be able to take published material and re-use it on the internet without the publishers permission, but the publisher has great latitude in how he can re-use it.

5 - The judge did say that a single article could not be offered to another publication, not affiliated with the parent.

6 - In her ruling the judge cited several types of "exploitation" by publishers that wouldn't be allowed under copyright law, including turning a freelance article into "a full length book" or creating "television or film versions of individual freelance contributions."

Appeal

A motion for Reargument of Tasini has been filed in Judge Sotomayor's court. The court has set September 26th as the final day to present arguments. At that point the judge may make an immediate decision or prepare another substantive opinion.

The judge is asked to reconsider three points:

o Whitford's position vs. Sports Illustrated since he had a written contract with SI. Opposing counsel acknowledged the contract. It is argued that this puts him in a different position from the other complaints who fall under 201(c).

o 201(c) requires that there must be obvious "substantial similarity" between two uses for a judge to make a summary judgement. If "substantial similarity" is a disputed question of fact it should be left for resolution by a jury.

o A question as to whether plaintiffs raised an argument at the appropriate time and thus did not give the defendants adequate time to address the issue in discovery or in argument. Plaintiffs argue that the record shows they did raise the issue appropriately.

Once this process is complete the next step would be to file an appeal in Federal Court.

Photographers and Writers Dilemma

For the last 21 years freelance photographers and writers have been producing work for relatively low fees for the first initial use with the contractual understandings -- backed up, we believed in law -- that we would receive appropriate payment for additional uses.

In fact, many creators have earned much more from the second rights to the work, than they were paid for the original use. Many could not support themselves on the fees paid for the initial use, and can only earn a decent living through a combination of initial use fees plus re-use fees.

Now, many of those re-use fees for the work done during the past 21 years have been terminated. This ruling certainly brings into question re-use fees for the publication of books, or chapters from books, as well as electronic uses. Thus, it affects every editorial creator.

Sotomayer indicated that Congress is free to change the law if it wants to take into account the new-media revolution and the resulting questions about writers' rights to their work, but she points out the courts can't act "on the basis of speculation as to how Congress might have done things differently had it known then what it knows now."

Sotomayor said that she had to apply the copyright law as it is written, even though new-media technology couldn't have been anticipated in 1976 when Congress revised the law.

ASJA Comments

Claire Safran, president of the American Society of Journalists and Authors (ASJA) said:

"While Jude Sotomayor's reading of the law and her logic may seem reasonable, her understanding of electronic publishing is seriously flawed.

"We're astonished that the judge bought the defense argument that database use constitutes only a 'revision' of an issue of a magazine or newspaper. It doesn't. And we're even more astonished at her statement that 'the electronic databases retain a significant creative element of the publisher defendants' collective works.' They don't.

"Electronic database compilers strip out nearly everything a publisher brings to its publication: photos, drawings, advertisements, page layout, headline type, index, table of contents--virtually everything that makes a magazine or newspaper what it is. Each article is reduced to the writers' words. And those words belong to the writers.

"The data base compilers then mix that issue's articles with hundreds of thousands of articles from years worth of hundreds of other publications, making a new and totally different compilation. A computer user simply cannot find the actual issue of the publication itself in the database--because it doesn't exist. A 'revision' of the publication? Hardly.

"One other important point is that this case revolves around a part of the copyright law that applies only when there is no written contract between publisher and author. But most magazines--and, increasingly, newspapers--do use written agreements. So the ruling in this case doesn't apply to most articles by freelance writers published in major magazines and newspapers.

"We think an appeals court would see things very differently from Judge Sotomayor."

Michael Gaynor, called the judge's decision "an Alice-in-Wonderland type interpretation" of federal copyright laws.

Bruce P. Keller, a Debevoise & Plimpton attorney representing the media organizations, said that all the judge's ruling does is permit publishers to do what they've always done -- reproduce the contents of their publications in other formats. Where once they did so on microfilm, now they're doing it in new media.

George Freeman, assistant general counsel for the New York Times, said the decision means "electronic reproduction of freelance articles such as in Lexis will be treated no differently than those articles on spools of microfilm."

Lawyers for the defendants acknowledged the decision covers only certain electronic re-uses of freelance articles; for example, it says nothing about the kind of "cherry picking" that typifies many Web sites.

The *Wall Street Journal* story after the decision said sweepingly, "Media companies in recent years have started requiring freelancers to relinquish their rights to the electronic versions of their work."

ASJA pointed out, "That's true of some, but by no means all publishers. Many publishers pay for electronic rights, whether its because they recognize that a single decision by the lowest federal court is not much protection this early in the game, or because they choose not to jeopardize the editor-writer relationship by bullying, or simply because it's right."

Creators Options

Creators need to band together to support an appeal if they want to protect work that has been published in the past 20 years. If this decision stands unchallenged publishers will be able to make almost unlimited use of the work they have published in the last two decades without providing any additional compensation to the creators.

In addition, creators need to actively support federal

copyright revision. However, even if Congress changes the Copyright Law that will probably only affect work after the new law is signed. It would be highly unlikely that changes in the current copyright law would in any way affect work produced between 1976 and the signing of any new law.

Finally, freelance creators must insist on much higher initial assignment fees in order to cover themselves for the potential loss of reuse income.

PHOTOGS FIGHT FOR RIGHTS

Twelve photographers have retained Alan Trachtman of Dealy & Trachtman, LLP in New York to pursue a monetary settlement with National Geographic Interactive for the proposed use of their images on a 30 disc set of CD-ROM's entitled *The Complete National Geographic: 108 Years of National Geographic Magazine*. The discs are scheduled for release this fall.

NGI is a for-profit organization affiliated with the non-profit National Geographic Society.

The photographers - Charles O'Rear, Fred Ward, Loren McIntyre, Tom Nebbia, Adam Woolfitt, Nathan Benn, Linda Bartlett, David Austen, Jim Pickerell, Steve Wall, Paul Horsted and Nick Sebastian - have had a total of more than 2700 images published in *National Geographic Magazine* between 1958 and 1993. They also wrote 24 articles for the magazine and had their pictures used on 16 covers.

National Geographic believes they have the right to reuse these images and stories without paying any additional compensation to the creators. Tom Stanton, Director of CD-ROM product management for National Geographic Interactive, a for-profit division of National Geographic Society, said, "Because the CD-ROM archive consists of an exact image of every page as it was originally published, this reissuance (or reprint) is not a 'further editorial use' of material such as requires additional payment to the photographers whose contracts commit the Society to payment under those circumstances."

Most of the images in dispute were produced under contract to National Geographic Society. Those contracts specified that there would be additional payment for additional uses of the images. Some photographers produced images on a freelance "one-time-use rights" basis and other images were purchased from stock.

In no case did National Geographic Society purchase electronic use rights to the images in question.

These photographers believe this set of 30 CD-ROM discs is a new usage under the terms of their contractual agreements. They believe they are entitled to "appropriate" compensation for this usage, and that it is the photographer, not NG, who decides what is "appropriate." They believe that if a photographer and the magazine can not come to an agreement on "appropriate compensation" then the photographer has the legal right, based on their contracts, to withhold the work.

Moreover, the photographers believe that if NG is allowed to make this additional electronic use of their images and text, without providing any additional compensation, it will set an extremely dangerous precedent for the industry.

National Geographic Interactive is claiming the right to use this material not only in this CD-ROM archive, but also "on versions in CD-I, DVD, and other versions, editions, adaptations, or sequels to the original title." The term and territories they intend to use the product in are, "twenty years worldwide, in all languages."

Jim Pickerell, who helped organize this group, said, "So far, not a single photographer or writer has come to me and indicated that they support NGI's position or believe it is fair or reasonable. Many, who still do occasional assignments for NG, have indicated that they support the photographer's position, but they are afraid to allow their names to be used for fear of retaliation by NG."

Some have asked if this is a class action that will benefit everyone who has ever provided pictures or text for the magazine. The answer, at this time, is NO. This action will only benefit those who are active participants within the group, who have paid a share of the retainer, signed a retainer agreement with the lawyers, and who are willing to allow their names to be used as being part of the group.

It is expected that NGI will insist on knowing specifically who they are compensating, and therefore it is impossible for individuals to benefit if they want to remain anonymous. Once NGI has reached an agreement with our group, there is nothing to prevent NGI from offering the same terms to everyone who has ever worked for National Geographic Magazine. However, given the position NGI has taken thus far, it is hard to imagine them doing that.

Pickerell emphasized, "Individuals or organizations who join our group are not required to accept a majority approved settlement offer. Once such an offer has been made each individual is free to reject it and pursue other remedies on their own, if they believe that is in their best interest."

In all likelihood, photographers who decide to sit on the sidelines will receive nothing for this use.

Preliminary research has revealed that in a two-and-a-half year period more than 500 photographers had at least one picture published in the magazine.

Any photographer, anywhere in the world, who has had work published in *National Geographic Magazine* is welcome to join this group. Individuals or agencies can do so by paying a retainer of $2.00 per image or $25 per text story published. In addition they must supply us with detailed information about when and how the work was produced and used. There is a minimum retainer or $50 per participant. Interested parties should contact Jim Pickerell at 301-251-0720 for more information.

The above rates are good until November 2, 1997. After that time the retainer fees per image will be $4.00, but the fee for text and the minimum retainer will remain the same. As we get close to an agreement it will be necessary to close the group in order to provide NG with specific details as to who will be compensated. We have no idea when this might happen, but the group may be closed to new entries at any time, without notice.

PACA RESPONDS TO NGI CD-ROM

PACA represents more than 100 picture agencies throughout North America. These agencies represent more than 10,000 photographers and more then 40,000,000 images. PACA works to develop uniform business practices within the stock photo industry based on ethical standards. PACA members sign a code of ethics, which serve as a guideline for relationships between agencies, as well as with agencies and photographers. On August 21, 1997 their attorney, Robert Cavallo, sent the following letter to Tom Stanton at National Geographic Interactive relative to NGI's claim that they are not required to make additional payment for republication of 108 years of National Geographic Magazines on CD-ROM.

Dear Mr. Stanton,

We are writing on behalf of the 107 members of the Picture Agency Council of America (the current membership roster is included with this letter.) As the Executive Committee, we must publicly state our disagreement with the philosophy and questionable actions regarding creation and distribution of your current CD-ROM, to be distributed by Mindscape, Inc.

We understand it is the position of National Geographic that no additional licensing fees will be paid to photographers whose work is included in the project. We most strongly object to this decision.

Our concerns include but are not limited to the fact that National Geographic will be selling this product as a separate and distinct collection of the magazines existence, that it will be reusing all of the imagery included in any single publication and that it will be marketed and distributed as a collection of works distinct from any other. Therefore, we believe that the production of this CD-ROM is an additional editorial use of the imagery in the magazines included on the CD-ROM. That you should decide to ignore this is most disappointing, especially in light of the important role professional, high quality photography plays in all of your products and publications and in light of The National Geographic Society Image Collection's Provisional Membership in PACA.

In the PACA Code of Ethics, signed by each member in each membership category annually, it states that PACA members will (among other things):

> Be ethical in dealing with photographers....
> Be mindful of the trust placed in them by photographers and always endeavor to promote the interest of the photographers they represent in tandem with their own.

Clearly your actions do not promote the interest of the photographers whose work appears in the CD-ROM project.

We respectfully request your reconsideration of this action. Thank you for your immediate attention to this matter.

Sincerely
The Executive Committee
Picture Agency Council of America

CONTRACTS - BE SPECIFIC

The Tasini decision should be a "wake up" call for photographers and stock agencies. Everyone should take great care to define usage on all invoices and be as specific as possible.

PACA Attorney, Robert M. Cavallo of Cavallo & Wolff, believes that sellers can prevent electronic or other types of use of stock photos without permission if they use the suggested language from the PACA Legal Handbook on their invoices and delivery memos.

The key language on the back of PACA invoices is: "Upon submission of the receipt of payment of an invoice by (agency name), a license only is *granted to use the images for the use specified on the invoice and for no other purpose.* Such use is granted for the United States only, unless otherwise specified. Recipient does not acquire any right, title or interest in or to any image, including, without limitation, *any electronic reproduction or promotional rights*, and will not make, authorize or permit any use of the particular photograph(s), plate(s) or digital files made therefrom other than as specified herein."

So far, the only individuals or organizations that NGI seems to be negotiating with for this usage are stock agencies that have sold individual photographs to the magazine, and have had this language in their invoice.

Some examples of language that might be on the front of the invoice related to the specific images are:

Non-exclusive re-use of Image #_____ by _____ in national trade internal house organ for Chevrolet. One time use in Chevrolet's Pro Magazine to Chevrolet dealerships only. Image will appear across spread as background, one press run of 117,000. All other rights reserved.

One time non-exclusive use of Image # _____ by _____ for North American English language with 10% World English distribution. Image size 1/4 page use as a chapter opener and less than 1/4 page use as a page turner image on 25 pages within the chapter, and spot usage in the table of contents, for use in one version only of the Student textbook entitled APPLES; A WAY OF LIFE, printing less than 40,000. Reproduction rights for teachers editions, ancillaries and/or related materials are available for additional fees. All other rights reserved.

PHOTOGRAPHER CONTRACTS

In the past we have reported, and many photographers have come to assume, that overseas selling offices retain, at most, 40% of the gross license price that the client pays. This is now changing.

Many selling offices are now keeping 50% and remitting 50% to the parent agency. This means that the photographer now receives 25% of the gross sale price, a 17% loss of income for the photographer.

We urge all photographers to:

- Check with their agency and determine if any of the

sub-agencies the agency is dealing with are retaining a share of the gross sale larger than 40%.

o Insert the following clause into any future revisions of their contracts:

> The photographer will be paid 50% of the gross sales fee collected by the primary selling office (define a country) except that in no event is the photographer to receive less than 30% of the gross sale fee paid by the client, when the sale is made through any type of secondary office.

Many may find that it is to their benefit to negotiate on this point, but at least they will know the percentage of gross sales they are receiving.

Given the standard language in most photographer contracts which says the "photographer will receive 50% of the amount paid to the parent agency" it is possible for selling agencies to take an even larger percentage and for the photographer to end up with even less than 25% of the gross sale price.

This potential particularly exists when the "selling agency" and the "parent agency" happen to be owned by the same international company. SELLER BEWARE.

TONY STONE IMAGES RESPONDS

In the last issue of **TAKING STOCK** I wrote an article entitled "Unhappy U.S. Photogs At TSI." Stephen Mayes, Group Creative Director of Tony Stone Images, took issue with many of the things I had to say and wrote the following.

Tony Stone Images prides itself on the partnership offered to photographers, and dozens of Creative staff around the world work closely with contributors to deliver the very best stock imagery to our clients. The successful launch of the new Interpretations catalogue demonstrates that commerce and creativity go hand in hand for the benefit of clients and photographers alike.

Many readers were therefore surprised by the article Unhappy U.S. Photogs at TSI (Taking Stock, July 1997) and some corrections are necessary to restore balance to the report. Many photographers are extremely happy with the launch of Interpretations which has been produced with our usual creative energy and commercial rigor. The content categories were advertised to all contributors a year before the submission deadline, and they were fulfilled brilliantly by a broad constituency of photographers.

As always, the only criteria for inclusion of work in a Tony Stone Images catalogue is quality and market relevance, and the catalogue selection team worked impartially to address the needs of our increasingly sophisticated market. All Tony Stone Images photographers can be confident that our light boxes are truly democratic and the imagery is selected by quality and not by privilege. For the record it should be noted that well over 50% of the selected images are by North American photographers signed to our Los Angeles and Seattle offices.

The article in July's "Taking Stock" is absolutely wrong in its assertion that no Los Angeles representative was invited to catalogue selection, and one of our most experienced Art Directors, Alex Bortkiewicz was present throughout. The selection team also included a permanent representative from the Seattle Creative team as well as the London, Paris and Munich Creative centers. We went a step further by circulating the page layouts to North American Sales and Creative departments for approval before going to print: no images were accepted that were felt to be "not quite up to par."

The proof of the pudding is in the eating, and our North American clients have already demonstrated a strong appetite for the new catalogue. The overall style of the images in Interpretations is very much in sync with the mainstream North American markets, and our contributors will enjoy the benefits of this and many more Tony Stone Images catalogues over the coming months.

Meanwhile the communication channels are open straight to the Getty management and my colleagues and I regularly exchange views and information with contributors around the world. The opinions expressed in July's "Taking Stock" are not typical of the wider photographic constituency that we represent.

Yours in the spirit of encouraging communication among photographers.

BRIAN SEED ON TSI CATALOG

Brian Seed, publisher of the **Stock Photo Report**, came to some markedly different conclusions about the "Interpretations" catalog than I did. With his kind permission, I am reprinting his article so my readers can be aware of opposing points of view. For more information about **Stock Photo Report** you can phone: 847-677-7887, fax: 847-677-7891 or e-mail: bseed@wwa.com. Again, I urge photographers to try to get a look at the "Interpretations" catalog and determine for yourself if this is the new direction for stock photography.

The newest catalog from Tony Stone Images, "Interpretations," is a truly creative work, with images that are liberated from the old, hidebound, generic stock categories. In this, it partly borrows from past catalogs of Photonica and Mon Tresor, providing simple, artful, non-specific images. In the TSI catalog, however, I find a more lyrical imagery which to me should have special appeal to buyers of photography, and should allow for more freedom of expression.

After looking through and enjoying this catalog, I wished that the editors who selected the images had been given credit for their work. Producing a catalog of this excellence, range, and size depends so critically on the many people who put it together. But all is not perfect and I do have one gripe. When will designers learn that the general population is aging and doesn't have 20/20 eyesight? What appears to be 6-point type in silver ink on a yellow background, on the back cover, may not be legible to many of us. The message conveyed by the images is crystal clear. Does the text not matter?

Jim Pickerell, in his newsletter, **Taking Stock**, claims that

National Geographic Angers Its Photographers

By ALEX KUCZYNSKI

The image of the National Geographic photographer is one of an intrepid, rakish adventurer, a man or woman with a time-worn face, a tilted khaki hat and interesting-looking scars. The image is not far from reality: in the last year, one Geographic photographer contracted flesh-eating bacteria on a shoot for the magazine, another was seriously injured in a car crash in Peru, a third weathered a summer in Pakistan in brutal 117-degree heat.

A Geographic photographer may spend three months shooting a story for the magazine, and expenses have run as high as $250,000 in photographers' and assistants' fees for feature stories. The team of approximately 80 independently contracted photographers — whether they work in the silently steaming Brazilian jungle or underneath Antarctic ice — produces the most exquisite and sought-after natural and cultural photography in the world.

But now the rugged adventurers are steaming mad over a contract dispute that they feel allows the Geographic's taxable divisions to take advantage of the not-for-profit mother ship, the vaunted 111-year-old National Geographic magazine.

The dispute is a symbol of the changing times at the National Geographic Society. Long used to the less hard-charging manner of an entirely tax-exempt organization, it has recently spun off several new, taxable arms that are as aggressive as any commercial network or publisher.

A case in point: this week, the magazine, which faces a slow but steady decline in circulation, will put 400,000 issues of its latest issue on newsstands across the country. It is the first time in the Geographic's 111-year history that it has resorted to newsstands, which it has long derided as downscale but now sees as the means for attracting the diverse and younger readers it so desperately needs.

The dispute with photographers also goes to the heart of creative ownership in an era when the issue of ownership of creative work can be easily muddied: If a photographic image is transported over the Internet, who owns it? If an image is displayed fleetingly on television, how much should a program pay to display it for 5 seconds? What about 35 seconds? If a giant publishing company owns magazines, Internet suppliers and book publishers, does it have the right to reproduce images throughout its various media without payment to the author of that work?

The current dispute centers on a fundamental problem. The photographers feel that many of the Geographic's new divisions, like the four-year-old National Geographic Ventures and the one-month-old National Geographic Enterprises Group,

Continued on Page 10



Ruby Washington/The New York Times

In one effort to revive its fortunes, National Geographic is starting to use newsstands.

National Geographic Angers Its Photographers

Continued From First Business Page

are robbing them of their fair money-making ability. Photographers who once expected that their work would appear only in the prestigious nonprofit magazine now say their photographs are to be used — either for free, or for extremely low fees — in the other divisions.

The proposed contract specifically would limit the amount of money that photographers will earn if their pictures are published in foreign-language editions, capping the final figure at a significantly lower payment than their present rate, photographers said. The problem is especially relevant this year, when the National Geographic wants to increase the number of its foreign-language editions to 11, from 5.

The photographers also complain that images could be used without payment in television programming, for merchandise, on T-shirts and on calendars. Some of the most nettlesome points involve book-publishing: previously, if one photographer's work made up more than 50 percent of a National Geographic book, the Society had to inform the photographer. The new contract would raise that limit to 90 percent.

Interviews with three dozen National Geographic photographers — all conducted on the condition of anonymity — revealed a deep love for the magazine. All said that there is no better place in the world to publish photography than in the pages of National Geographic. Most added that National Geographic is staffed and managed by editors who care about the art of photography. But they place the blame for the contract scuffle on the for-profit divisions of the Geographic.

"You've got this formerly not-for-profit company," said one. "Now it's acting like a for-profit company, and negotiating with these independent contractors with the aggressiveness of a for-profit company."

Another talked of a new "bean-counter mentality" and several photographers described the other divisions of National Geographic as "predatory."

But John M. Fahey Jr., president and chief executive of the National Geographic Society, said that he saw the new contract as an opportunity for photographers to reach a worldwide audience. "We cherish our photographers," he said.

Terrence B. Adamson, a senior vice president, emphasized that the trend among many media groups is simply to buy all rights with one fee. And he said that the photographers were already paid well for their work.

Mr. Fahey added: "Each photographer is in a different situation personally. Some care more about secondary use rights, some care more about foreign-language syndication, so it's not a monolith."

Faced with the challenges of the Internet, multimedia products and television, National Geographic has no choice but to extend its valuable brand name beyond the magazine. And circulation, long a stalwart, is slowly but steadily falling. In 1989, the National Geographic magazine's circulation reached a peak of 10.9 million subscribers. Circulation for 1996, the last year for which figures are available from the Audit Bureau of Circulation, was 9 million.

In March, the Society will lend its name to a a new magazine, National Geographic Adventure, which will compete with for-profit titles like **Mariah Media** Inc.'s Outside magazine and **Wenner Media's** Men's Journal. The National Geographic Enterprises Group, founded in December, will license the National Geographic name to a wide variety of consumer products, like games and children's toys.

But 1995 marked the biggest shift. The Society introduced National Geographic Ventures, the for-profit division that oversees television and film operations, interactive services and map publishing, among other products. In the last 18 months, the Ventures group has introduced National Geographic television channels in 44 countries, and in the coming year plans to introduce either an independent cable channel in the United States, with its television partner, **NBC**, or rent time on an existing cable channel for National Geographic programming.

But the photographers, who have hired a lawyer to advise them on their case, see all the expansion as a financial disadvantage.

One wrote an impassioned letter: "N.G.S. is no more the patrician, inward-looking institution it once was. It is now headed and increasingly run by professional corporate people who are looking to expand the empire globally and increase the number of its for-profit ventures. I personally have no problem with this and wish them total success. At the same time, and this goes for all freelance people including writers, the rights publishers expect are increasing without commensurate pay increases for the use of our work they so dearly depend on to create their products."

New Case - New ruling
12-10-97

Court Rules for AP in Lawsuit

By RICHARD PYLE, NEW YORK (AP) -

A federal judge dismissed a suit by photographers against The Associated Press on Wednesday, saying the worldwide news agency has a legal claim to copyright of all pictures taken for it by freelancers on assignment.

In a 31-page ruling, U.S. District Judge Denise L. Cote rejected five claims by the National Association of Freelance Photographers - among them that The AP, through its ''dominance of the market,'' violated antitrust, monopoly, restraint of trade and copyright infringement laws.

The primary complaint was that AP required the photographers, as a condition of sale, to surrender copyright and future earnings from the resale of their pictures.

The plaintiffs said AP also would ''refuse to do business with ... or threaten not to do business with those freelance photographers who object'' to its policy.

Cote rejected the plaintiffs' contention that the photographers owned the copyright to their work, and sided with The AP in saying that the NAFP ''lacked standing'' as a professional organization to seek legal redress on their behalf.

The suit was filed last March by three New York-based freelancers, Kevin J. Larkin, Joseph M. Tabacca and Paul Hurschmann. Larkin is president of the NFPA, Hurschmann is executive vice president and Tabacca is a member.

The suit involved ownership of pictures taken by freelancers who were given assignments by the AP.

The AP asked for sanctions against the NAFP for what it said were ''improper motives'' and false claims concerning copyright. The photographers withdrew the disputed claims but sought to sanction AP for the cost of opposing the AP motion. Cote denied both motions.

The plaintiffs noted that AP pays outside photographers by checks that carry a legend saying that ''endorsement signifies consent'' to give up copyright claims. Cote upheld the provision, saying the plaintiffs had failed to show why the practice was not valid.

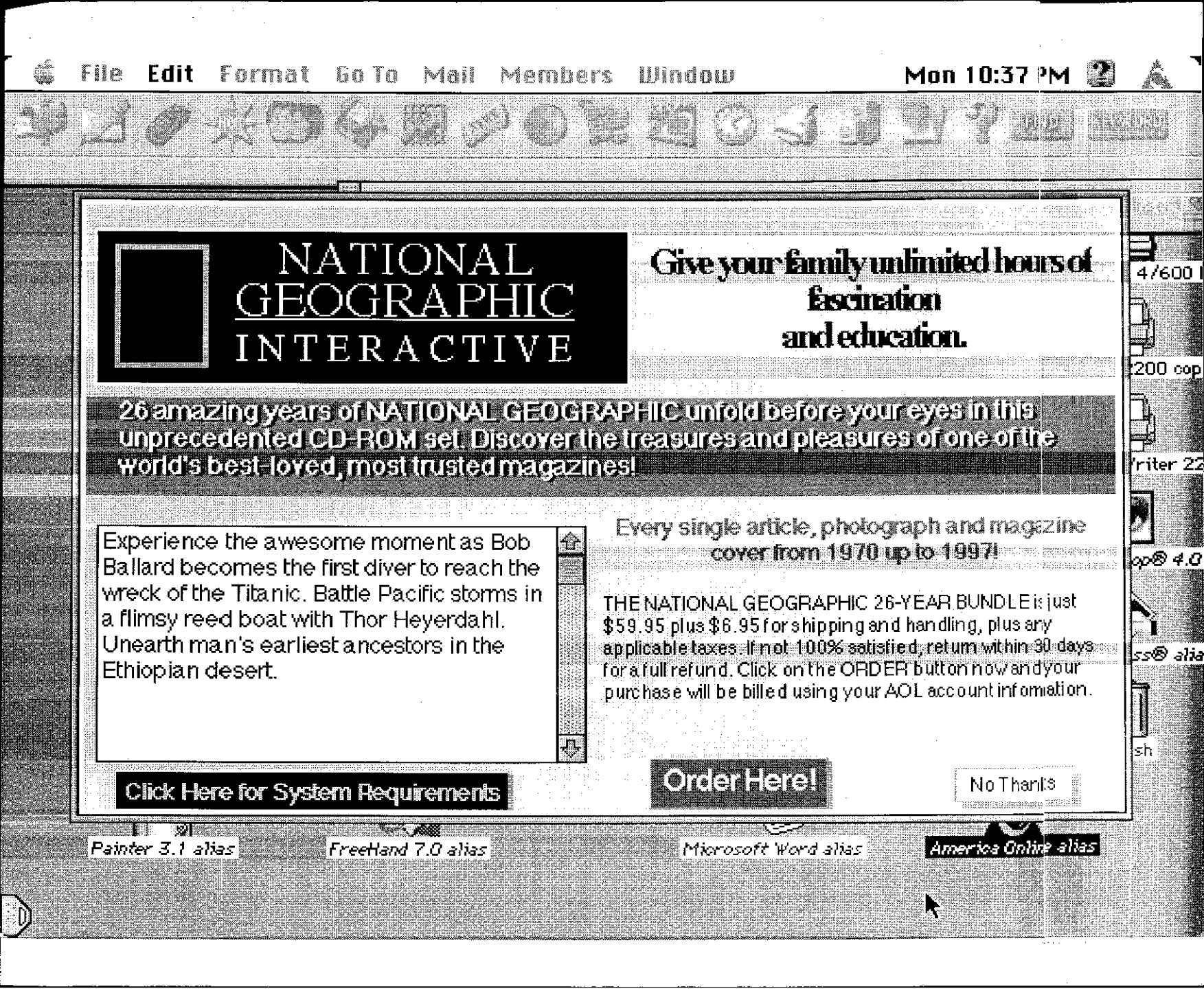
Cote also said that a copyright infringement arises only if the individual had acquired a certificate of registration in advance from the U.S. Copyright Office. Larkin had applied but had not received one, she said.

She also rejected the claim that AP monopolized the market, saying there was no evidence, as required by the law, that the news agency had engaged in ''predatory or anticompetitive conduct'' or raised a ''dangerous probability of achieving monopoly power.'' ''The complaint contains not a single factual allegation demonstrating that AP has any market power, or the extent thereof, let alone that AP's market power makes it dominant,'' Cote said.

Neither, she added, did the photographers offer facts to show that AP policy had any ''adverse effect on competition'' or that it intended to seek a future monopoly status in the field.

The lawyer for the three photographers said he had not seen

the ruling and could not comment. Vincent J. Alabiso, AP vice president and executive photo editor, said the news agency would have no comment.


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Mon 10:37 PM
NATIONAL GEOGRAPHIC INTERACTIVE
Give your family unlimited hours of fascination and education.
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Quest for Profits Is Shaking a Quiet Realm

By CONSTANCE L. HAYS

WASHINGTON

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

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

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

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Continued on Page 12

Continued From Page 1

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Were it not for selling some securities in its endowment, the society would not have been in the black either of the last two years, though its executives attribute the recent higher costs to downsizing. That explains, in part, the attraction to the world of for-profit media — even if it means eventually paying taxes. The society, though, has yet to pay the Government anything for its new ventures, which have racked up a $24 million loss that, under current law, could shelter future income.

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Some people argue that the change is long overdue, that National Geographic enjoys an unfair advantage by classifying itself as a nonprofit society.

"National Geographic isn't nonprofit — it's simply nontaxpaying," says Dean Hammond, chairman and chief executive of Hammond Maps, which for decades has considered National Geographic a competitor. "As a small family-owned business, we have paid thousands of times the taxes they have ever paid, and yet they have this self-polished halo and the reputation of being good guys."

Mr. Murphy, who succeeded Mr. Grosvenor a year ago, counters that National Geographic created the interest in maps in the first place.

The changes at National Geographic started slowly but are now in overdrive. First came the switch from not-for-profit status to a partly taxable institution in 1994, when the society created National Geographic Ventures, the for-profit arm that includes its television, on-line and map-making businesses. Society executives set up the dual structure to avoid jeopardizing National Geographic's tax-exempt status as it competed in other media. Except for the flagship magazine, which is sent monthly to anyone who pays the $27 annual membership fee, just about anything that becomes a high-volume business or is sold in commercial venues where it vies with products from tax-paying competitors can fall under the for-profit division.

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BUT like someone's great-aunt who suddenly decides to take up bungee-jumping, the fin-de-siècle Geographic faces other perils besides taxes. "Talk about a shift," said Peter Miller, the senior assistant editor for expeditions, who is generally enthusiastic. "You have a new lord and master: What can we do that will thrill people and still make money?"

There are plans for all kinds of ventures, from full-length feature films to CD-ROM's that contain every issue of the flagship magazine — an information trove that might help loyalists feel better about finally shedding those back copies.

Cable television broadcasting partnerships have been forged with NBC and Rupert Murdoch's British Sky Broadcasting. Hallmark is a sponsor of a made-for-television mini-series about Stanley and Livingstone that will be broadcast on ABC. And talks are on with two movie studios, Columbia Tristar and Francis Ford Coppola's American Zoetrope.

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But the society's staff members, the true believers in that mission, aren't taking as well to the upheaval, which many say has threatened the quality of the magazine. To those who would like to slow the pace of change, Martha E. Church, a geographer and board member, says: "We're playing some catch-up. There are people who say, 'Stop, we'd like to think it through.' But I'm afraid that luxury isn't there."

Among the other vanished luxuries are the annual 25-cent Thanksgiving dinner, revered more for its camaraderie than for food quality; free parking (it now costs $25 a month) and, more important, the sense of unlimited time in the field for photographers and writers — having the commitment, as Mr. Murphy boasts in the society report, to wait 21 days for a gorilla to take a bath.

"You have the new regime saying, 'Why do you have to spend so much time in the field?' " Mr. Ohanian said. "And the editors say, 'No one else produces the product we do.' "

At the magazine, like everywhere else in publishing, there has been an emphasis on shorter articles. That explains at least some of the flak, says William L. Allen, the magazine's editor. "The staff is overwhelmed and a little bit overworked right now," he added. "We're producing 40 percent more articles than we did two and a half years ago."

Some staff members also question the magazine's decision to switch to lighter-weight paper, which saves a

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bit on postage but, some people say, is not as attractive.

At ground zero of the activity is Mr. Murphy, a Georgia native who held top posts at The Atlanta Constitution, The San Francisco Examiner and The Baltimore Sun. A 63-year-old with the craggy visage of an osprey, Mr. Murphy calls himself "the least scholarly person you know."

And he has urged the staff to be a little less compulsive. "I don't want them to waste their time anymore calling the Library of Congress to find out how high is an elephant's eye," he said. "On the other hand, they are charged with the responsibility of making things accurate, and beyond accurate, insightful."

THAT said, his vision for Geographic includes producing the magazine in other languages, making the society more of an international activist (he'd like to buy a rain forest, he says, to study and preserve it) and going after new technology to help spread geographic knowledge. "We're going to do the same kinds of things we've always done, but in additional formats," he said in an interview in his sprawling corner office atop the Geographic building fronting 17th Street. His staff, he added, "thinks it's revolutionary, but really, it's evolutionary," something no more harmful than the decision to add photography in 1905 or to make television documentaries 60 years after that.

"Change is the rock in everybody's shoe," he said. "And some people limp."

Mr. Murphy said the society's members, with their computer literacy and fast-paced life styles, were themselves driving the change. As for the Thanksgiving dinner, he said: "We're not running a plantation here. We're trying to run a membership society."

Toward that end, he has hired many people who are sometimes viewed with suspicion by the old-timers, mainly because they are seen as "his" people. Two of his friends, D. Ronald Daniel, a management consultant, and Terry Adamson, a Washington lawyer, are the outside directors on the five-member board that oversees the for-profit operations. On the society's board, he has added Nina Hoffman, a former Simon & Schuster executive who arrived last year to run the book division and international editions, and John M. Fahey Jr., who was hired 15 months ago from Time-Life to head National Geographic Ventures and was quickly promoted to chief operating officer of the society.

At the same time, other employees are gone, most notably the 350 people who worked in Gaithersburg, Md., filling customer orders. The building has been sold, and the services hired out to three corporations.

"There is a changing of the guard here, from the Grosvenor family to what a journalist would say is professional management," said Mr. Daniel, a director of McKinsey & Company, the management consulting firm, as well as the Harvard Corporation.

There was plenty of notice. Gil Grosvenor said he made clear to the board several years ago his plans to retire at 65. Neither of his two adult children wanted to continue the family's five-generation involvement with the Geographic. (The third child is in high school.) An executive search firm found Mr. Murphy in 1994, when he was president of the United States Golf Association.

And Mr. Grosvenor, who now concentrates on raising ponies and azaleas on his Maryland farm, is well aware of the staff's unease over the end of his family's tenure at the magazine.

"Hopefully, senior managers coming from other publications will recognize the importance of maintaining the image of the yellow rectangle," he said. "Image takes a long time to develop, in our case, 108 years. But images can be destroyed overnight. They are very fragile."

There are rumors that he and Mr. Murphy, the past and the present, are at each other's throats. A senior editor, who spoke on condition of anonymity, said: "This place is like a Southern family with a dead aunt upstairs. Everybody knows she's there, but nobody wants to talk about it."

Mr. Grosvenor and Mr. Murphy deny the talk of discord. Mr. Grosvenor said, "When I walked out this door last June, I told Reg it's his ship."

Still, even Mr. Grosvenor's elderly stepmother has apparently expressed her displeasure. "She said, 'How would you feel if a man took over your family's business and said in front of other people, this is not your father's Oldsmobile?'" a recent dinner companion of hers said. The society is also having to put out fires among its many contributors. The CD-ROM project, overseen by the head of the on-line division, Lawrence R. Lux, is producing a 36-disk boxed set, marketed with Kodak and containing reproductions of every National Geographic published through December 1996. The project has infuriated some writers and photographers, whose contracts specified that they be paid for any "new and different" use of their work.

But in Mr. Lux's view, "It's clear that we in the society own the rights to the magazine, and what we've done is reprint the magazine."

Jim Pickerell, a photographer whose work has appeared three times in the magazine, has hired a lawyer to represent photographers opposed to the CD-ROM, which is scheduled for a September release. "To a man or a woman, I have not heard of anyone who supports the Geographic position," he said.

Nathan Benn, who spent nearly 20 years as a contract photographer on assignments ranging from Pittsburgh to Peru, said: "It's blatantly inconsistent with our agreement. I am not nostalgic for a paternalistic relationship. But even businesses that are well-run and efficient uphold their agreements."

The sudden interest in profit involves other judgment calls, too. While buying a rain forest appeals to Mr. Murphy, starting a restaurant chain along the lines of Rainforest Cafes would not. Putting a credit-card company's logo on a National Geographic classroom map is considered acceptable, but allowing a licensee to produce baby bottles emblazoned with the society's logo is still taboo, since it would hardly be educational. "I worry a great deal about making a move that is inappropriate," said Mr. Fahey, who is considered Mr. Murphy's heir apparent.

THE society, meanwhile, has borrowed another page from Disney's playbook: incentive-laden pay packages. Last year, it commissioned Towers Perrin, the compensation specialists, to compare senior managers' salaries with those elsewhere in the media industry. The firm concluded that lower-rung employees were paid competitively, but that senior managers were way behind their peers. (The society's latest tax return shows Mr. Murphy making $303,007 in 1995, second only to Mr. Grosvenor, who, as president and board chairman, made $430,000.)

"There are no stock options, and there had been no bonus plan until this year," said Mr. Fahey, who favors splashy Valentino ties, in contrast to Mr. Grosvenor, whose neckwear features globes and other geography-related themes. Mr. Fahey said he took a pay cut to work at the Geographic, a situation he and others now seem dedicated to correcting.

It's an interesting time. While the world is getting smaller, and Mars is permitting photographs, people at the society, typically chroniclers of such things, are struggling with their destiny.

"I look at this selfishly and say I wish they would shape up and do a good job," said Mr. Benchley, the author. "I'd hate to see this thing go down the chute." □

The New York Times

Sunday, August 3, 1997

Money&Business

Section 3

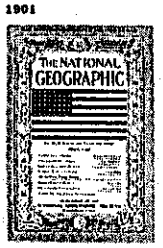
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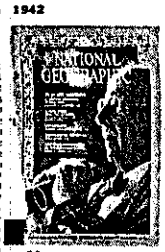
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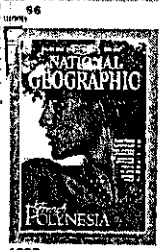
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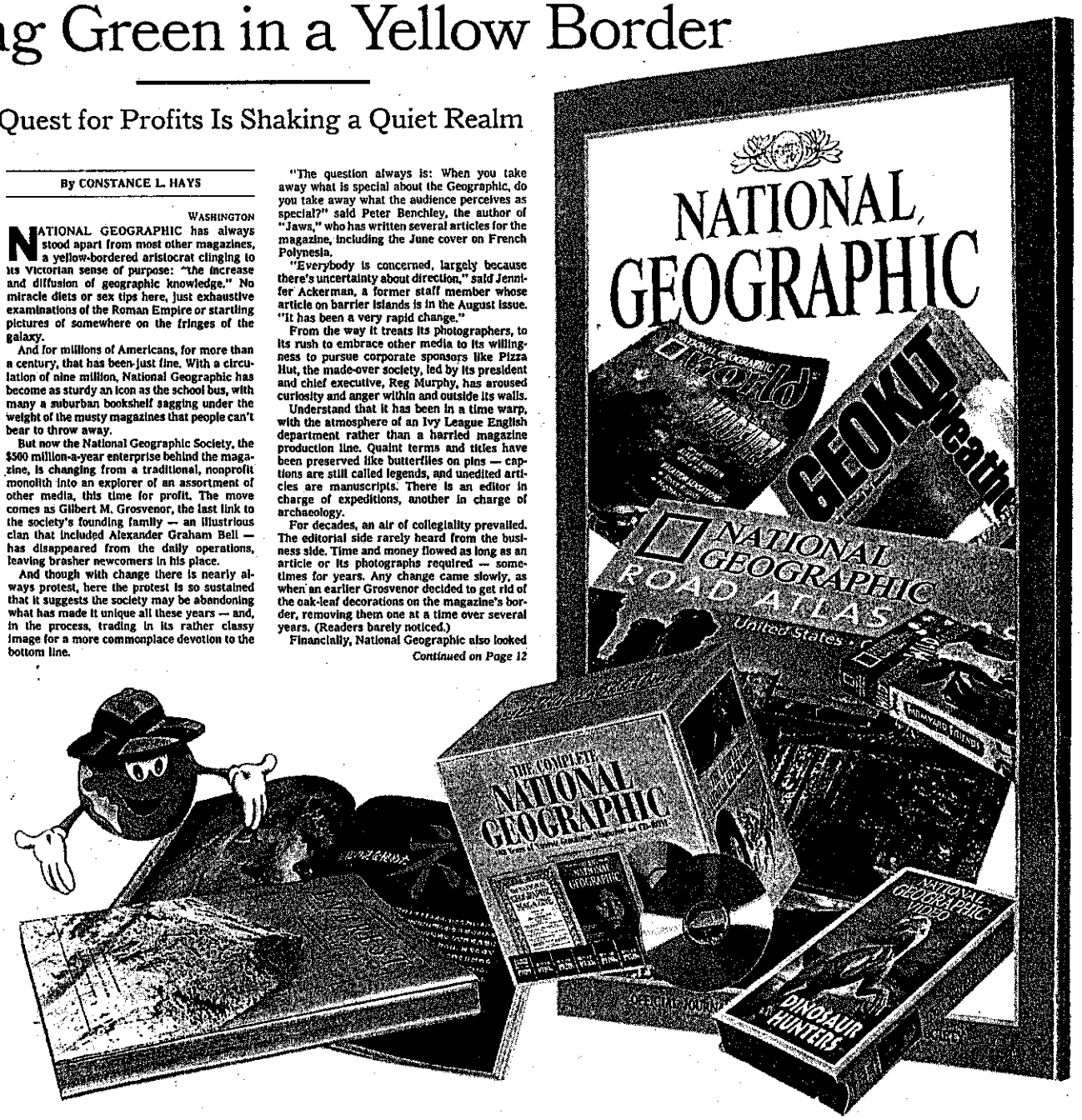
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Continued on Page 12





Photographs by Chuck Kennedy for The New York Times

Reg Murphy, chief executive of National Geographic, sees the society's new directions and projects as more evolutionary than revolutionary.

Seeing Green in a Magazine's Yellow Border

Continued From Page 1

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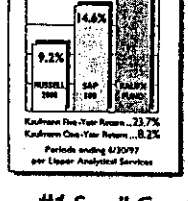
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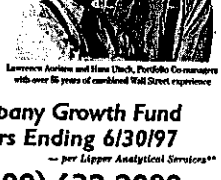
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Storied History, New Horizons

THE PAST: A Sleepy Nonprofit

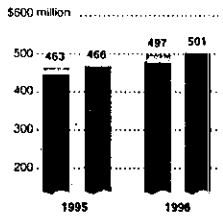
The National Geographic Society was born at the end of the Victorian era, a time when public imagination was captivated by both the science and the romance of exploration, archeology and natural history. Its magazine-style journal and, later, its companion television programs grew so popular that they came to be the society's main reason for being, rather than vice versa, straining the group's traditional, quasi-academic institutional culture.

Budget Deficits

Revenue increased in 1996, but expenses grew faster, leaving the society with a widening operating deficit.

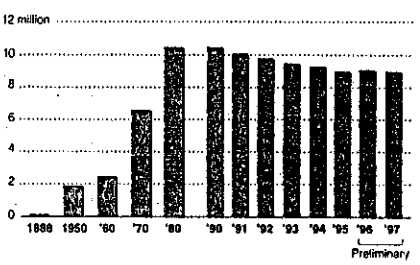
Revenue
- Membership dues, educational sales and contributions.
- Dividend and interest income; net assets released from restrictions.

Expenses



Stagnant Membership

Almost everyone who receives the magazine does so by becoming a member of the society and paying annual dues of $27; a subscription to the magazine comes free with membership.



THE FUTURE: Into the Marketplace

In 1994 the society created a taxable for-profit subsidiary called National Geographic Ventures and transferred to it some of the more commercially oriented activities of the nonprofit society. The subsidiary is also used to make acquisitions and develop new ventures. Here are some of the programs it oversees.

Television and Film

National Geographic Specials and **Documentaries** broadcast on NBC and PBS.

Really Wild Animals, a children's TV series formerly on CBS, now on the Disney Channel.

National Geographic Explorer, a TV series on Turner Broadcasting.

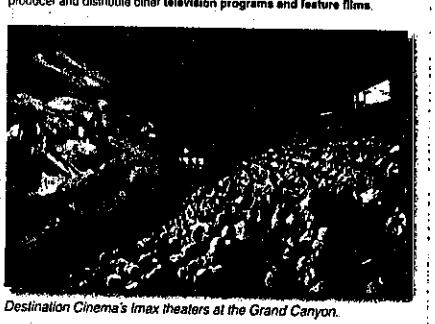


"Stanley and Livingstone"

National Geographic Channel, a new cable channel in Britain, Scandinavia and Australia, a joint venture with NBC and BSkyB.

Stanley and Livingstone, a mini-series produced with Hallmark Entertainment, to be broadcast by ABC.

Partnerships with Warner Brothers, Tristar Pictures and Britain's Channel 4 to producer and distribute other **television programs and feature films.**



Destination Cinema's Imax theaters at the Grand Canyon.

A 44 percent equity stake in a company that manages and develops **Imax theaters** at tourist attractions like the Grand Canyon in Arizona and the Hearst Castle in California.

Other Media

Road maps and travel atlases created in partnership with Geosystems Global Systems Inc.; **guides to national parks** created by Trails Illustrated, a newly acquired subsidiary.

CD-ROM's of National Geographic material distributed by Mindscape, a subsidiary of Pearson P.L.C. Eleven titles are planned for release in the next two years, including a collection of all 108 years of National Geographic magazine.

National Geographic on the **Internet**, through a World Wide Web site whose address is http://www.nationalgeographic.com.



TECHNOLOGY

Copyrights caught in web

nternet spurs debate on rules, enforcement

/ ELIZABETH WASSERMAN
ight-Ridder News Service

Once, copyright law was a staid and sleepy body of rules that enthralled pub-hers and media companies, usicians and writers — or at ast their lawyers.

Then came the Internet age d the ability to copy everything gitally, from jazz recordings to wspaper articles to software de, and transmit the informa-on around the world in seconds. he rules were the same, but uch easier to break.

The role of copyright in elec-onic publishing is such a vola-le issue that, on the opening eekend of the recent Associa-on for Computing Machinery's nference and exposition on the xt 50 years of computing, hun-eds of people bypassed the hibits — such as the Virtual abuki Theater and the ancient M 360/40 mainframe com-ter — to attend a sometimes ated debate on copyright on e Net.

At the heart of the debate: Do e need new laws governing pyright on the Net and, if so, w should we enforce them? Or e there technological ways to sure that rights are upheld and forced worldwide?

This broad debate is further mplicated by other questions r forefathers never fathomed hen drafting the Constitution. it, they authorized Congress to tablish laws giving "authors d inventors the exclusive right their respective writings and scoveries" to encourage publi-tion for progress in arts and iences.

The Internet has people ques-oning whether browsing full, pyrighted texts on the World ide Web should be made ille-l, since a computer's memory akes temporary copies when ey call up a web page.

Should online services, including universities and libraries, have to monitor the actions of subscribers who might violate copyright laws? And should firms that compile public data be awarded intellectual property rights, the upshot of which would be that even scientists and reporters wouldn't be able to use the data without permission or payments?

"When it comes to looking at copyrighted materials, we used to be able to use, read and browse things without asking permission," said Pam Samuelson, a law and information management professor at the University of California-Berkeley. "As bad as photocopying machines were [for copyright protection] they were things that didn't seem a threat. Now, these new technologies do seem to be a threat."

One of the reasons is that copyright-based industries, such as publishing, recording and movie-making, see new kinds of markets.

"CDs of the future may be time-stamped," Samuelson said. "If you buy a CD, the average use is listening to it 20 times, so why not buy that level of usable? If you want to pay to listen to it 700 times, then you could do that. This notion of paying for what you're actually using is appealing to publishers."

But some of the changes may not appeal to the public, which has become accustomed to a different standard. At one panel discussion, a software programmer stood and waved a copy of a book he owned. When he bought the book, he said, he bought the right to read it as many times as he wanted, rip it in half or throw it out. In the future, he might have to negotiate with a publisher.

Copyright laws have come under renewed scrutiny in part because of several treaties signed last year by the World Intellectual Property Organization. The Clinton administration has been a strong supporter of the pacts, which extend copyright protections to the Internet in such industries as entertainment and music.

At the same time, some of the proposed provisions — most notably that databases be awarded the same types of rights — were successfully opposed by an array of consumer, academic and technical groups.

The treaties still must win the approval of Congress. Barbara Simons, who chairs the ACM's public policy committee, urged conference attendees to get involved in the debates.

Technologists tended to advocate technology solutions.

Mark Stefik, a principal scientist at the Xerox Palo Alto Research Center and author of several books, said the online world will gravitate toward "trusted systems," a type of software-based or software-and-hardware-based solution that will honor certain usage rights.

For example, if you buy only "first-use" rights of a document, the trusted system will only let you call up that document once. Similarly, products coming to market from such companies as IBM, InterTrust, Softbank and Xerox will carry within them the ability to make a transaction — to charge for the ability to copy, transmit or read a file.

But even with technological solutions, there are potential legal consequences. "The 'trusted system' keeps track of what someone does with the document," Stefik said. "You have to ask, 'What are my privacy rights?' "

In the end, publishers on the Internet may still be left with the sticky situation of enforcing their own rights.

NET SOLUTIONS · BUSINESS INTERNET SOLUTIONS

INTERNET

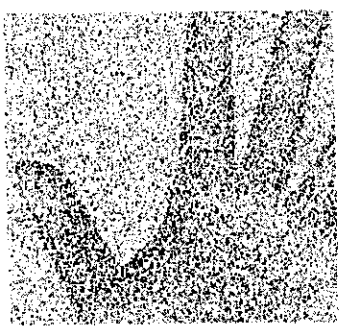
BY CYNTHIA KURKOWSKI

Make your mark

Digital watermarks are catching on quickly as digital artists and publishers begin to post and distribute their copyright works online. Watermarks provide a cheap means of copyrighting information and a way to notify would-be users how to contact the copyright owner to gain permission for use and pay copyright fees. It's the way to go if a copyright holder who needs to distribute works without fear of losing major revenue to unauthorized use. I say this because while watermarks digitally copyright online materials, they are by no means foolproof, nor do they prevent an unauthorized user intent on reproducing the work.

A digital watermark is similar in function to a traditional watermark. It identifies a person's stationery so a digital watermark underlying a graphic, photo, or document identifies the creator or owner of a certain work. Some forms of watermarking are referred to as signatures, or fingerprints. I was taught there is a functional distinction between watermarks and fingerprints. But be aware that digital *watermarking* and *fingerprinting* are often used interchangeably.

A watermark identifies the copyright owner and even relays permission information, a fingerprint is essentially a recorded digital imprint left by the user. An intelligent fingerprint is a telltale script of the violator's location and use(s) of the copyrighted work. To enforce copyright protection, you just follow the fingerprint trail. A publisher "reads" the fingerprints to determine who used the work, how it was used, and how many times it was used. Many watermarking software makers are now offering integrated intelligent fingerprinting features.



The more rudimentary watermarking techniques require the original work with which to compare the digital watermark or the coded value (checksum) used in algorithm-based encoding. The more advanced techniques highlighted below have been developed to eliminate the use of an original to extract the watermarked message.

Spread-spectrum watermarking and steganography are the most common forms of digital watermarking today. Steganography encodes, or hides, coded sequences within the binary file of the image, video, or audio. A classic example of steganography is writing a secret message with invisible ink between the lines of a letter. Likewise, digital steganography hides a message in a computer image or digital audio clip. Digital watermarks can be uniquely created so that each watermarked image persists with each digital copy made, and persistent watermark reproduction is key to deterring digital reproduction. The encoded watermark is often referred to a work's digital signature.

The most available form of watermarking is based on spread spectrum communications techniques. The watermark information is hidden using any modulation scheme (any method of communicating over a continuous channel that works at low signal-to-noise ratios). MIT Media Lab and Dice Company watermarks are prime examples of how spread spectrum-based–watermarks are created via the direct-sequencing technique. Think of the original image as the noise and the hidden message as the signal. In the direct-sequence method, the hidden message chooses a key and uses it to generate a pseudorandom carrier function that is then modulated by the information to be encoded, and added to the original image. To extract the information, an image is demodulated with the carrier generated by the original key.

A digital watermark identifies the creator or owner of a certain work.

MIT Media Lab's *PixelTag* media watermark encodes bits of copyright information in the pixel brightness values, rather than the image itself. The benefit of the *PixelTag* technique is that the watermark is retained despite changes in format or digital-to-analog conversion such as what occurs in printing. Another key feature is the original image is not required to extract the watermark information, enabling the use of a Web crawler to systematically search for illegal copies of images. The decoding process reveals an actual message (e.g. author's email address) instead of a checksum.

On the other hand, Dice Company's *Argent* refers to its watermarks as digital signatures, but the process of embedding one into a digital sample stream is not accomplished via a digital signature calculation. These signatures are single, continuously integrated numbers, or messages, over a large area of the carrier signal. Dice's definition of watermark is "a continuous integration of...many repetitions of an informational message over arbitrary carrier signal areas." The information encoded by *Argent* can be digitally signed to certify its validity when it is extracted. *Argent* watermarks are removed with an authorized key. Without a key, removal will damage the content.

Two well-known developers in the field of digital rights management, Dr. Jian Zhoa and R. Eckhard Koch, employ a pseudorandom position sequence embedded watermark using their new *SysCop* system. *SysCop* has a two-step process to embed and retrieve copyright labels. The first step is to generate a pseudorandom position sequence for selecting blocks where the code is embedded, using extracted image data together with a user-supplied key. This step produces the actual copyright code and a random sequence of locations for code embedding. The second step embeds the code at specified locations, using a set of embedding methods dependent on the type or even the content of the multimedia materials. It also retrieves the code from the blocks specified in the position sequence using different watermarking methods.

The embedded copyright label is reportedly tamperproof and does not reduce the quality of the multimedia data. The method is said to resist damage from data compression, low pass filtering and file format conversion. A Web interface to the *SysCop* has been developed to provide Web users with services to mark their materials.

(*Digimarc* is one of the better known watermarks as it is available as an Adobe *Photoshop* plug-in.) A *Digimarc* watermark placed throughout the image is created by imitating naturally occurring image variations. To further hide the watermark, the *Digimarc* automatically varies the intensity of the watermark in order to remain invisible in both flat and detailed areas of an image. The *Digimarc* watermark contains both ownership and usage permission information. To read the information, the user must have a *Digimarc* reader, also bundled with tools like Adobe *Photoshop*.

Although the watermark is embedded digitally within the image, it remains part of the image even when printed and can be read later by scanning the image into a computer. A Digimarc watermark is reportedly retained through copying, editing, and most file format conversions.

Highwater's *FBI fingerprints* which uses *FBI Write* and *FBI Detector* is another Adobe *Photoshop* watermark plug-in. The tools apply and detect *FBI fingerprints*. The fingerprint does not increase the image file size, nor degrade the reproducible quality. FBI offers two key advantages. It can detect when a part of a protected image has been used, such as in a photo montage. Most importantly, *FBI fingerprints* can be detected in printed output, giving owners an extra level of copyright control.

Watermarking alone does not deter reproduction. The watermarks need to be combined with other technical mechanisms (e.g. cryptographic containers) to physically prohibit the reproduction of works. Optical character recognition (OCR) processing software used in scanners raises some technical challenges to preserving watermarks. Intelligent page analysis software is needed to correctly identify and reproduce the watermark's unique signature or line spacing when OCR processing. Otherwise, the watermark becomes scrambled or destroyed.

Background watermarks also can be destroyed by the same tools used to clean up water stains and other discolorations on scanned documents. Watermarking does not restrict users from copying or printing. If the rights holder can restrict printing a document or image, then he or she is assured that the secured materials cannot be reproduced beyond the desktop.

The most obvious solution is to integrate watermarks into cryptographic containers, as does IBM *Cryptolope*. While this is the best and most effective means of displaying and enforcing copyright information, it is not a cost-effective solution for the free agent. It depends on what a copyright owner can afford to lose through unenforced copyright reproduction. Hey, it's a risky business. CU

(Cynthia Kurkowski, ComputerJournalist @Large covers emerging technologies for NC World, Web-Vantage, *and the UK's* Web Open Technologies. *Email: zen@sirius.com)*

FOR MORE INFORMATION

Highwater Signum Ltd.; (http://www.signumtech.com)•**SysCop;** (http://syscop.igd.fhg.de)•**Jian Zhoa's Index to Digital Copyright Protection & Digital Watermarking Technology;** (http://www.igd.fhg.de/~zhao/copyright.html)•**Information, Policies, Copyright, and Intellectual Property;** (http://www.nlcbncca/ifla/II/cpyright.htm)

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

Continued from page 26

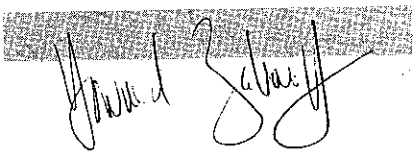
that do not simply liven your text by displaying the author's style. (For a more detailed discussion of fair use, see my "Your Best Defense" in the October 1993 WD.)

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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Washington Post
5-18-98

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.

John Schwartz's e-mail address is schwartzj@twp.com

NET SOLUTIONS · BUSINESS INTERNET SOLUTIONS

INTERNET

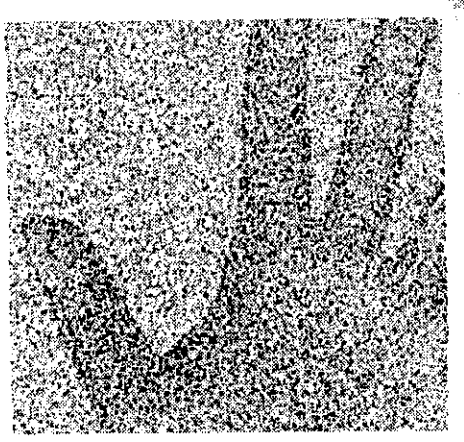
BY CYNTHIA KURKOWSKI

Make your mark

Digital watermarks are catching on quickly as digital artists and publishers begin to post and distribute their copyright works online. Watermarks provide a cheap means of copyrighting information and a way to notify would-be users how to contact the copyright owner to gain permission for use and pay copyright fees. It's the way to go if a copyright holder who needs to distribute works without fear of losing major revenue to unauthorized use. I say this because while watermarks digitally copyright online materials, they are by no means foolproof, nor do they prevent an unauthorized user intent on reproducing the work.

A digital watermark is similar in function to a traditional watermark. It identifies a person's stationery so a digital watermark underlying a graphic, photo, or document identifies the creator or owner of a certain work. Some forms of watermarking are referred to as signatures, or fingerprints. I was taught there is a functional distinction between watermarks and fingerprints. But be aware that digital *watermarking* and *fingerprinting* are often used interchangeably.

A watermark identifies the copyright



owner and even relays permission information, a fingerprint is essentially a recorded digital imprint left by the user. An intelligent fingerprint is a telltale script of the violator's location and use(s) of the copyrighted work. To enforce copyright protection, you just follow the fingerprint trail. A publisher "reads" the fingerprints to determine who used the work, how it was used, and how many times it was used. Many watermarking software makers are now offering integrated intelligent fingerprinting features.

The more rudimentary watermarking techniques require the original work with which to compare the digital watermark or the coded value (checksum) used in algorithm-based encoding. The more advanced techniques highlighted below have been developed to eliminate the use of an original to extract the watermarked message.

Spread-spectrum watermarking and steganography are the most common forms of digital watermarking today. Steganography encodes, or hides, coded sequences within the binary file of the image, video, or audio. A classic example of steganography is writing a secret message with invisible ink between the lines of a letter. Likewise, digital steganography hides a message in a computer image or digital audio clip. Digital watermarks can be uniquely created so that each watermarked image persists with each digital copy made, and persistent watermark reproduction is key to deterring digital reproduction. The encoded watermark is often referred to a work's digital signature.

The most available form of watermarking is based on spread spectrum communications techniques. The watermark information is hidden using any modulation scheme (any method of communicating over a continuous channel that works at low signal-to-noise ratios). MIT Media Lab and Dice Company watermarks are prime examples of how spread spectrum-based–watermarks are created

A digital watermark identifies the creator or owner of a certain work.

via the direct-sequencing technique. Think of the original image as the noise and the hidden message as the signal. In the direct-sequence method, the hidden message chooses a key and uses it to generate a pseudorandom carrier function that is then modulated by the information to be encoded, and added to the original image. To extract the information, an image is demodulated with the carrier generated by the original key.

MIT Media Lab's *PixelTag* media watermark encodes bits of copyright information in the pixel brightness values, rather than the image itself. The benefit of the *PixelTag* technique is that the watermark is retained despite changes in format or digital-to-analog conversion such as what occurs in printing. Another key feature is the original image is not required to extract the watermark information, enabling the use of a Web crawler to systematically search for illegal copies of images. The decoding process reveals an actual message (e.g. author's email address) instead of a checksum.

On the other hand, Dice Company's *Argent* refers to its watermarks as digital signatures, but the process of embedding one into a digital sample stream is not accomplished via a digital signature calculation. These signatures are single, continuously integrated numbers, or messages, over a large area of the carrier signal. Dice's definition of watermark is "a continuous integration of...many repetitions of an informational message over arbitrary carrier signal areas." The information encoded by *Argent* can be digitally signed to certify its validity when it is extracted. *Argent* watermarks are removed with an authorized key. Without a key, removal will damage the content.

Two well-known developers in the field of digital rights management, Dr. Jian Zhoa and R. Eckhard Koch, employ a pseudorandom position sequence embedded watermark using their new *SysCop* system. *SysCop* has a two-step process to embed and retrieve copyright labels. The first step is to generate a pseudorandom position sequence for selecting blocks where the code is embedded, using extracted image data together with a user-supplied key. This step produces the actual copyright code and a random sequence of locations for code embedding. The second step embeds the code at specified locations, using a set of embedding methods dependent on the type or even the content of the multimedia materials. It also retrieves the code from the blocks specified in the position sequence using different watermarking methods.

The embedded copyright label is reportedly tamperproof and does not reduce the quality of the multimedia data. The method is said to resist damage from data compression, low pass filtering and file format conversion. A Web interface to the *SysCop* has been developed to provide Web users with services to mark their materials.

(*Digimarc* is one of the better known watermarks as it is available as an Adobe *Photoshop* plug-in.) A *Digimarc* watermark placed throughout the image is created by imitating naturally occurring image variations. To further hide the watermark, the *Digimarc* automatically varies the intensity of the watermark in order to remain invisible in both flat and detailed areas of an image. The *Digimarc* watermark contains both ownership and usage permission information. To read the information, the user must have a *Digimarc* reader, also bundled with tools like Adobe *Photoshop*.

Although the watermark is embedded digitally within the image, it remains part of the image even when printed and can be read later by scanning the image into a computer. A Digimarc watermark is reportedly retained through copying, editing, and most file format conversions.

Highwater's *FBI fingerprints* which uses *FBI Write* and *FBI Detector* is another Adobe *Photoshop* watermark plug-in. The tools apply and detect *FBI fingerprints*. The fingerprint does not increase the image file size, nor degrade the reproducible quality. FBI offers two key advantages. It can detect when a part of a protected image has been used, such as in a photo montage. Most importantly, *FBI fingerprints* can be detected in printed output, giving owners an extra level of copyright control.

Watermarking alone does not deter reproduction. The watermarks need to be combined with other technical mechanisms (e.g. cryptographic containers) to physically prohibit the reproduction of works. Optical character recognition (OCR) processing software used in scanners raises some technical challenges to preserving watermarks. Intelligent page analysis software is needed to correctly identify and reproduce the watermark's unique signature or line spacing when OCR processing. Otherwise, the watermark becomes scrambled or destroyed.

Background watermarks also can be destroyed by the same tools used to clean up water stains and other discolorations on scanned documents. Watermarking does not restrict users from copying or printing. If the rights holder can restrict printing a document or image, then he or she is assured that the secured materials cannot be reproduced beyond the desktop.

The most obvious solution is to integrate watermarks into cryptographic containers, as does IBM *Cryptolope*. While this is the best and most effective means of displaying and enforcing copyright information, it is not a cost-effective solution for the free agent. It depends on what a copyright owner can afford to lose through unenforced copyright reproduction. Hey, it's a risky business. CU

(Cynthia Kurkowski, ComputerJournalist @Large covers emerging technologies for NC World, Web-Vantage, *and the UK's* Web Open Technologies. *Email: zen@sirius.com)*

FOR MORE INFORMATION

Highwater Signum Ltd.; (http://www.signumtech.com)•**SysCop;** (http://syscop.igd.fhg.de)•**Jian Zhoa's Index to Digital Copyright Protection & Digital Watermarking Technology;** (http://www.igd.fhg.de/~zhao/copyright.html)•**Information, Policies, Copyright, and Intellectual Property;** (http://www.nlcbncca/ifla/II/cpyright.htm)

GET INVOLVED

And let's come to grips with reality BY DAVE HARP

In last month's *Bulletin*, we ran the entire text of a white paper written by national directors Tom Guidera and Woody Packard. *A Proposal for Independent Creators* traces the evolution of our current situation and highlights the dilemmas—often recounted in this and other trade and consumer publications—facing publication photographers today and suggests some solutions that might just make our lives easier and more productive. Tom's and Woody's efforts took hundreds of hours of research, writing, editing and rewriting. It was a monumental effort by two mega-volunteers. If you didn't take the time to read it, I encourage you to go back and do so.

Their labors began last September at what proved to be an unorthodox and remarkable national board meeting. Normal procedures were suspended and, with the help of organizational psychologist Dr. Alan Black, we tackled four questions: What is the critical problem facing publications photographers today? What is the critical problem facing ASMP? What is the solution to the critical problem facing photographers? What problems must ASMP overcome to solve the critical problems?

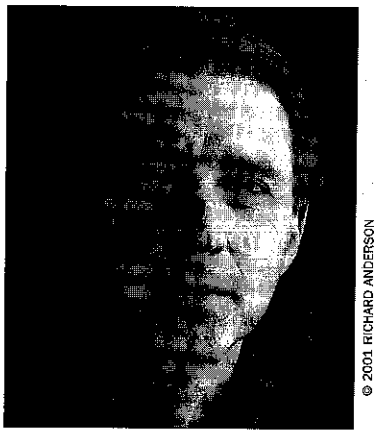
We came to the consensus that photographers lack a market force, that no individual photographer could or should stand up to the pressures of the marketplace especially when the other side has teams of lawyers writing contracts to protect their client's best interests. We also agreed that it is unreasonable to expect an organization with a volunteer board, a small staff and limited resources to be able to solve all the problems for publications photographers. It became very clear to us that we needed to find resources outside of ASMP to get the job done. With the National Cooperative Bank and Co-op Solutions, we have begun to do that.

During the Bradshaw Leadership Conference this month in Aspen, another group of volunteers—chapter leaders from throughout the country—will be presented with questions similar to those that the board considered. Since this is written prior to that conference, I don't know whether they will agree with the national board's conclusions from September.

Perhaps they will have a different slant on our problems, shed more light on our conclusions or agree with us wholeheartedly. It's not vital that our answers agree. What is really important is that we try to come to grips with what is going on around us as we contemplate the delights and dilemmas of the digital revolution.

That's the very essence of our Society of photographers—an interdependence based on our common desire to make a living by publishing photographs.

The same goes for each of you. The more people we get off the sidelines and into the game, the greater the chance that we will win. Those of us in leadership positions will continue to search for revenues and resources to fulfill our mission and for partners to augment our volunteer efforts. But, unless we engage our members in great numbers—a true collective action — undoubtedly we will fall short of our goals.



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Dave Harp
ASMP president and chairman of the board

Photographers have looked to ASMP for help and guidance for more than a half century and they will continue to do so if we take the time and effort to study the issues and strive for consensus. If we can read off the same page we will have a much better shot at financial security than if we continue to go it alone. I have been a member of ASMP since 1988 and have been a good student of our business seminars, white papers, *Bulletin* articles and chapter meetings about business practices in photography. Yet I always find myself at a disadvantage when I am up against an art director or picture editor who wants to "own" my photographs or to lease them under unreasonable conditions. "Just say no" hasn't solved the drug problems in this country nor will the same mantra allow a lone photographer to turn down a bad contract. It's time we understand what's happening to our profession, to take collective action, and take control of our livelihoods.

ON A PERSONAL NOTE

You will have noticed a new face on this page. Gene Mopsik has completed his term as president and the board has given me a one-year sentence to take his place. (No time off for good behavior.) Gene has been an exemplary volunteer for ASMP: as president of the Philadelphia chapter, as national board member, treasurer and of course, national president. I am certain that I would not have taken on this new responsibility without his guidance and counsel over the past year. When he took the top job in January of 2000, he promised me he would give it everything he had and be a tough act to follow. He kept that promise and I will try to do the same. Fortunately, he has three more years on the national board and I know ALL of his phone numbers. ∞

LEGAL ACTIVITY

Fighting the cold war for creators BY VICTOR S. PERLMAN

ASMP's legal and advocacy efforts are at an all-time high as photographers find themselves in a cold war, being attacked from all sides. In this arena, ASMP has been carrying out its mission and strategic objectives by leading the battles for photographers' rights. Those battles have been chosen for one of two reasons: either to improve the situation for photographers or to stop the erosion of their position. The Society's activities with the Register of Copyrights, Mary Levering, her general counsel, and her senior staff are also at an all-time high, elevating ASMP's profile within the Copyright Office. ASMP is competing with organizations that represent huge, rich and powerful corporations or enormous numbers of individuals and it has only been through the consistent and assertive efforts that ASMP has exerted within the Copyright Office and the copyright community that we have managed to achieve such an excellent relationship with that office. This in turn has developed the clout that ASMP is able to wield within the world of copyright owners and users.

During the past year or so, ASMP testified and filed comments in hearings before the Register on technical, but highly controversial, aspects of the Digital Millennium Copyright Act. When the Copyright Office was threatened with budget cuts under appropriations legislation that would have been disastrous, ASMP was the first, and one of the most out-spoken, organizations to leap to the defense of the Copyright Office, repeatedly contacting key legislators in both houses of Congress.

Most importantly we have moved our efforts at achieving expedited copyright registration to the point where a proposed regulation for expedited registration of groups of published works has been drafted, published, and publicly commented upon (as required by law). The Copyright Office general counsel tells us that he expects to have the regulation finalized before the end of the calendar year.

"ASMP current legal activity includes involvement in a number of cases which affect a wide cross section of creators."

SHOOTING ON FEDERAL LAND AND OTHER LEGISLATION

ASMP has finally achieved success in the passage and enactment of a federal law that provides for fair and uniform permit requirements for photographers shooting on government lands, no matter which agency is in charge. Generally, if you are not using models or props, and if you aren't putting unusual burdens on the lands or the government's staff, you do not need a permit. This has been years in the making, and ASMP staff testified before Congress on several occasions to achieve this.

We have also been carefully watching several pieces of legislation. H.R. 1304 is a bill unrelated to photography or copyrights, but of great interest to us. It is a bill that would grant a limited exemption from the antitrust laws for physicians negotiating with health plan providers. It would provide for a 3-year trial period. If this law passes, and if the trial period does not produce disastrous results, it may serve as the foundation for us to try to achieve a similar exemption for freelance photographers negotiating with huge publishing entities and mega-stock-houses. This bill has been passed in the House and sent to the Senate, where it was sent to the Committee on Health, Education Labor and Pensions in late July.

Also, in response to recent court decisions granting states sovereign immunity from copyright infringement suits, Senator Leahy has introduced bill S.1835, which is designed to do what we thought we accomplished several years ago: change the law so that states can be sued for copyright infringement. That bill is stuck in the Senate Judiciary Committee, and we have been working with the committee's minority staff to try to pry it loose. Unfortunately, despite fairly broad support, we expect that nothing will happen before the end of this session, and the bill will have to be reintroduced next year. At that time, we are hoping that it will be reintroduced with both bipartisan and bicameral support so that it will be more likely to be passed and enacted.

ASMP current legal activity includes involvement in a number of cases which affect a wide cross section of creators including photographers, writers, musicians and artists. It seems that in all areas of intellectual property, creators are having to fight for or defend their rights. The following are some examples of current struggles in the cold war.

A&M RECORDS ET AL. V. NAPSTER

As a result of the extremely high, and high profile, level of ASMP's activity in numer-

Our Cover

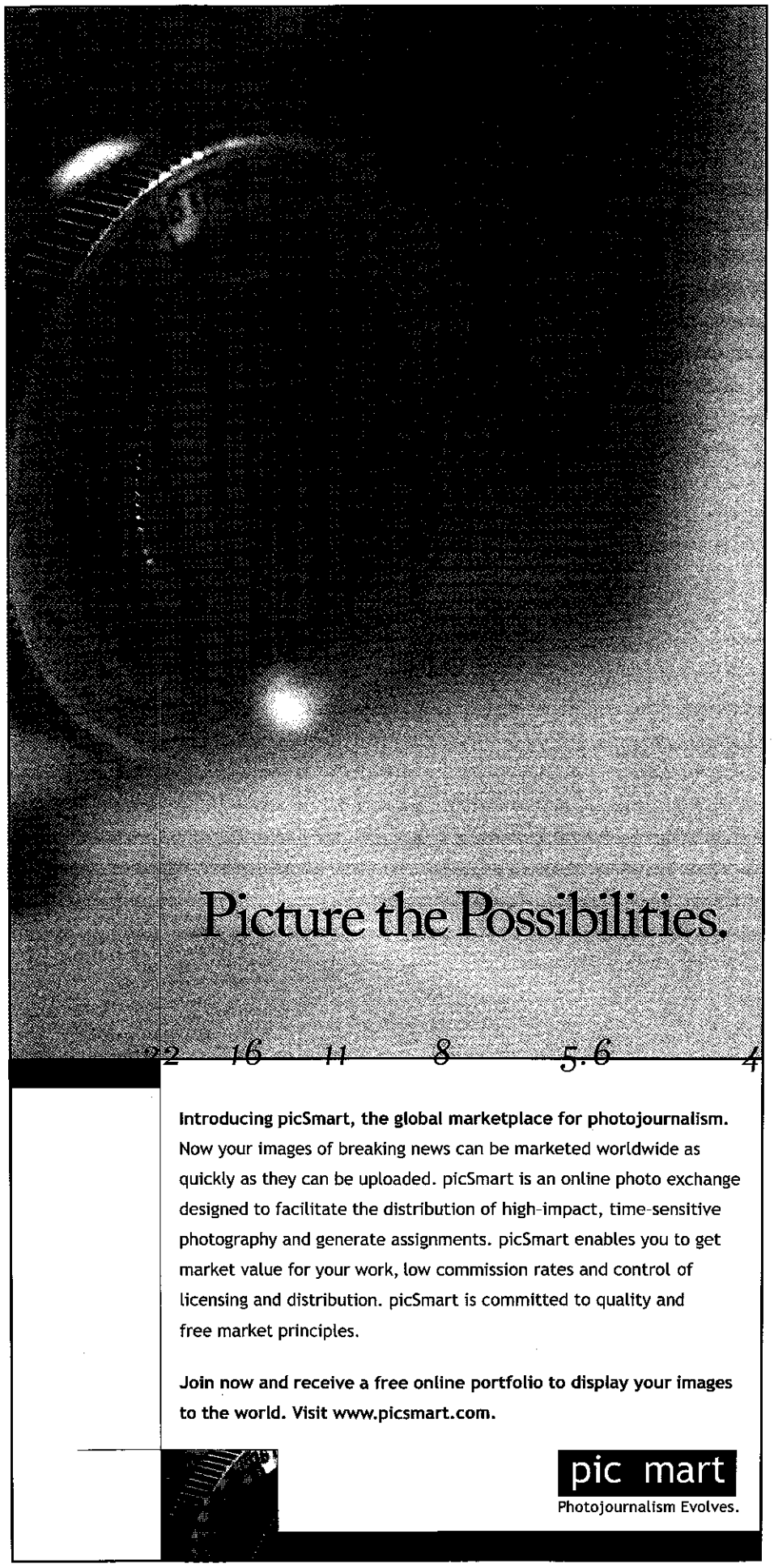
At age 33, New York-based photographer Jill Greenberg is one of ASMP's younger members, representing a new wave of exciting young talent in contemporary photography. Born in Montreal, Canada, in July, 1967, she grew up in a suburb of Detroit. In 1989 she graduated from the Rhode Island School of Design with a BFA in Photography and moved to New York City to pursue a career in photography. It was a good move.

Within the past five years, from 1995 to the present, Greenberg has built up an impressive array of clients ranging from Coca Cola, Pepsi, MTV, Eastman Kodak and Absolut Vodka to Warner Bros., IBM, Motorola, Microsoft and Chase Manhattan Bank. Agencies she works with include Saatchi & Saatchi, McCann Erickson, DDB Needham, J. Walter Thompson, Leo Burnett and Young & Rubicam.

Pick up publications like *GQ, People, Seventeen, Wired, Spin, Entertainment Weekly, Men's Health* and *Teen People* (to name but a few) and you are likely to see Greenberg's photographs of celebrities and musicians such as David Bowie, Kevin Spacey, Conan O'Brien, Howard Stern, Spike Lee and Oscar de la Hoya.

Our cover image, which was shot for *Paper* magazine in 1998, was made with a Mamiya RZ with a 90mm lens and shot on Agfa Optima film. Greenberg lit the model with Speedotron strobes and colored gels. The negatives were then scanned on an Optonics drum scanner and colors were altered in Photoshop.

Of her approach to creating images, Greenberg says: "I like to blur the line between photography and illustration. I grew up drawing and painting and doing my own Photoshop™ allows me to keep up with that aspect of my art, plus I love retouching faces and altering color." And, obviously, her approach is successful. ∞



ous other high profile cases, we have been asked by the Motion Picture Association of America (MPAA) to join them and the Recording Industry Association of America (RIAA) in the amicus curiae brief they are filing in the Napster case. The Napster issue is similar to that in Kelly v. Arriba Soft and centers around the legality of freely downloading copyrighted works off the Internet. ASMP has reviewed the draft brief and agreed to join MPAA and RIAA. The brief was filed shortly after Labor Day.

ETS-HOKIN V. SKYY SPIRITS

Photographers have had a big victory in the Ninth Circuit. ASMP supplied both legal representation for the photographer and an amicus curiae brief. This was the appeal of a decision in US District Court in San Francisco that said that product shots for an ad campaign weren't sufficiently original to be copyrightable. If we had not supported this case and won, every product shot could have been the equivalent of a work-made-for-hire for the ad agency or its client. (*See pages 7 and 27.*)

GREENBERG V. *NATIONAL GEOGRAPHIC*

Briefs have been filed, and we are waiting for the U.S. Court of Appeals in Florida to hear oral arguments and then rule. ASMP filed an amicus curiae brief. The issue is whether *National Geographic* can take all of its back issues and, without permission from the photographers, put out new electronic products like CD-ROMs using the photographs. The case is similar to *Tasini* in the sense that we are trying to prevent publishers from seizing rights in electronic media without paying for them.

TASINI V. *NY TIMES*

Creators had a big win in the Second Circuit and now are waiting to see if the U.S. Supreme Court will hear the case. ASMP filed an amicus curiae brief. The issue is whether publishers automatically have the right to take the contents of their print publications and put them into online and CD-ROM databases without permission from, or payment to, the authors of the original articles. The US Court of Appeals for the Second Circuit has said no, the publishers have to get permission, which means they have to pay the writers and photographers.

GENTIEU V. GETTY/TONY STONE IMAGES

This case is at the discovery stage and ASMP has paid part of ASMP member Penny Gentieu's legal bills. The issue here is one of mistreatment of a photographer by a stock agency involving flagrant breaches of contract by the agency. ASMP is involved to show the agencies that they "can't put the screws" to photographers and get away unscathed.

KELLY V. ARRIBA SOFT

Briefs have been filed in the Ninth Circuit, and ASMP is providing both legal counsel for the photographer and an amicus curiae brief. This is an appeal of a decision in the U.S. District Court in Southern California that held that Web site operators could scour the Internet, collect every photograph it could find, put those photographs in its Web site for anyone to access, and deep link to the photographers' Web sites, without permission and without violating copyright law. If nothing is done to reverse the decision, every photograph on the Internet will be fair game for fair use.

BOSTON GLOBE CONTRACT

Pleadings have been filed in state court in Boston. ASMP is sharing the cost of the litigation with the United Auto Workers, UAW. This legal action, Marx et. al. v. The Globe Newspaper Co.,is supported by three organizations representing freelancers, on behalf of their members who contribute to the Globe: The National Writers Union, Local 1981 of the International Union, UAW; the Graphic Artists Guild, Local 3030 of the International Union, UAW; and ASMP.

The issue is the validity of a contract designed to make an end run around the decision in Tasini. It forces photographers and other contributors to grant a retroactive license to the *Globe* for electronic and other uses that the *Globe* has been making, without any additional compensation.

cont. on p. 24

HOW TO SUPPORT THE LEGAL ACTION FUND

YES, I would like to contribute to the ASMP Legal Action Fund and help my Society's legal advocacy efforts. Please find enclosed my contribution of

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To phone in a credit card contribution, please call:
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Please mail your check or money order to:
ASMP, Legal Action Fund, 150 N. Second Street, Philadelphia, PA 19106.

Thank you for your support. 10/00

LEGAL ACTIVITY *cont. from p. 23*

Without that contractual license, the *Globe* is in violation of the copyrights of numerous photographers and other contributors. (***Editor's note:*** *For more details go to ASMP's Web site [www.asmp.org] News and events and see Special Announcements.*)

MORRIS V. BUSINESS CONCEPTS

ASMP is filing an amicus brief - briefs are due in October - in the Second Circuit Court of Appeals. The decision being appealed held that the copyright registrations of issues of a magazine was not registration as far as the individual articles in those issues is concerned. This means that, unless the appeal is successful, photographers cannot rely on the copyright registrations of collective works by their publishers for any kind of copyright protection; to be protected, the photographer will have to register each image on his or her own.

ETW V. JIREH PUBLISHING - THE TIGER WOODS CASE

Briefs have just been filed in the Sixth Circuit. We are providing an amicus brief. This case is one where we are defending a lower court decision on appeal, instead of trying to get it reversed. The case involves claims by Tiger Woods through his management company that a limited edition poster showing a recognizable image of him violated his trademark and/or publicity rights. Woods has amicus briefs being filed from organizations such as the NFL to the estates of celebrities like Elvis Presley. If the lower court decision is overturned, photographers may need to get permission from, and pay royalties to, every possible celebrity for every possible use except hard news.

ROCK AND ROLL HALL OF FAME V. CHUCK GENTILE

This decision in photographer Chuck Gentile's favor was a major victory for photographers and ASMP. ASMP worked closely with Gentile from the beginning of the case and filed an amicus curiae brief on his behalf. The Sixth Circuit ruled that Gentile's poster showing his photograph of the Rock and Roll Hall of Fame building, and the caption identifying it, did not violate the Rock Hall's trademark or any other rights. If Gentile had lost, photographers would have been unable to make photographs of, or even showing, any building without running the risk of a lawsuit or getting permission from each building owner.

PICTURE PERFECT

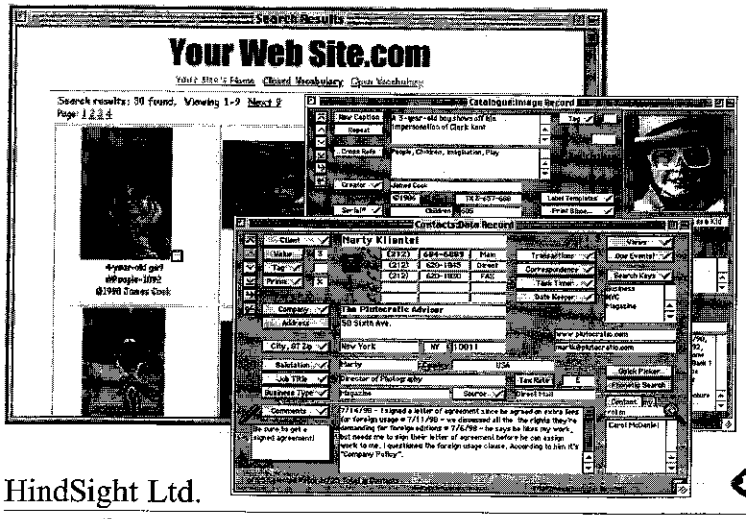
ASMP is running and paying for an investigation in this situation in which an agency has not paid photographers or intermediate agencies any fees for a long time, and we have been trying to find ways of stopping Picture Perfect from continuing to license images; get the photographers as much money as may be possible; and get the images back to the photographers from the agency.

GOOD OFFICES

One of the most important, but least visible, areas of ASMP's legal and advocacy activities is the Society's *good offices* program. Every year, ASMP receive literally thousands of phone calls, e-mails and faxes from photographers with questions and problems. Many of them involve situations where they need intervention, not just advice, from someone on their side, but are not yet at the point where hiring a lawyer is appropriate. In response, ASMP staff make phone calls, send letters, even attend meetings, on behalf of photographers to convince clients and others to do things like paying their bills, returning slides, paying for infringements, and similar. For those photographers involved, those efforts are probably the most important thing that ASMP ever does.

Equally important, and almost equally time-consuming is ASMP's support of members indirectly, through their lawyers. Many members have lawyers with questions, who need assistance in order to provide their clients, our members, with the best possible representation. Over the course of the year we spend scores of hours talking with these lawyers, providing them with cases and other information to support their positions in court and/or negotiations, putting them in touch with expert witnesses, networking lawyers so that they can pool their resources in related cases, That kind of support makes the difference between members winning or losing their cases. It is invaluable, yet it costs our members and their lawyers nothing, because we provide it as part of the benefits our members get for joining and paying their dues. ∞

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3/27/2001

Court rules against magazine

BY CATHERINE WILSON
Associated Press

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Tough Love FOR WALL STREET

Freelancers get lift on digital rights

Federal appeals court unanimously finds that a National Geographic CD-ROM infringed a photographer's rights

By Roger Parloff
INSIDE.COM

March 23 — Less than a week before the U.S. Supreme Court is scheduled to hear a case that will determine whether freelance writers can demand royalties from newspapers and magazines that resell their articles to electronic databases, the publishers have suffered a major setback.

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REVERSING THE RULING of a Miami federal district judge, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously concluded on Thursday that the National Geographic Society had infringed the copyrights of freelance photographer Jerry Greenberg when it republished his photos in a 30 CD-ROM compilation of every issue of the magazine from 1888 to 1996.

The questions raised by the case are almost identical to those raised in the U.S. Supreme Court

case, Tasini v. The New York Times Company. In that legal battle, six freelance writers have sued three publishers and two database companies — Reed Elsevier's Lexis-Nexis and the Bell & Howell Information and Learning Company (formerly University Microfilms, Inc.) — for failing to obtain their consent before reprinting their articles. As in the Greenberg case, the district judge in Tasini had ruled for the publishers, but the appellate panel unanimously reversed in September 1999. The Eleventh Circuit ruling is especially ominous for the publishers, since in certain respects the facts of the case are slightly more favorable to the publisher than are those in the Tasini case.

Advertisement



The critical issue in both cases centers around the rights of freelancers when it comes to contributions they make to "collective works" — publications, like newspapers and magazines, that are made of individually copyrighted articles and photos. Publishers are permitted to own copyrights to each complete issue of their collective work, because each edition reflects editorial choices about how to display and prioritize the numerous articles, photos, graphics and ads contained within it. Freelance contributors to those collections, on the other hand, retain their copyrights to their own articles for other uses unless they have signed them away.

In 1976, when Congress revamped the copyright laws, it added a provision that specified that publishers of collective works would be presumed to own only the right to use the freelancer's contribution as part of that particular "collective work," a "revision" of it or "any later collective work in the same series." Examples of "revisions" that were cited by the law's drafters at the time were the evening edition of a morning newspaper, or a revised edition of an encyclopedia.

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change +0.450
Add this stock to your MSNBC homepage
MSNBCINTERACTIVE
Data: MSN MoneyCentral Investor and S&P Comstock 20 min.delay.

In both the Tasini and Greenberg cases, the defendants have argued that the electronic databases are, in essence, "revisions" of the original work. The argument seems especially strained in the context of databases like Lexis-Nexis, where works from one publication are commingled with those from thousands of other publications, and where articles are displayed in disembodied text files, divorced from the photos, graphics, tables, charts, ads and other information that originally appeared around it.

The National Geographic CD-ROM set, however, called the Complete National Geographic, poses a tougher question. It takes advantages of more

and accurately portray each page of every issue of every magazine. (In this respect, it more closely resembles, for instance, microfiche or microfilm versions of a publication, which have generally been assumed to be either the "collective work" itself or a "revision" of it.)

In fact, Judge Stanley F. Birch Jr., writing for the appeals panel in the Thursday ruling, never specifically decides whether the CD-ROM set would have violated Greenberg's rights had it consisted of nothing more than these digital replicas of the magazine. Instead, he found that because the set also encompassed a sophisticated search engine and other software for navigating the set, as well as an introductory animated montage of 10 cover photos — one of which Greenberg had taken in 1961 — that it could not be considered a mere revision. "Common-sense copyright analysis," he wrote, "compels the conclusion that the Society . . . has created a new prodcut . . . in a new medium, for a new market that far transcends any privilege of revision or other mere reproduction envisioned" in the law.

New York Times
- Message Board
- Company Profile
- Earnings Estimates
- Analyst Reports

[INSIDE] LINKS
- Inside.com
- Inside Dope
- Deals & Corporate Moves
- Job Changes

In an important fillip to its ruling, the appeals court also instructed the lower court to focus on alternatives to ordering anything so Draconian as deleting Greenberg's works from the CD-ROM set. "We urge the court to consider alternatives, such as mandatory license fees," Judge Birch wrote, "in lieu of foreclosing the public's computer-aided access to this educational and entertaining work."

That moderate, flexible approach to fashioning relief in this situation is important, because the publishers and their allies in the Tasini case have strenuously argued that any ruling for the freelancers would force them to destroy existing CD-ROMs, and to delete thousands of articles from their databases, leaving holes in the historical record and doing great damage to the public.

National Geographic Society lawyer Robert Sugarman, who was still only just absorbing the ruling, said only, "We respectfully disagree with the result and rationale and are considering what to do."

More entertainment & media news

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- AOL plans cable TV music channel
- Inside.com: MP3.com plays new revenue streams
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- Barnes & Noble reports loss
- Inside.com: CNET vet to lead Industry Standard

The Society has also been socked with three other suits by freelancers whose works are reprinted in the CD-ROM set, all of which are pending in federal court in Manhattan. In related litigation, three potential class-action suits have been filed on behalf of freelance writers who seek compensation from 14 electronic databases for past and future alleged copyright infringement, due to their archiving of the writers' works. Those cases have been consolidated in federal court in Manhattan before Judge George B. Daniels, but have been stayed pending resolution of the Tasini case by the U.S. Supreme Court, which is expected to rule by end of June.

(Author's disclosure: Since I have written freelance articles, I may eventually be a class member in the class actions that have been filed.)

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[redacted] [INSIDE]

[redacted] Coin Toss Decides Supreme Court Lawyer for Freelancers' Case

[redacted] Ken Burns and Doris Kearns Goodwin Show Up on Publishers' Side in Dispute With Freelancers

[redacted] Supreme Court to Review the Electronic Rights of Freelancers

[redacted] National Geographic Society Hunts For a New Magazine Czar

[redacted] Freelancer Looks to Make a Business Out of Syndicating His Colleagues

Subj: **more on Jerry's win**
Date: Saturday, March 24, 2001 9:56:15 AM
From: fward@erols.com
To: dausten@hoosier.net, WhoDUExpct@aol.com, dirck.halstead@pressroom.com, rainbow@bcn.net, cmoore1567@earthlink.net, bcphoto@maine.rr.com, lulukiku@aol.com, shipshooter@mindspring.com, jim@chd.com, freepress@wpfc.org, larry@mindenpictures.com

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

BY CATHERINE WILSON
Associated Press

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The precedent-setting decision Thursday by the 11th U.S. District Court of
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The lawsuit brought by freelance photographer Jerry Greenberg of South Miami
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The appellate ruling ``establishes brand new law that had not existed before,'' Norman Davis, Greenberg's attorney, said Friday. ``It'll apply to any author who owns the copyright in his work.''

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---------- Headers ----------
Return-Path: <fward@erols.com>
Received: from rly-yd04.mx.aol.com (rly-yd04.mail.aol.com [172.18.150.4]) by air-yd05.mail.aol.com (v77_r1.36) with ESMTP; Sat, 24 Mar 2001 09:56:14 -0500
Received: from smtp-hub.mrf.mail.rcn.net (207-172-4-107.in-addr.mail.rcn.net [207.172.4.107]) by rly-yd04.mx.aol.com (v77_r1.36) with ESMTP; Sat, 24 Mar 2001 09:56:05 -0500
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Date: Sat, 24 Mar 2001 09:58:46 -0500
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Organization: Gem Book Publishers
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X-Accept-Language: en,pdf
MIME-Version: 1.0
To: "Austen, David" <dausten@hoosier.net>,
 "Burnett, David" <WhoDUExpct@aol.com>,
 "Halstead, Dirck" <dirck.halstead@pressroom.com>,
 "Mccoy, Dan" <rainbow@bcn.net>,
 "Moore, Charlie" <cmoore1567@earthlink.net>,
 "Curtsinger, Bill" <bcphoto@maine.rr.com>,
 "Greenberg, Idaz & Jerry" <lulukiku@aol.com>,
 "Atkin, Jonathan" <shipshooter@mindspring.com>,
 "Pickerell, Jim" <jim@chd.com>, "Bullen, Dana" <freepress@wpfc.org>,
 "Minden, Larry" <larry@mindenpictures.com>
Subject: more on Jerry's win
Content-Type: text/plain; charset=iso-8859-1; x-mac-type="54455854"; x-mac-creator="4D4F5353"
Content-Transfer-Encoding: 8bit

Subj: **No Subject**
Date: 3/22/01 2:36:00 PM Eastern Standard Time
From: Earthimag@aol.com
Sender: owner-asmpuw@mail2.comfluent.net
To: underwater@asmp.org

This is a message forwarded from Vic Perlman!

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Managing Director and General Counsel
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Fax: 215-451-0880
E-mail: <perlman@asmp.org> or <vperlman@earthlink.net>
URL: http://www.asmp.org

Subj: **No Subject**
Date: 3/22/01 2:36:00 PM Eastern Standard Time
From: Earthlmag@aol.com
Sender: owner-asmpuw@mail2.comfluent.net
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FLORIDA

IVAX

Expects to beat profit forecast

Shares of **Ivax Corp. (IVX)** jumped nearly 10 percent Friday after the Miami pharmaceuticals company said it will beat profit expectations for the quarter ending March 31.

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

Ivax shares closed Friday at $30.10, up $2.65. The stock is still well below its 52-week high of $52.88.

MAYOR'S JEWELERS

Getz resigns as retail president

Samuel A. Getz resigned as president of Sunrise-based **Mayor's Jewelers' (MYR)** retail operating subsidiary Friday.

Getz, who couldn't be reached for comment, has agreed to serve as a consultant to the company. The company, formerly known as Jan Bell Marketing, acquired the Mayor's business in 1998 from a group that included Getz's family. Jan Bell later changed its name to Mayor's.

Getz's resignation isn't surprising. Last month, Mayor's longstanding deal to operate jewelry retail operations in Sam's Club, Wal-Mart Stores warehouse-club chain, ended. That left the Sunrise company with just the Mayor's business, a chain of upscale jewelry stores. Some

Business Day
The New York Times

Big Media v. Freelancers: The Justices at the Digital Divide

By FELICITY BARRINGER and RALPH BLUMENTHAL

For scholars, the electronic archives of contemporary journalism are a mother lode of history. For publishers and database owners, they are valuable intellectual property. But for a group of angry freelance writers, these archives are a legally dubious bazaar where their wares are peddled without their consent.

So the writers sued publishing giants like The **New York Times** Company and **Time Inc.**, arguing — as actors, screenwriters and musicians have argued elsewhere — that their work has been unfairly appropriated.

On March 28, after a seven-year fight that produced contradictory lower court decisions, the freelancers' case will be argued before the United States Supreme Court, opening the way for the court's first decision on the murky issue of who owns what on the digital frontier.

The writers argue that they retain ownership of their work. But, they say, publishers are illegally making the work available to new, paying audiences through electronic database owners like **Lexis-Nexis** and companies like **University Microfilms International**, which put the archives on CD-ROM's. Seeking to share in the bounty, they cite the 18th-century lexicographer Samuel Johnson, who said, "No man but a blockhead ever wrote, except for money."

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A sharp debate among historians and biographers has followed. Pulitzer Prize-winning historians like David McCullough, Doris Kearns Goodwin and David M. Kennedy are lining up with the publishers, while the writers have support from the Pulitzer Prize biographer Robert K. Massie and the science writer and biographer James Gleick.

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Continued From First Business Page

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The sides offer dueling visions of the dire consequences that await if their foes prevail. Bruce P. Keller, a lawyer for the publishers, said last week: "If they win, everyone will lose. The publishers will lose because they stand the risk of possible copyright liability judgments. The public will lose because the historical record will be incomplete, and the freelancers will lose because their articles will no longer be included" in electronic archives.

Mr. Tasini responds: "The issue we're facing is the same issue that actors are facing and screenwriters are facing. All of us are saying we deserve a fair share of revenue that these big media companies are making in the digital age. You want to use my work? You have to pay."

Mr. Gleick, in a separate interview, added: "I'm really sort of shocked and disappointed that any writers and historians can be on the other side. How can you get writers to say, 'Steal my work — don't bother paying me please'?"

A bazaar to plunder writers' work, or a legitimate source of corporate revenue?

The percentage of newspaper and magazine archives contributed by freelancers is not yet known, and it is unclear how much a defeat in this case could cost the publishers. Damages could be awarded in a later court proceeding, if the Supreme Court rules for the writers.

The case turns on the question of ownership. There is no question that the publishers bought the right to print the articles. Changes that Congress made in the copyright laws in 1976 to enhance the rights of freelancers made it clear that these writers still own their articles after publication, but that publishers could still include them in "revised" versions of the newspaper. Now, do electronic archives qualify as a "revision"?

The writers argue that the solution lies in a rights clearinghouse, akin to the American Society of Composers, Authors and Publishers, which licenses performance rights for music owned by Ascap members. Mr. Tasini's group, the National Writers Union, established such a clearinghouse in 1994. The publishers' lawyers argue that this sort of clearinghouse can never protect against maverick freelancers who hope to make more money through lawsuits.

As Mr. Keller said, "It may be in the eyes of many freelancers that the potential reward is greater by suit." He added, "If that is true, the only way to reduce the right of infringement liability is to delete today in advance of the claim they may make tomorrow."

Mr. Tasini responds, "Authors on their own are not going to sue people if there's another solution that's simpler and easier."

Leon Friedman, a professor of copyright law at Hofstra Law School, who filed a brief on behalf of the freelancers, scornfully calls the prospect of archival deletions "the parade of horribles." But the prospect of a historical record with holes in it was enough to bring the publishers some high-powered academic support. This brought out comparable support on the writers' side. Now, an array of award-winning writers, professors and historians are facing off across the Tasini divide.

The publishers and database operators enlisted, among others, Ken Burns, the documentary-film maker, and the authors Richard N. Goodwin and Gordon S. Wood. The freelancers have enlisted, in addition to Mr. Gleick and Mr. Massie, scholars and authors like Jacques Barzun, Tracy Kidder, Jack Miles and Jean Strouse.



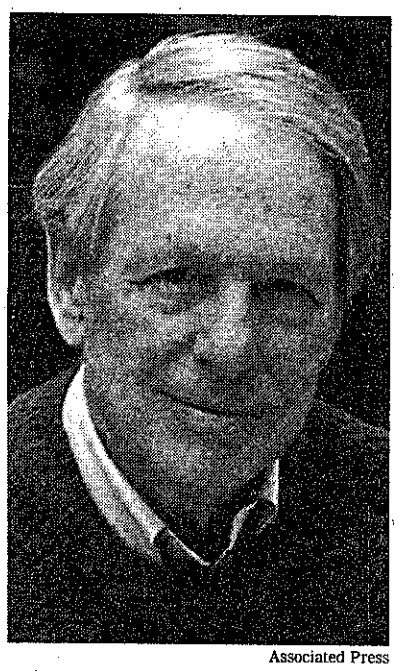
Susan B. Markisz for The New York Times

Jonathan Tasini, the president of the National Writers Union, argues: "We deserve a fair share of revenue that these big media companies are making in the digital age. You want to use my work? You have to pay."



Associated Press

Laurence H. Tribe, of Harvard Law School and the Florida recount, will argue the publishers' case before the Supreme Court. The dispute has enlisted thinkers and writers on both sides, several with Pulitzer Prizes.



Associated Press

The biographer Robert K. Massie saw "another attempt to take from authors the little they make."



Sara Krulwich/The New York Times

The Pulitzer Prize historian Doris Kearns Goodwin is one of those lining up with the publishers.

Mr. Gleick, an Internet entrepreneur and author who worked for The Times for 10 years as a reporter and editor and still contributes to the paper, said he doubted that the integrity of electronic archives would suffer if publishers had to pay freelancers for copyrights. "Where's the evidence this ever happened?" he asked. "It's a straw man." He added that the publishers' legal argument rested on a "contortionist's claim" that Nexis is an edition of The New York Times.

Those aligned with the freelancers argue in legal papers that there is "a vast difference between a single edition of a newspaper or magazine and the Nexis database, which incorporates material from so many different sources."

The writers are concerned about potential economic loss. Mr. Massie, a former president of the Author's Guild, called the publishers' position "another attempt to take from authors the little they make."

Arthur Sulzberger Jr., chairman of The New York Times Company, responded: "The Times has long believed and continues to believe that it fully compensates its journalists, both financially and otherwise. The advent of another form of distribution does not change that, any more than the introduction of the New York Times News Service many years ago changed it. The Times could not be the newspaper it is without the great writers it has had and continues to have to this day."

The legal brief filed by the authors who are aligned with the publishers warns of damage to scholarship if publishers, feeling legally vulnerable, excise bits of their archives. Such gaps, the brief argues, represent "a grave threat to the quality and completeness of historical scholarship."

Jack N. Rakove, a history professor at Stanford University who joined in that brief, said in an interview, "If, in fact, there is a serious chance that complications in getting authorial permission would lead to the dilution of future historical archives, it would be of serious concern."

But, he said, he was also a freelancer and did not want "to deny the legitimacy of their concerns."

When the case was filed in December 1993, electronic archives had been in widespread use for at least a dozen years, but freelancers usually arranged assignments and fees with newspaper editors on an informal, oral basis. Since the lawsuit was filed, both Newsday and The Times have instituted a system of formal contracts for freelancers. These specify that the publishers have the rights necessary for electronic uses.

Time Inc. is a defendant in the suit thanks to an article in Sports Illustrated. The magazine's contract with the freelancer who later joined the infringement suit did not mention digital rights. Time Inc. contracts now do so.

In suing, the freelancers relied on the Copyright Act of 1976. The crucial language gives publishers who buy freelance work "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Lexis-Nexis, the publishers argue, is just such a revision of a collective work.

In August 1997, Judge Sonia Sotomayor, of United States District Court in Manhattan, ruled for the publishers, saying "the electronic databases retain a significant creative element of the publisher defendants' collective works."

In September 1999, the United States Court of Appeals for the Second Circuit overturned this decision, ruling: "Nexis is a database comprising thousands or millions of individually retrievable articles taken from hundreds or thousands of periodicals. It can hardly be deemed a 'revision' of each edition of each periodical that it maintains."

Business Day
The New York Times

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The writers argue that the solution lies in a rights clearinghouse, akin to the American Society of Composers, Authors and Publishers, which licenses performance rights for music owned by Ascap members. Mr. Tasini's group, the National Writers Union, established such a clearinghouse in 1994. The publishers' lawyers argue that this sort of clearinghouse can never protect against maverick freelancers who hope to make more money through lawsuits.

As Mr. Keller said, "It may be in the eyes of many freelancers that the potential reward is greater by suit." He added, "If that is true, the only way to reduce the right of infringement liability is to delete today in advance of the claim they may make tomorrow."

Mr. Tasini responds, "Authors on their own are not going to sue people if there's another solution that's simpler and easier."

Leon Friedman, a professor of copyright law at Hofstra Law School, who filed a brief on behalf of the freelancers, scornfully calls the prospect of archival deletions "the parade of horribles." But the prospect of a historical record with holes in it was enough to bring the publishers some high-powered academic support. This brought out comparable support on the writers' side. Now, an array of award-winning writers, professors and historians are facing off across the Tasini divide.

The publishers and database operators enlisted, among others, Ken Burns, the documentary-film maker, and the authors Richard N. Goodwin and Gordon S. Wood. The freelancers have enlisted, in addition to Mr. Gleick and Mr. Massie, scholars and authors like Jacques Barzun, Tracy Kidder, Jack Miles and Jean Strouse.



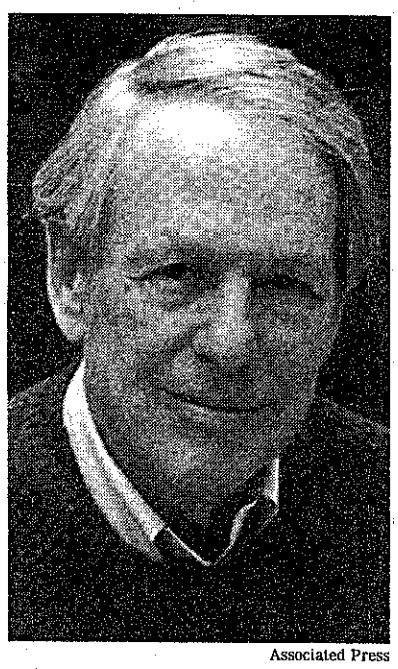
Susan B. Markisz for The New York Times

Jonathan Tasini, the president of the National Writers Union, argues: "We deserve a fair share of revenue that these big media companies are making in the digital age. You want to use my work? You have to pay."



Associated Press

Laurence H. Tribe, of Harvard Law School and the Florida recount, will argue the publishers' case before the Supreme Court. The dispute has enlisted thinkers and writers on both sides, several with Pulitzer Prizes.



Associated Press

The biographer Robert K. Massie saw "another attempt to take from authors the little they make."



Sara Krulwich/The New York Times

The Pulitzer Prize historian Doris Kearns Goodwin is one of those lining up with the publishers.

Mr. Gleick, an Internet entrepreneur and author who worked for The Times for 10 years as a reporter and editor and still contributes to the paper, said he doubted that the integrity of electronic archives would suffer if publishers had to pay freelancers for copyrights. "Where's the evidence this ever happened?" he asked. "It's a straw man." He added that the publishers' legal argument rested on a "contortionist's claim" that Nexis is an edition of The New York Times.

Those aligned with the freelancers argue in legal papers that there is "a vast difference between a single edition of a newspaper or magazine and the Nexis database, which incorporates material from so many different sources."

The writers are concerned about potential economic loss. Mr. Massie, a former president of the Author's Guild, called the publishers' position "another attempt to take from authors the little they make."

Arthur Sulzberger Jr., chairman of The New York Times Company, responded: "The Times has long believed and continues to believe that it fully compensates its journalists, both financially and otherwise. The advent of another form of distribution does not change that, any more than the introduction of the New York Times News Service many years ago changed it. The Times could not be the newspaper it is without the great writers it has had and continues to have to this day."

The legal brief filed by the authors who are aligned with the publishers warns of damage to scholarship if publishers, feeling legally vulnerable, excise bits of their archives. Such gaps, the brief argues, represent "a grave threat to the quality and completeness of historical scholarship."

Jack N. Rakove, a history professor at Stanford University who joined in that brief, said in an interview, "If, in fact, there is a serious chance that complications in getting authorial permission would lead to the dilution of future historical archives, it would be of serious concern."

But, he said, he was also a freelancer and did not want "to deny the legitimacy of their concerns."

When the case was filed in December 1993, electronic archives had been in widespread use for at least a dozen years, but freelancers usually arranged assignments and fees with newspaper editors on an informal, oral basis. Since the lawsuit was filed, both Newsday and The Times have instituted a system of formal contracts for freelancers. These specify that the publishers have the rights necessary for electronic uses.

Time Inc. is a defendant in the suit thanks to an article in Sports Illustrated. The magazine's contract with the freelancer who later joined the infringement suit did not mention digital rights. Time Inc. contracts now do so.

In suing, the freelancers relied on the Copyright Act of 1976. The crucial language gives publishers who buy freelance work "only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." Lexis-Nexis, the publishers argue, is just such a revision of a collective work.

In August 1997, Judge Sonia Sotomayor, of United States District Court in Manhattan, ruled for the publishers, saying "the electronic databases retain a significant creative element of the publisher defendants' collective works."

In September 1999, the United States Court of Appeals for the Second Circuit overturned this decision, ruling: "Nexis is a database comprising thousands or millions of individually retrievable articles taken from hundreds or thousands of periodicals. It can hardly be deemed a 'revision' of each edition of each periodical that it maintains."

Subj: **No Subject**
Date: 3/22/01 2:36:00 PM Eastern Standard Time
From: Earthlmag@aol.com
Sender: owner-asmpuw@mail2.comfluent.net
To: underwater@asmp.org

This is a message forwarded from Vic Perlman!

Great Job!

I have just learned that the US Court of Appeals for the 11th Circuit today reversed the District Court in Florida and ruled in favor of ASMP member Jerry Greenberg. The main issue was whether National Geographic could issue CD-ROM versions of its print magazine, including Jerry's photographs, without his permission. The trial court originally said that it could, based on the same theory as in the trial court decision in the Tasini case. The Circuit Court in Greenberg's case has now done the same thing that the Circuit Court did in Tasini: reversed and ruled in favor of the photographers and authors. I have not yet seen the text of the decision, so I cannot comment on the 11th Circuit's legal analysis, other than saying that it's a great result.

ASMP has been a major supporter of the photographer in this case, providing financial assistance to Jerry, consultations with his attorney, and an amicus curiae brief on Jerry's behalf; we have also been deeply involved with the Tasini case, which will be argued before the US Supreme Court on March 28. Both cases involve the use of copyrighted works by publishers in digital media when they do not have permission to do so from the creators of those works. With this win in the Greenberg case, our position has been upheld in the two federal Circuit Courts that have ruled on it so far. We do not know yet if the decision in the Greenberg case will be appealed, and we will keep you posted on developments in both cases.

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

Vic
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Story 231

GEOGRAPHIC GUILTY OF COPYRIGHT INFRINGEMENT

June 16, 1999

Judge Joan A. Lenard has found that National Geographic Society infringed the copyright of underwater photographers Jerry and Idaz Greenberg when they used the Greenberg's copyrighted images as reference materials for two projects without permission or compensation. The case was heard in Federal Court in the Southern District of Florida in Miami.

The case has been referred to Magistrate Judge William C. Turnoff for the purposes of holding a settlement conference to determine the amount National Geographic will be required to pay to the Greenbergs.

This is the first time National Geographic has been found guilty of copyright infringement of a photographer's work. The case may open the door for legal action by other photographers against the Society.

In a review of the facts of the case it was shown that Walter Cutler, the work-for-hire illustrator hired by the Society to produce illustrations for an educational GeoPack project, improperly used books produced by the Greenbergs as reference for his illustrations.

On his working drawings Cutler noted the page references referring to the photographs he had copied so the Society editors could verify that the illustrations were accurate. This clearly laid the responsibility on the Society editors because they were fully aware of what had been done and were responsible to obtain proper permissions and deal with compensation issues.

Cutler's illustrations also met the test of "substantial similarity" according to Judge Lenard. The Greenbergs had produced overlays from their books that clearly showed the illustrations were almost exact matches of the Greenberg's photos.

In challenging the Greenbergs' motion for Summary Judgement on Liability, lawyers for National Geographic Society argued that the newly created illustration did not violate the Greenbergs' copyright, and "that even if these images reflect copyrighted material, this use constitutes "fair use".

Judge Lenard found that the illustrations "improperly infringed the photographs at issue, and that the doctrine of fair use is not applicable to these facts."

The court took into consideration the four nonexclusive factors to be considered when determining whether the fair use doctrine applies and concluded, "that neither the GeoPack product nor the Jason Project poster qualify as fair use."

The four factors are:

1 - the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2 - the nature of the copyrighted work;
3 - the amount and substantiality of the portion used in relation to the copyrighted work as a

whole; and
4 - the effect of the use upon the potential market for or value of the copyrighted work.

The courts detailed presentation of the facts related to each of these points should be useful to others faced with a "fair use" claim by any organization, and particularly National Geographic.

Counts three and four in the Greenberg's case are not a part of this decision and dealt with the use of the Greenbergs copyrighted images in the "108 Years of National Geographic on CD-ROM". Earlier in the proceedings lawyers for National Geographic argued that these two counts should be considered based on the "Tasini" decision.

On this point the judge agreed with National Geographic and the arguments for the use of the Greenberg's images in that project were not heard. The Greenbergs have the option to appeal that decision of the judge.

Oral arguments for the appeal of the "Tasini" decision have been heard in the New York Appeals court and all parties are presently waiting for the judge's ruling in that case. The results of that case could affect the Greenbergs ultimate decision.

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Return to News Contents

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Story 389

GREENBERG WINS AGAINST NATIONAL GEOGRAPHIC

March 27, 2001

The U.S. District Court of Appeals in Atlanta has ruled that National Geographic Society (NGS) made unauthorized use of photographer Jerry Greenberg's copyrighted photographs in their "108 Years of National Geographic on CD-ROM" (108 Years), and that such copyright infringement "is not excused by the privilege afforded the Society under 201(c)" of the copyright law.

NGS had claimed that their copyright in the original issues of the Magazine in which the photographs appeared gave them the right to use the pictures in (108 Years) without additional compensation to the creators. The Federal District Court of the Southern District of Florida had granted NGS's motion for summary judgment and held that the "allegedly infringing work was a revision of a prior collective work and fell within the defendants' privilege under 201(c)." The appeals court reversed the lower court finding that (108 Years) was a new collective work, not a revision, and that this new work fell beyond the scope of 201(c).

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

NGS executive vice president Terrence Adamson said he was "surprised and disappointed" by the court's action. "This is an important decision that has a lot of implications for a lot of things quite apart from National Geographic." Adamson said NGS is considering appeal options including asking the 11th Circuit to reconsider the case and going to the Supreme Court.

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

Section 201(c) is entitled "Contributions to Collective Works". It provides: Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

In rejecting NGS's arguments that the CD_ROM's were revisions, Judge Stanley F. Birch, Jr., writing for the appeals panel, said, "(I)n layman's terms, the instant product is in no sense a 'revision'".

The panel referred to the legislative commentary which said, "The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption. Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it, the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work."

Also the creation of the introductory sequence using one of Greenberg's images clearly violated these exclusive rights under 106(2). "Manifestly, this Sequence, an animated, transforming selection and arrangement of preexisting copyrighted photographs constitutes at once a compilation, collective work, and, with reference to the Greenberg photograph, a derivative work."

The court found that "In the context of this case, Greenberg is 'the author of the contribution' (here each photograph in a contribution) and the Society is 'the owner of copyright in the collective work' (here the Magazine). Note that the statute grants to the Society 'only [a] privilege,' not a right. Thus the statute's language contrasts the contributor's 'copyright' and 'any rights under it' with the publisher's 'privilege.' This is an important distinction that militates in favor of narrowly construing the publisher's privilege when balancing it against the constitutionally-secured rights of the author/contributor."

The appeals court ordered U.S. District Judge Joan Lenard in Miami to enter a judgment on the copyright claims in favor of Greenberg and to provide injunctive relief. In addition, it found Greenberg the prevailing party was entitled to attorneys' fees under the Copyright Act. The panel urged Judge Lenard "to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work."

It is important to note that in this case Greenberg had very clear letters of assignment and had his copyrights registered prior to the infringement. Thus, the case has major differences from the "Tasini" decision which deals with authors rights when there were no written agreements and no registration of the copyrights prior to infringement.

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FX: 301-309-0941

Subj: **PACA WEEKLY UPDATE 223**
Date: 3/25/01 8:18:50 PM Eastern Standard Time
From: info@stockindustry.org (Lonnie Schroeder)
To: info@stockindustry.org

PACA WEEKLY UPDATE
Prepared for and Distributed to the Members of the Picture Agency Council of America - No.223
Monday, March 26, 2001

DATES TO KEEP IN MIND -- PLEASE-PLEASE-PLEASE:
March 30 Surveys due at the University of St. Thomas
April 1 Room Reservations for Annual Meeting due in PACA Office
April 13 Annual Meeting Program Registrations due in PACA Office

PACA LEGAL UPDATE: 11th Circuit holds NGS liable for copyright infringement of photographs used in CD-ROM "The Complete National Geographic"
by Nancy Wolff, PACA Counsel, Wolff & Godin, LLP

Freelance photographer Jerry Greenberg sued the National Geographic Society and National Geographic Enterprises (collectively "NGS") in the Federal District Court of the Southern District of Florida for infringing the copyright in four of his photographs included in the thirty volume set of CD-ROMs, "The Complete National Geographic". One image was used in an introductory moving cover sequence of 10 covers while the others were within the digitally reproduced magazines. The lower court dismissed Greenberg's action on summary judgment in favor of the NGS finding that the CD-ROM was a "revision" of a prior collective work that the NGS was entitled to publish under the copyright it owned in the original magazines as a collective work. (Summary judgment means that there is no factual dispute for trial and the court can decide just based on the law). On appeal to the 11th Circuit ,(the Appellate Division for Florida), the court held that the CD-ROM's were not revisions but new works that fell outside the scope of the magazines copyright in the collective work.

The individual magazines are considered "collective" works under the Copyright Act and are defined as "a work in which a number of contributions, constituting separate and independent works in themselves are assembled into a collective whole." The individual photographs are works of authorship in which the photographer owns a separate copyright. As copyright owner, Greenberg owned the exclusive right to reproduce the photographs, distribute them, create derivative works, and to publicly display and transmit the works.

The creation and distribution of the CD-ROM of back magazines in digital form, and the creation of the introductory sequence clearly violated these exclusive rights. However, the NGS relied on Section 201(c) of the Copyright Act in contending that it is privileged to use the photographs.

Section 201(c) is entitled "Contributions to Collective Works". It provides: Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

Greenberg owned the copyright in the photographs. The NGS owned the copyright in the magazine edition each photograph was first published in.

NGS argued that the 30 volume set was a compendium of back issues and therefore it was allowed to use the photographs because this compendium was simply a revision of the earlier works.

The court disagreed and stated: "(i)n layman's terms, the instant product is in no sense a "revision". Using common sense copyright analysis, the court concluded that NGS in collaboration with Mindscape (the software company) created a new product.

Looking at the opening sequence in which one of Greenberg's photographs was used to create a moving visual sequence, the court found that this use of the photograph also violated Greenberg's exclusive right to create a derivative work. It refused to find, as NGS suggested, that this use was "fair use", even though the Complete National Geographic may serve an educational purpose. The sale of the work was for profit and the inclusion in the sequence was found to diminish the photographer's opportunity to license the photograph to other potential users. Neither did the court find that the use was de minimus (too small to rise to the level of infringement).

The court directed judgment on these copyright claims in favor of Greenberg. In addition, it found Greenberg the prevailing party and entitled to attorneys' fees under the Copyright Act. The court directed that the court below ascertain damages, attorneys' fees, and any injunctive relief, and urged that the court consider alternatives to an injunction such as mandatory licensing fees, in lieu of preventing the public access to this work.

The case relied upon by the court below in initially dismissing these copyright claims, Tasini v. New York Times Co. is scheduled for oral argument before the Supreme Court of the United States this Wednesday. The 11th Circuit felt that the issue of the creation of a new work on a CD-ROM was more than just reproducing the work in another medium, one of the issues to be decided in Tasini, in which magazine articles were included in digital databases such as Nexis. As a consequence, it did not withhold its decision in this Greenberg case.

ANNUAL MEETING: POEMS, WE GET POEMS, WE GET STACKS AND STACKS OF POEMS

I can tell from the rhymes
That were back to the times
Yes, it must be that PACA's
Annual conference is back-a.

Our young leader Lonnie
Whose face is so bonnie
Seems determined to harass
Until we mobilize our ...

So join Allen and Alan
As they drink gallons and gallons
And hear Nancy and Kinne
Make us legally fancy and win-ee

You know that Steven in tech
Will sort the good from the drech
And the Donahues and Burkes
Will help you deal with the jerks.

Pickerell daughter and father
Will protect us from bother.
While tall folks like Scanlon and Dodge
Will make sure we're well lodged.

Please don't try to resist
These appeals that persist

Subj: **Jerry's case as reported by PACA**
Date: Monday, March 26, 2001 11:41:17 AM
From: fward@erols.com
To: dausten@hoosier.net, dirck.halstead@pressroom.com, rainbow@bcn.net, cmoore1567@earthlink.net, bcphoto@maine.rr.com, lulukiku@aol.com, shipshooter@mindspring.com, psihov@aol.com, freepress@wpfc.org, larry@mindenpictures.com

Attached is what Nancy Wolff of PACA had to say about the case.

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Wolff, PACA Counsel, Wolff & Godin, LLP

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Reply-To: fward@erols.com
Organization: Gem Book Publishers
X-Mailer: Mozilla 4.7 (Macintosh; I; PPC)
X-Accept-Language: en,pdf
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"Halstead, Dirck" <dirck.halstead@pressroom.com>,
"Mccoy, Dan" <rainbow@bcn.net>,
"Moore, Charlie" <cmoore1567@earthlink.net>,
"Curtsinger, Bill" <bcphoto@maine.rr.com>,
"Greenberg, Idaz & Jerry" <lulukiku@aol.com>,
"Atkin, Jonathan" <shipshooter@mindspring.com>,
"Psihoyos, Louis" <psihov@aol.com>,
"Bullen, Dana" <freepress@wpfc.org>,
"Minden, Larry" <larry@mindenpictures.com>
Subject: Jerry's case as reported by PACA
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Content-Transfer-Encoding: 7bit

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PDNewswire
by **Dorothy Ho**

Special Report

National Geographic Ruling a Major Victory for Photographers

ATLANTA–The 11th Circuit Court of Appeals ruled March 22 that National Geogr Society violated photographer Jerry Greenberg's copyright by including several of in a CD-ROM product without his permission. The ruling was a decisive victory fo their ongoing tug-of-war with publishers over electronic rights–but by no means th

Greenberg sued the Society for using his images without permission on the 1997 C compilation of the entire *National Geographic* magazine archive. The CD boxed se each back issue of the magazine page by page, but also includes a search engine an introductory montage. The Society claimed it didn't need permission to use Greenl images because the CD is simply a "revision" of its magazine. The copyright statut publishers of collective works, such as magazines and newspapers, to produce and "revisions" of the collective work without permission of contributors. Examples of include evening editions of newspapers or encyclopedias.

The court rejected the publisher's claim. "In layman's terms, the [CD] is in no sens the court said. "The Society…has created a new product, in a new medium, for a ne

The court said the CD is a new collective work, and not merely a revision of existin noting that it contains an animated opening montage and search and retrieval softwa enables users to quickly locate articles using keywords.

A 1997 copyright notice on the CD packaging indicated a new work of authorship, noted. And the Society indicated on its copyright application for the CD that it had registered the work, or any earlier versions of it. "Accordingly, this is a new work," reiterated.

The appeals court said Greenberg is entitled to damages, court costs and attorney's which will be determined by the lower court that originally rejected his claims.

"We're just plain delighted," said Greenberg's attorney, Norman Davis of Miami. the legal community predict the Society will appeal to the Supreme Court.

Chicago attorney Patricia Felch, who wrote an amicus brief on behalf of ASMP in Greenberg, made no effort to hide her glee with the decision. When asked for a com replied, "Whooopeeee!"

Felch is part of a legal team preparing to argue the *Tasini* case before the Supreme week. That case is similar to Greenberg's: Jonathan Tasini and other freelancer writ

New York Times and other publishers for distributing their stories through the NEX database. Like the *National Geographic*, *The Times* is arguing that the database am allowable revision of its print publication.

The Supreme Court ruling on *Tasini* could affect an appeal of the Greenberg ruling the high court interprets the definition of a revision more broadly than the 11th Circ in Greenberg. In a pre-emptive defense of the Greenberg decision, though, Felch an attorneys on the side of authors' rights say the facts of the Greenberg and *Tasini* ca different.

A ruling on *Tasini* is expected by July.

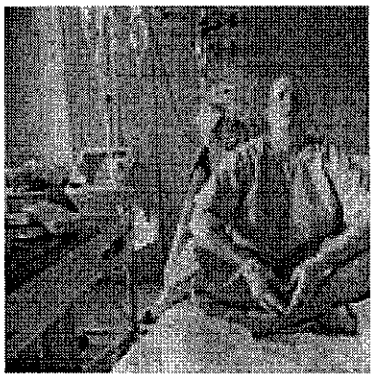
--David Walker

Photo-J News

Pictures Of The Year Winners

For the first time in 58 years, the Pictures of the Year contest awarded a posthumou Photographer **Tara McParland**, who died last November at age 33, won the Canon Essay prize for the document she made of her fight with breast cancer. The essay w in four parts by her newspaper, *The Florida Times-Union*. "What took her portfoli level was that she was documenting her own circumstances," says award coordinato **Mohesky**. "The judges were impressed with her courage to want to tell her story th

Dennis Hamilton Jr., photo editor of the *Times-Union* in Jacksonville, says the win is "an affirmation of what Tara did and what she shared." The win will allow her story to reach more people, he says. "I think she would have been happy about it, but her reward has always been community response," Hamilton adds. When McParland went public with her story, she received an outpouring of support, he remembers.



McParland meditates before
© *The Florida Times-*
Photo By Tara McPa

For first time entrant **Scott Strazzante**, winning the Newspaper Photographer of the Year was a big surprise. The 37-year-old staff photographer at *The Herald News*, part of the Cople Newspapers, sent in a portfolio of 10 singles and a personal essay on two elderly fa knew I had a good year," he says, "but I didn't think I could get an award." Knowin 24-year-old **Rob Finch**, last year's winner and this year's runner-up in the same ca Strazzante a "little boost" to enter his own portfolio. "When [Finch] joined Copley, pushed each other to get better," says Strazzante. "I was watching him and learning



Freelance shooter **Jon Lowenstein** won both the Magazine Photographer of the Year and the Fuji Community Awareness Award. As part of the City 2000 project, he spent the whole year photographing Chicago. He wanted to show

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Jerry / Idaz - You're Everywhere!

Story 388

TASINI HEATS UP

March 27, 2001

Prior to the U.S. Supreme Court hearing later this week of the Tasini vs. New York Times Company case, two actions that have raised the hopes of content creators.

Marybeth Peters, the Register of Copyrights, and a long time advocate for creators' rights, has gone on record with a compelling document supporting authors.

In addition the 11th Circuit Court of Appeals found in favor of photographer Jerry Greenberg in his suit against National Geographic for copyright infringement. (See Story 389.)

The New York Times, their co-defendants, and other publishers should be particularly concerned about the Greenberg case. National Geographic used digital technology to faithfully and accurately portrays each page of every issue of every magazine. The resulting CD-ROM's more closely resembles the original than the "revisions" created by the New York Times co-defendants.

Nevertheless, Judge Stanley F. Birch, Jr., writing for the appeals panel, found that NGS's output could not be considered a mere revision and said, "Common-sense copyright analysis compels the conclusion that the Society...has 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 law.

The court of appeals panel also dealt with the issue of injunctive relief. The publishers in the Tasini case have tried to argue that if the court rules for the freelancers databases will be forced to "minimize the risk of liability by prophylactically eviscerating electronic collections" of freelanced materials, "irreparably undermining" the public record. In the Greenberg case the appeals panel urged U.S. District Judge Joan Lenard who will determine appropriate injunctive relief, "to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work."

Marybeth Peters views are a response to a request from Congressman McGovern and have been published in the Congressional Record. They have also been incorporated into legal briefs being prepared by authors' attorneys in the Tasini case.

Ms. Peters stated plainly, and emphatically, that freelancers should be compensated for their work. She opened by stating that the Supreme Court should affirm the decision of the court of appeals which found in favor of authors. "In Tasini, the court of appeals ruled that newspaper and magazine publishers who publish articles written by freelance authors do not automatically have the right subsequently to include those articles in electronic databases. The freelance authors assert that they have a legal right to be paid for their work. I agree that copyright law requires the publishers to secure the authors' permission and compensate them for commercially exploiting their works beyond the scope of section 201 (c) of the Copyright Act," she told McGovern.

Peters also rejected the publishers' protests that recognizing the authors' rights would mean that the publishers would have to remove the affected articles from their databases. "The issue in Tasini should not be whether the publishers should be enjoined from maintaining their database of articles intact, but

whether authors are entitled to compensation for downstream uses of their works," she said.

Ms. Peters document delves into various aspects of the Copyright Act and explains why legislative law backs up her views and supports the authors position. I have printed her letter below in its entirety.

February 14, 2001

Dear Congressman McGovern:

I am responding to your letter requesting my views on New York Times v. Tasini. As you know, the Copyright Office was instrumental in the 1976 revision of the copyright law that created the publishers' privilege at the heart of the case. I believe that the Supreme Court should affirm the decision of the court of appeals.

In Tasini, the court of appeals ruled that newspaper and magazine publishers who publish articles written by freelance authors do not automatically have the right subsequently to include those articles in electronic databases. The publishers, arguing that this ruling will harm the public interest by requiring the withdrawal of such articles from these databases and irreplaceably destroying a portion of our national historic record, successfully petitioned the Supreme Court for a writ of certiorari.

The freelance authors assert that they have a legal right to be paid for their work. I agree that copyright law requires the publishers to secure the authors' permission and compensate them for commercially exploiting their works beyond the scope of section 201(c) of the Copyright Act. And I reject the publishers' protests that recognizing the authors' rights would mean that publishers would have to remove the affected articles from their databases. The issue in Tasini should not be whether the publishers should be enjoined from maintaining their databases of articles intact, but whether authors are entitled to compensation for downstream uses of their works.

The controlling law in this case is 17 U.S.C. 201(c), which governs the relationship between freelance authors and publishers of collective works such as newspapers and magazines. Section 201(c) is a default provision that establishes rights when there is no contract setting out different terms. The pertinent language of 201(c) states that a publisher acquires "only" a limited presumptive privilege to reproduce and distribute an author's contribution in "that particular collective work, any revision of that collective work, and any later collective work in the same series."

The Supreme Court's interpretation of section 201(c) will have important consequences for authors in the new digital networked environment. For over 20 years, the Copyright Office worked with Congress to undertake a major revision of copyright law, resulting in enactment of the 1976 Copyright Act. That Act included the current language of 201(c), which was finalized in 1965.of interests.

Although, in the words of Barbara Ringer, former Register and a chief architect of the 1976 Act, the Act represented "a break with the two-hundred-year- old tradition that has identified copyright more closely with the publisher than with the author" and focused more on safeguarding the rights of authors, freelance authors have experienced significant economic loss since its enactment. This is due not only to their unequal bargaining power, but also to the digital revolution that has given publishers opportunities to exploit authors' works in ways barely foreseen in 1976. At one time these authors, who received a flat payment and no royalties or other benefits from the publisher, enjoyed a considerable secondary market. After giving an article to a publisher for use in a particular collective work, an author could sell the same article to a regional publication, another newspaper, or a

syndicate. Section 201(c) was intended to limit a publisher's exploitation of freelance authors' works to ensure that authors retained control over subsequent commercial exploitation of their works.

In fact, at the time 201 came into effect, a respected attorney for a major publisher observed that with the passage of 201(c), authors "are much more able to control publishers' use of their work" and that the publishers' rights under 201(c) are "very limited." Indeed, he concluded that "the right to include the contribution in any revision would appear to be of little value to the publisher." Kurt Steele, "Special Report, Ownership of Contributions to Collective Works under the New Copyright Law," Legal Briefs for Editors, Publishers, and Writers (McGraw-Hill, July 1978).

In contrast, the interpretation of 201(c) advanced by publishers in Tasini would give them the right to exploit an article on a global scale immediately following its initial publication, and to continue to exploit it indefinitely. Such a result is beyond the scope of the statutory language and was never intended because, in a digital networked environment, it interferes with authors' ability to exploit secondary markets. Acceptance of this interpretation would lead to a significant risk that authors will not be fairly compensated as envisioned by the compromises reached in the 1976 Act. The result would be an unintended windfall for publishers of collective works.

The Public Display Right

Section 106 of the Copyright Act, which enumerates the exclusive rights of copyright owners, includes an exclusive right to display their works publicly. Among the other exclusive rights are the rights of reproduction and distribution. The limited privilege in ß201(c) does not authorize publishers to display authors' contributions publicly, either in their original collective works or in any subsequent permitted versions. It refers only to "the privilege of reproducing and distributing the contribution." Thus, the plain language of the statute does not permit an interpretation that would permit a publisher to display or authorize the display of the contribution to the public.

The primary claim in Tasini involves the NEXIS database, an online database which gives subscribers access to articles from a vast number of periodicals. That access is obtained by displaying the articles over a computer network to subscribers who view them on computer monitors. NEXIS indisputably involves the public display of the authors' works. The other databases involved in the case, which are distributed on CD-ROMs, also (but not always) involve the public display of the works. Because the industry appears to be moving in the direction of a networked environment, CD-ROM distribution is likely to become a less significant means of disseminating information.

The Copyright Act defines "display" of a work as showing a copy of a work either directly or by means of "any other device or process." The databases involved in Tasini clearly involve the display of the authors' works, which are shown to subscribers by means of devices (computers and monitors).

To display a work "publicly" is to display "to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times." The NEXIS database permits individual users either to view the authors' works in different places at different times or simultaneously.

This conclusion is supported by the legislative history. The House Judiciary Committee Report at the time 203 was finalized referred to "sounds or images stored in an information system and capable of being performed or displayed at the initiative of individual members of the public" as being the type of

"public" transmission Congress had in mind.

When Congress established the new public display right in the 1976 Act, it was aware that the display of works over information networks could displace traditional means of reproduction and delivery of copies. The 1965 Supplementary Report of the Register of Copyrights, a key part of the legislative history of the 1976 Act, reported on "the enormous potential importance of showing, rather than distributing copies as a means of disseminating an author's work" and "the implications of information storage and retrieval devices; when linked together by communications satellites or other means," they "could eventually provide libraries and individuals throughout the world with access to a single copy of a work by transmission of electronic images." It concluded that in certain areas at least, "'exhibition' may take over from 'reproduction' of 'copies' as the means of presenting authors' works to the public." The Report also stated that "in the future, textual or notated works (books, articles, the text of the dialogue and stage directions of a play or pantomime, the notated score of a musical or choreographic composition etc.) may well be given wide public dissemination by exhibition on mass communications devices."

When Congress followed the Register's advice and created a new display right, it specifically considered and rejected a proposal by publishers to merge the display right with the reproduction right, notwithstanding its recognition that "in the future electronic images may take the place of printed copies in some situations." H.R. Rep. No. 89-2237, at 55 (1966).

Thus, 201(c) cannot be read as permitting publishers to make or authorize the making of public displays of contributions to collective works.

Section 201(c) cannot be read as authorizing the conduct at the heart of Tasini. The publishers in Tasini assert that because the copyright law is "media-neutral," the 201(c) privilege necessarily requires that they be permitted to disseminate the authors' articles in an electronic environment. This focus on the "media-neutrality" of the Act is misplaced.

Although the Act is in many respects media-neutral, e.g., in its definition of "copies" in terms of "any method now known or later developed" and in 102's provision that copyright protection subsists in works of authorship fixed in "any tangible medium of expression," the fact remains that the Act enumerates several separate rights of copyright owners, and the public display right is independent of the reproduction and distribution rights. The media-neutral aspects of the Act do not somehow merge the separate exclusive rights of the author.

Revisions of Collective Works

Although 201(c) provides that publishers may reproduce and distribute a contribution to a collective work in three particular contexts, the publishers claim only that their databases are revisions of the original collective works.

Although "revision" is not defined in Title 17, both common sense and the dictionary tell us that a database such as NEXIS, which contains every article published in a multitude of periodicals over a long period of time, is not a revision of today's edition of The New York Times or last week's Sports Illustrated. A "revision" is "a revised version" and to "revise" is "to make a new, amended, improved, or up-to-date version of" a work. Although NEXIS may contain all of the articles from today's New York Times, they are merged into a vast database of unrelated individual articles. What makes today's edition of a newspaper or magazine or any other collective work a "work" under the copyright law --

its selection, coordination and arrangement -- is destroyed when its contents are disassembled and then merged into a database so gigantic that the original collective work is unrecognizable. As the court of appeals concluded, the resulting database is, at best, a "new anthology," and it was Congress's intent to exclude new anthologies from the scope of the 201(c) privilege. It is far more than a new, amended, improved or up-to-date version of the original collective work.

The legislative history of 201(c) supports this conclusion. It offers, as examples of a revision of a collective work, an evening edition of a newspaper or a later edition of an encyclopedia. These examples retain elements that are consistent and recognizable from the original collective work so that a relationship between the original and the revision is apparent. Unlike NEXIS, they are recognizable as revisions of the originals. But as the Second Circuit noted, all that is left of the original collective works in the databases involved in Tasini are the authors' contributions.

It is clear that the databases involved in Tasini constitute, in the words of the legislative history, "new" "entirely different" or "other" works. No elements of arrangement or coordination of the pre-existing materials contained in the databases provide evidence of any similarity or relationship to the original collective works to indicate they are revisions. Additionally, the sheer volume of articles from a multitude of publishers of different collective works obliterates the relationship, or selection, of any particular group of articles that were once published together in any original collective work.

Remedies

Although the publishers and their supporters have alleged that significant losses in our national historic record will occur if the Second Circuit's opinion is affirmed, an injunction to remove these contributions from electronic databases is by no means a required remedy in Tasini. Recognizing that freelance contributions have been infringed does not necessarily require that electronic databases be dismantled. Certainly future additions to those databases should be authorized, and many publishers had already started obtaining authorization even before the decision in Tasini.

It would be more difficult to obtain permission retroactively for past infringements, but the lack of permission should not require issuance of an injunction requiring deletion of the authors' articles. I share the concern that such an injunction would have an adverse impact on scholarship and research. However, the Supreme Court, in Campbell v. Acuff-Rose Music, Inc.,and other courts have recognized in the past that sometimes a remedy other than injunctive relief is preferable in copyright cases to protect the public interest. Recognizing authors' rights would not require the district court to issue an injunction when the case is remanded to determine a remedy, and I would hope that the Supreme Court will state that the remedy should be limited to a monetary award that would compensate the authors for the publishers' past and continuing unauthorized uses of their works. Ultimately, the Tasini case should be about how the authors should be compensated for the publishers' unauthorized use of their works, and not about whether the publishers must withdraw those works from their databases.

Sincerely,
Marybeth Peters
Register of Copyrights

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JUNE 16, 1999

Story 231

GEOGRAPHIC GUILTY OF COPYRIGHT INFRINGEMENT

June 16, 1999

Judge Joan A. Lenard has found that National Geographic Society infringed the copyright of underwater photographers Jerry and Idaz Greenberg when they used the Greenberg's copyrighted images as reference materials for two projects without permission or compensation. The case was heard in Federal Court in the Southern District of Florida in Miami.

The case has been referred to Magistrate Judge William C. Turnoff for the purposes of holding a settlement conference to determine the amount National Geographic will be required to pay to the Greenbergs.

This is the first time National Geographic has been found guilty of copyright infringement of a photographer's work. The case may open the door for legal action by other photographers against the Society.

In a review of the facts of the case it was shown that Walter Cutler, the work-for-hire illustrator hired by the Society to produce illustrations for an educational GeoPack project, improperly used books produced by the Greenbergs as reference for his illustrations.

On his working drawings Cutler noted the page references referring to the photographs he had copied so the Society editors could verify that the illustrations were accurate. This clearly laid the responsibility on the Society editors because they were fully aware of what had been done and were responsible to obtain proper permissions and deal with compensation issues.

Cutler's illustrations also met the test of "substantial similarity" according to Judge Lenard. The Greenbergs had produced overlays from their books that clearly showed the illustrations were almost exact matches of the Greenberg's photos.

In challenging the Greenbergs' motion for Summary Judgement on Liability, lawyers for National Geographic Society argued that the newly created illustration did not violate the Greenbergs' copyright, and "that even if these images reflect copyrighted material, this use constitutes "fair use".

Judge Lenard found that the illustrations "improperly infringed the photographs at issue, and that the doctrine of fair use is not applicable to these facts."

The court took into consideration the four nonexclusive factors to be considered when determining whether the fair use doctrine applies and concluded, "that neither the GeoPack product nor the Jason Project poster qualify as fair use."

The four factors are:

1 - the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
2 - the nature of the copyrighted work;
3 - the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
4 - the effect of the use upon the potential market for or value of the copyrighted work.

The courts detailed presentation of the facts related to each of these points should be useful to others faced with a "fair use" claim by any organization, and particularly National Geographic.

Counts three and four in the Greenberg's case are not a part of this decision and dealt with the use of the Greenbergs copyrighted images in the "108 Years of National Geographic on CD-ROM". Earlier in the proceedings lawyers for National Geographic argued that these two counts should not be considered based on the "Tasini" decision.

On this point the judge agreed with National Geographic and the arguments for the use of the Greenberg's images in that project were not heard. The Greenbergs have the option to appeal that decision of the judge.

Oral arguments for the appeal of the "Tasini" decision have been heard in the New York Appeals court and all parties are presently waiting for the judge's ruling in that case. The results of that case could affect the Greenbergs ultimate decision.

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MARCH 27, 2001

Story 389

GREENBERG WINS AGAINST NATIONAL GEOGRAPHIC

March 27, 2001

The U.S. District Court of Appeals in Atlanta has ruled that National Geographic Society (NGS) made unauthorized use of photographer Jerry Greenberg's copyrighted photographs in their "108 Years of National Geographic on CD-ROM" (108 Years), and that such copyright infringement "is not excused by the privilege afforded the Society under 201(c)" of the copyright law.

NGS had claimed that their copyright in the original issues of the Magazine in which the photographs appeared gave them the right to use the pictures in (108 Years) without additional compensation to the creators. The Federal District Court of the Southern District of Florida had granted NGS's motion for summary judgment and held that the "allegedly infringing work was a revision of a prior collective work and fell within the defendants' privilege under 201(c)." The appeals court reversed the lower court finding that (108 Years) was a new collective work, not a revision, and that this new work fell beyond the scope of 201(c).

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

NGS executive vice president Terrence Adamson said he was "surprised and disappointed" by the court's action. "This is an important decision that has a lot of implications for a lot of things quite apart from National Geographic." Adamson said NGS is considering appeal options including asking the 11th Circuit to reconsider the case and going to the Supreme Court.

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

Section 201(c) is entitled "Contributions to Collective Works". It provides: Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

In rejecting NGS's arguments that the CD_ROM's were revisions, Judge Stanley F. Birch, Jr., writing for the appeals panel, said, "(I)n layman's terms, the instant product is in no sense a 'revision'".

The panel referred to the legislative commentary which said, "The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption. Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it, the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work."

Also the creation of the introductory sequence using one of Greenberg's images clearly violated these exclusive rights under 106(2). "Manifestly, this Sequence, an animated, transforming selection and arrangement of preexisting copyrighted photographs constitutes at once a compilation, collective work, and, with reference to the Greenberg photograph, a derivative work."

The court found that "In the context of this case, Greenberg is 'the author of the contribution' (here each photograph in a contribution) and the Society is 'the owner of copyright in the collective work' (here the Magazine). Note that the statute grants to the Society 'only [a] privilege,' not a right. Thus the statute's language contrasts the contributor's 'copyright' and 'any rights under it' with the publisher's 'privilege.' This is an important distinction that militates in favor of narrowly construing the publisher's privilege when balancing it against the constitutionally-secured rights of the author/contributor."

The appeals court ordered U.S. District Judge Joan Lenard in Miami to enter a judgment on the copyright claims in favor of Greenberg and to provide injunctive relief. In addition, it found Greenberg the prevailing party was entitled to attorneys' fees under the Copyright Act. The panel urged Judge Lenard "to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work."

It is important to note that in this case Greenberg had very clear letters of assignment and had his copyrights registered prior to the infringement. Thus, the case has major differences from the "Tasini" decision which deals with authors rights when there were no written agreements and no registration of the copyrights prior to infringement.

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Story 389

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Subj: **Jerry's case as reported by PACA**
Date: Monday, March 26, 2001 11:41:17 AM
From: fward@erols.com
To: dausten@hoosier.net, dirck.halstead@pressroom.com, rainbow@bcn.net, cmoore1567@earthlink.net, bcphoto@maine.rr.com, lulukiku@aol.com, shipshooter@mindspring.com, psihov@aol.com, freepress@wpfc.org, larry@mindenpictures.com

Attached is what Nancy Wolff of PACA had to say about the case.

PACA LEGAL UPDATE: 11th Circuit holds NGS liable for copyright infringement
of photographs used in CD-ROM "The Complete National Geographic" by Nancy
Wolff, PACA Counsel, Wolff & Godin, LLP

Freelance photographer Jerry Greenberg sued the National Geographic Society
and National Geographic Enterprises (collectively "NGS") in the Federal District Court of the Southern District of Florida for infringing the copyright in four of his photographs included in the thirty volume set of
CD-ROMs, "The Complete National Geographic". One image was used in an introductory moving cover sequence of 10 covers while the others were within the digitally reproduced magazines.

The lower court dismissed Greenberg's action on summary judgment in favor
of the NGS finding that the CD-ROM was a "revision" of a prior collective
work that the NGS was entitled to publish under the copyright it owned in
the original magazines as a collective work. (Summary judgment means that
there is no factual dispute for trial and the court can decide just based

on the law). On appeal to the 11th Circuit ,(the Appellate Division for Florida), the court held that the CD-ROM's were not revisions but new works
that fell outside the scope of the magazines copyright in the collective work.

The individual magazines are considered "collective" works under the Copyright Act and are defined as "a work in which a number of contributions, constituting separate and independent works in themselves

are assembled into a collective whole." The individual photographs are

works of authorship in which the photographer owns a separate copyright. As
copyright owner, Greenberg owned the exclusive right to reproduce the photographs, distribute them, create derivative works, and to publicly display and transmit the works.

The creation and distribution of the CD-ROM of back magazines in digital

form, and the creation of the introductory sequence clearly violated these
exclusive rights. However, the NGS relied on Section 201(c) of the Copyright Act in contending that it is privileged to use the photographs.

Section 201(c) is entitled "Contributions to Collective Works". It provides: Copyright in each separate contribution to a collective work is
distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express
transfer of the copyright or of any rights under it, the owner of copyright
in the collective work is presumed to have acquired only the privilege of
reproducing and distributing the contribution as part of that particular

collective work, any revision of that collective work, and any later collective work in the same series.

Greenberg owned the copyright in the photographs. The NGS owned the copyright in the magazine edition each photograph was first published in.
NGS argued that the 30 volume set was a compendium of back issues and therefore it was allowed to use the photographs because this compendium was
simply a revision of the earlier works.

The court disagreed and stated: "(I)n layman's terms, the instant product
is in no sense a "revision". Using common sense copyright analysis, the court concluded that NGS in collaboration with Mindscape (the software company) created a new product.

Looking at the opening sequence in which one of Greenberg's photographs was
used to create a moving visual sequence, the court found that this use of
the photograph also violated Greenberg's exclusive right to create a derivative work. It refused to find, as NGS suggested, that this use was

"fair use", even though the Complete National Geographic may serve an educational purpose. The sale of the work was for profit and the inclusion
in the sequence was found to diminish the photographer's opportunity to license the photograph to other potential users. Neither did the court find
that the use was de minimus (too small to rise to the level of infringement).

The court directed judgment on these copyright claims in favor of Greenberg. In addition, it found Greenberg the prevailing party and entitled to attorneys' fees under the Copyright Act. The court directed that the court below ascertain damages, attorneys' fees, and any injunctive
relief, and urged that the court consider alternatives to an injunction such as mandatory licensing fees, in lieu of preventing the public access
to this work.

III. CONCLUSION

We conclude that the unauthorized use of the Greenberg photographs in the CNG compiled and authored by the Society constitutes copyright infringement that is not excused by the privilege afforded the Society under § 201(c). We also find that the unauthorized use of Greenberg's diver photograph in the derivative and collective work, the Sequence, compiled by the Society, constitutes copyright infringement, and that the proffered de minimis use defense is without merit. Upon remand, the court below is directed to enter judgment on these copyright claims in favor of Greenberg. Counsel for the appellant should submit its documented claims for attorneys fees relative to this appeal to the district court for review and approval. We find the appellant to be the prevailing party on this appeal and, therefore, is entitled to an award of costs and attorneys fees. Upon remand, the district court should ascertain the amount of damages and attorneys fees that are due as well as any injunctive relief that may be appropriate. In assessing the appropriateness of injunctive relief, we urge the court to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work.

REVERSED and REMANDED.

Court rules against magazine

BY CATHERINE WILSON
Associated Press

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Businessmen convicted in Guatemala

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ists and U.S. government

A lawyer blamed international

City said.

The government still has to make progress in its labor

FLORIDA

IVAX

Expects to beat pro

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LAW FIRMS

Goldstein joins Ake

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