Subj: **A Brief History of Copyright in the USA**
Date: Wednesday, April 24, 2002 1:41:01 PM
From: fward@erols.com
bcc:

You might find this useful sometime. It was on Editorial Photography today.

Fred

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The makings of copyright in its present form can be traced to 1710 when Parliament enacted the Statute of Anne. The Statute of Anne contained legal protection for copyrighted works. It defined in part public domain and it required that literature must be new work in order to obtain a copyright. The statute provided for the first time a copyright for an author but the actual benefit was minimal because it also required that the author had to assign the work to a bookseller or publisher.

1790 US Constitution

The first U.S. Copyright Law was signed on July 17, 1790 by George Washington. The Copyright Act gave a creator the concept of protection for a period of 14 years, with the right of renewal for another 14 years.

"The Congress shall have power . . . to promote the progress of science and useful arts . . . by securing for limited times to authors and inventors the exclusive rights to their respective writings and discoveries."

1841 Folsom v. Marsh

Folsom v Marsh was the beginning of Fair Use. George Washington's private letters were being used to create a fictionalized biography without the permission of the owner of the letters. The court found that there was not an infringement. Justice Storey stated: "In short,

we must often, in deciding questions of this sort, look to the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale or diminish the profits, or supersede the objects, of the original work."

1886 Berne Convention

The Berne Convention provides the basis for copyright on an international level. It has been revised five times since 1886. Of particular note are the revisions in 1908 and 1928. In 1908, the Berlin Act set the duration of copyright at life of the author plus 50 years.

1909 Revision of U.S. Copyright

This major revision extended of the number of years in a renewal term (14-28) for a total of 56 years of protection. The Congress also addressed the difficulty of balancing the public interest with the copyright holders rights.

1976: Revision of the U.S. Copyright Act

The 1976 revision was undertaken to address advances in technology and the impact on what might be copyrighted and how works might be copied. The 1976 Act pre-empted all previous copyright law in the United States. The Act covered scope and subject matter, exclusive rights, term of copyright , Copyright notation and registration, copyright Infringement, and fair use. With this revision, for the first time copyright was extended to unpublished works.

In addition it contains an exception to the exclusive rights of owners to make and distribute copies of their works. It states that "for purposes such as criticism, comment, news, reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. "

The National Commission on New Technological Uses of Copyrighted Works was appointed by Congress in 1976 to establish guidelines for the "minimum standards of educational fair use" under the 1976 Act.

1983 Encyclopedia Britannica Educational Corp. v. Crooks

The Board of Cooperative Educational Services was sued by Encyclopedia Britannica for taping educational programs that were broadcast on public television stations and making copies available to member schools. The court found that the actions of the school board would have a detrimental effect on a commercial use and determined that in this case it did not come under the guidelines of fair use.

1987 Salinger v. Random House

Fair use was further defined by a second circuit appeals court that found that use paraphrasing of unpublished materials in an unauthorized biography of J.D. Salinger was not fair use.

1988 Berne Convention

The United States became a Berne signatory. There would be greater protection for copyright holders, entailing relations with 24 additional countries, and elimination of the requirement of a copyright notice on a copyrighted work.

1990 Circulation of Computer Software

Congress amended the Copyright Act. The amendment noted that libraries could lend software provided that the copy of a computer program which is lent has a notice that the program is copyright protected. This amendment is a modification of the first sale doctrine.

1990: Immunity of State Governments

Congress amended the Copyright Act to ensure that state universities

would not be immune from being sued for monetary damages in federal court. State and private universities are now subject to the same copyright regulations, and may be sued for copyright infringement.

1991: Basic Books, Inc. v. Kinko's Graphics Corp.

A Federal District Court in New York ruled that Kinko's Graphic Corporation infringed copyrights, and did not exercise fair use. The court found that most of the fair use factors worked against Kinko's in this case because Kinko's was also making a profit in the process.

1991 Feist Publications v. Rural Telephone Service Co., Inc.

The Supreme Court found that the a telephone directory by Feist was not an infringement even though it was compiled from telephone white pages. The information in the white pages was not copyrightable because it is public information.

1992-1995: Texaco Case

American Geophysical Union v. Texaco results from a class action suit brought by six scientific publishers on behalf of other publishers registered with the Copyright Clearance Center. In July 1992, a U.S. District judge ruled in the seven-year old copyright case that a Texaco scientist violated the U.S. Copyright Law (Section 107) when he copied articles without providing the appropriate fee to the publishers.
Texaco, which conceded no wrongdoing in the proposed settlement, paid a seven figure settlement and retroactive licensing fee to the CCC.

1992 Amendment to Sec. 304
Amendment to Sec. 304 of Title 17 made copyright renewal automatic.

1993 Playboy Enterprises Inc. v. Frena
The courts held that the Playboy's distribution rights were infringed when one of their photographs was digitized and placed on an electronic commercial bulletin board system by one subscriber and

downloaded by another subscriber.

1994 Campbell v. Acuff-Rose Music, Inc.

The Supreme Court ruled that a rap parody of a Roy Orbison's song, "Pretty Woman," was a fair use. The court found that a commercial use could be a fair use.

1995 Religious Technology Center v. Netcom

A federal judge in California ruled that Netcom may be held liable for copyright infringement because the company did not remove copyrighted materials posted by a subscriber.

1995: S. 989 and H.R. 483

A Copyright Term Extension bill under consideration in Congress would add 20 years to the term of copyright protection for almost all published works, and at least 10 years to the term of protection for unpublished ones.

1996: Database Protection Legislation

On May 23, 1996 the Database Investment and Intellectual Property Antipiracy Act of 1996 (H.R. 3531) was introduced by Rep. Moorhead to amend Title 15 U.S.C. The bill seeks to "promote investment and prevent intellectual property piracy with respect to databases."

1998 :The Digital Millenium Copyright Act

On October 12, 1998, the U.S. Congress passed the Digital Millennium Copyright Act. Two weeks later, on October 28th, President Clinton signed the Act into law.

Primarily the DMCA deals with technology, digital works and the mechanisms to circumvent copyright. Under section 1201 of the DMCA ,

the circumvention of mechanisms used to insure copyright (even the placement of the notation © year and date and name on an image) is illegal, with only a few exemptions. The DMCA makes distribution of material used to primarily circumvent copyright illegal.

2001: Greenberg v. National Geographic Society

March 22 2001
The case centers around a 30 CD-ROM library collection of National Geographic that collects every issue of the magazine from 1888 to 1996. The CDs are combined with ten covers including one by Jerry Greenberg. Greenberg sued for copyright infringement.
The NGS argued that the Greenberg photographs constituted a revision of the collective work, i.e., the magazine.
Section 201(c) did not give the publisher the right to revise the contribution itself or include it in a new anthology or a different collective work. The court ruled that NGS created a new work, and forfeited any privilege that it might had enjoyed with respect to reproduction of previous magazines.
The Court also found the opening montage infringed upon Mr. Greenberg's right to prepare derivative works based on his copyrighted photograph.

2001: NEW YORK TIMES COMPANY vs Tasini

June 25, 2001

The United States Supreme Court ruled that print publishers such as newspapers and magazines may not use material in online databases to which they had previously obtained only print rights from independent contractors. The Court1s ruling establishes that such online and electronic uses are separate uses from that of print.

Experts Weigh Tasini Rulingís Impact
On Freelancers and Electronic Publishing

A group of copyright law experts, in a day-long briefing sponsored by Glasser Legal Works, considered the short and long-range implications of the Supreme Courtís recent ruling in New York Tines v. Tasini that republishing the writings of freelance authors in an electronic database was infringing. Several of the panelists at the Sept. 24 conference in New York suggested that the freelancersí victory in the high court will bring them as much grief as glory.

Tasini Overview. Last June, the Supreme Court held that the ìrevisionî privilege held by publishers of collective works under Section 201(c) of the Copyright Act does not cover the republication of freelancersí articles in electronic databases. New York Times Co. v. Tasini 121 Sup.Ct. 2381, 60 USPQ2d 1001 (2001) (62 PTCJ 188, 198, 6/29/01.).
By a 7-2 vote, the court found that the presentation of the articles to the end users of the database does not perceptibly reproduce articles ìas part ofî the collective work or its revision. The court noted that the transfer of articles to the databases is not a mere conversion of in-tact periodicals or revisions from one medium to an-other, pointing out that databases offer users individual articles, not intact periodicals.

Emily Bans, who represented Tasini and the other freelancers from their initial defeat in the Southern District of New York to the final victory In the Supreme Court, retraced her involvement in that litigation.
To the freelancers, according to Bass, the most important language in Section 201(c) was ìas part of.î If we could demonstrate that the database operators were making available the freelancersí work as stand-alone, free-standing works, rather than as ìpart ofî the original collective work, she said, then we could prove infringement of the freelancersí copyrights. If the print publishers were enabling the database to allow access in those stand-alone works, she asserted, then they were liable as contributory infringers.
Through discovery the freelancers learned how the print publishers constructed their collective works, Bass related After an article was submitted, she re-counted, it was input into a computer a file was created, then the articles were edited, declared final and sent to the typesetter. The printed taxi was created and merged with graphics and the ìmechanicalsî page was created as a negative photo image sent to the printers. Through that elaborate process, Bass concluded, a collective work was created and printed.
What astonished us, Bass told the conferees, was that once the print papers were sent out, the publishers destroyed all embodiments of the collective works the negatives, molds tapes, etc. At that point according to Bass, the publishers concerned themselves instead with creating and feeding databases on a daily basis. To make sure that each freelance article they pulled from the original newspaper was individually retrievable, the publishers assigned it a unique number and key words

Significantly enough, Bass observed, the license agreements between the print publishers and the databases databases provided that the databases would allow user access to the individual articles In the database one at a time, rather than in the format of their original compilation In fact, the licenses forbade the databases from making more than one article available at a time she noted.
Ultimately, Bass reported, the Second Circuit and the Supreme Court found those same facts and concluded that the original article was no longer physically ìpart ofí the publishersí collective work, and thus, the Section 201(c) revision provision was not applicable The databases were presenting individual articles as part at a new compendium or anthology, not a revision of the original collective works, Bass explained.

In Bassís view, the court delivered a ìstraightforward, bright-line rule,î i.e., that disassembling the original collective work and making available the individual freelancersí articles without their authorization exploited the copyrights in those individual works.

Bright-Line Rule, but Murky Consequences.

The Supreme Court may have made a bright-line ruling that permission is required from freelancers going forward but the consequences of the ruling may not he so bright for freelancers. For one thing, recent reports have disclosed that the New York Times is barring the plantiff freelancers in the Tasini litigation from writing for that paper.

Internet law specialist Ian Ballon of Phelps & Phillips LLP In Palo Alto, California, suggested that freelancers may have won the battle but lost the war in other respects as well. With the Tasini case on the horizon, publishers in the 1990s became aware of their potential liability to freelancers, so they began extracting ìall rightsî agreements designed to allow their reuse of freelancersí contributions, Ballon said. Those contracts are standard now, but publishers are not offering any more money to freelancers for the entire package of rights than they did before the Tasini ruling according to Ballon.

As to the pre-1990s works, the publishers have reponded to the Tasini by purging their databases of those works, rather than pay royalties to freelancers. The disappearance of those works from electronic databases hurts not just readers but the freelancers themselves, who rely on the databases to record their accomplishinents, Ballon maintained.

Worse yet, Ballon lamented, most newspapers are uncertain as to which articles in their archives are by freelancers so they are resorting to over-inclusive purges just to be safe This course of action is not taken with malice to freelancers, but with ìgreat reluctance and remorse,î Ballon said.

A significant practical limitation of the Tasini case is that it applies only to freelancers. not staff journalists whose works belong to the newspaper publishers as works for hire. As such, Keith Kupferschmid, intellectual property counsel for the Software Information Information Industry Association, said that the case is only a ìmodest one-time windfallî for the plaintiff freelancers Meanwhile he agreed with Ballon that all freelancers now are faced with signing over all their electronic rights if they want to write stories for newspapers in the future.

Archival Purges Substantial. New York attorney Charles Sims, of Proskauer Rose LLP, agreed with the other panelists that the Tasini case had an unintended consequence. It has already led to the elimination of hundreds of thousands of articles from database Even though only articles up to the mid- or late-90s have been withdrawn, the impact is massive, according to Sims. Interested readers will now have to find libraries that s till have paper copies of the articles he said.

Like Kupferschmid, Sims said the wide-scale purges are as threatening to freelancers as they are to users. In fact, some freelancers in the wake of Tasini have given permission for the databases to retain their past archival work saying, they donít want to ìdisappear electronically.î

Moreover, according to Sims, since the amount paid to freelancers under todayís all-rights contracts has not risen as a result of Tasini, ìthe Supreme Courtís decision means nothing at all from the point of view of compensation.î Even as to the backlog of articles at issue in Tasini, he suggested, the potential recovery of damages for freelancers will be negligible because the value of those works is probably is not particularly high.

Sims noted that the plaintiff freelancers in a group of class action damages suits that have been filed as a consequence of Tasini are not seeking injunctive relief against the publishers because they essentially already have it: publishers are scurrying to remove the articles from electronic sources. Moreover, he suggested, any agreements the plaintiffs in the Tasini case might work out with the New York Times wouldnít protect other newspapers, and that is why the deletion of freelance from those publishersí databases was inevitable.

Need for Deletions Questioned. However Bass charged that the publishers are over-reacting by preemptively purging their databases of freelance works. She pointed out that the plaintiffs in the pending class actions offered a ìstandstillî agreement of several months with the hope of working out a payment scheme for freelance works and avoiding the elimination of any articles from databases But the publishers were not oven interested in discussing such an arrangement, Instead preferring the ìsword of Damoclesî of purging their databases, she said.

In any case Bass, maintained, the focus of copyright is not just to ensure the continuing distribution at works, but to compensate their authors. Databases make tremendous amount of money from the new works they create using freelancersí articles, she said. They should share those proceeds with the people whose works they use. She took umbrage at Kupferschmidís characterization of the freelancersí victory in Tasini as a ìmodest windfall,î asserting that it is the print and database publishers who have enjoyed a windfall from their free reuse of freelance works over the years.
Arnold Lutzkor, a Washington copyright lawyer whose clients include library associations said traditional role libraries play as archivists was being unfairly discounted in the aftermath of the Tasini case. Lutzker questioned the database ownersí claim that retention of freelancersí articles in their ìelectronic librariesî was the only to guarantee preservation of that material. As one of the justices remarked in the Supreme Court oral argument, the Tasini case was ìabout money,î Lutzkor said; it wasnít about maintaining an archive. And if someone is making money by providing electronic access to the freelance works, is reasonable to pay their authors, he said.

Copyright Office Maneuvering. David Carson, general counsel for the Copyright Office recounted the agencyís position in the. Tasini case, and its novel efforts to make its views known, short of filing amicus briefs with the Supreme Court
Carson said that the Copyright Office sided with the authors in Tasini and decided to weigh in when the Supreme Court granted review of the Second Circuitís decision. Register of Copyrights Marybeth Peters was nervous that the authorsí case would be argued by inexperienced counsel, so she asked the solicitor generalís permission to file an amicus brief in favor of the authors, according to Carson. However, when the Patent and Trademark Office opposed the filing, the solicitor general opted not to file a brief, Carson said.

However, Tasini himself was resourceful, Carson said. He persuaded Rep. James P. McGovern (D-Mass.) to write a letter to the Copyright Office soliciting its views. Peters responded, indicating the Copyright Officeís sympathy with the freelancers. The letter also outlined the registerís position that the publishers were infringing the freelancersí public display rights under Section 106 of the Copyright Act, Carson related
So although the Idea of an amicus brief was scrapped, the Copyright Officeís letter to McGovern appeared in the Congressional Record, Carson noted. More significantly, he added, it was mentioned by Justice OíConnor during the Supreme Court oral arguments and was cited three times by the court, whose holding was consistent with the Copyright Officeís views.
The Copyright Office letter also stressed that trial courts need not issue an injunction ordering publishers no dismantle of their databases as a remedy to cure the infringement, Carson told the conferees. Instead, he said, the letter urged the high court to recommend compensation to the authors for past and continuing use of their works.
The Copyright Office underscored those recommendations in a letter to the House Judiciary Committeeís Chairman Howard Cohie (R-N.C) after the Supreme Courtís Tasini ruling.

Agency Urges Parties to Negotiate. Carson said the Copyright Office continues to hope both sides of the Tasini dispute can ìovercome their rhetoricî and work out a solution that

serves the parties and the public alike. As to potential damages for reuse of the freelance works, Carson said it is difficult to believe the publishersí claim that they derive no added value from republishing those works electronically, given their argument that upholding the Second Circuit ruling would have ìdevastating consequencesî and ìpunch holesî in the nationís electronic libaries.
ì5urely there is a numberî that reflects the reasonable value for reuse of the freelancesí works, Carson said. The pending class action suits could set a fair value level that would effectively bind all potential claimants and even frame a standard for a legislative remedy, he suggested.
Admittedly, however, he conceded, those suits wonít resolve the issue for the future. While authors ought to get extra value when their works are reused, our system is based on arms-length contracting, Carson noted. As long as the bargaining power lies with the publishers, freelancers wonít get much it future negotiations, he predicted.

Future Uncertain. Meanwhile, according to the panelists, publishers and database providers are assessing how to avoid exposure to new lawsuits from freelancers following Tasini. According to line SILAís Kupferschmid, their options include the following: (1) completing the removal of all archival freelance articles from their databases; (2) working out royalty deals with individual freelancers as to those articlesó-an unlikely alternative because it is difficult to assess the current value of those older pieces; (3) creating a central licensing mechanism similar to that used in the music industryóagain, a problematic choice because of the difficulty in determining market value of the archival works; or (4) deleting the identifying freelance works but continuing to maintain identifying material and even abstracts for the omitted articles, indicating that the works are ìunavailable due to Tasini but providing information on where they can be locatedóa course or action .that would help consumers but be costly for publishers and database providers.
For her part, Bass also acknowledged that, despite its definitive ruling in favor of the freelancers in Tasini, the Supreme Court left some questions unanswered. Is there, for example, a difference between retrievability and searchability of individual articles in a database, she wondered. If the freelancersí articles could have been presented in intact collective works on the database, would Section 201(c) apply, she asked. Would that provision apply even if the database also allowed users to download and/or search individual works, she added. Finally, she queried, was the publishersí revision privilege transferable as a ìnaked licenseî to the database operators?

Tasini as Applied to Freelance Photo Dispute. A few months before the Supreme Courtís Tasini decision, the Eleventh Circuit relied in part on the Second Circuitís ruling in Tasini to hold that the use of a freelancers photographs in CD-ROM versions of the National Geographic Magazine created an infringing new work, not a priviledged revision of the print publication. Greenberg v. National Geographic Society, 244 F.3d 1267, 58 USPQ2d 1267 (11th Cir. 2001) (01 PTCJ 517, 3/30/01).
The court reversed a summary ruling for the magazine publisher card ordered the district court to enter judgment for the photographer. The appellate court urged the loer court in fashioning injunctive relief to consider alternatives to foreclosing the publicís computer-aided access to the disputed material.
National Geographic sought Supreme Court review of the Eleventh Circuitís ruling against it in Greenberg, but the high court recently refused to hear the case. 62 PTCJ 540, 10/12/01.
Several of the panelists commented on the interplay between the Tasini and Greenberg rulings. Like the Copyright Office, Bass noted that the Section 201(c) revision privilege doesnít appear to include a ìpublic displayî right, and that infringement of this right might also be implicated by the electronic reuse of freelance works in Tasini.

As to the Greenberg case, however, Bass noted that the dispute there involves CD-ROM compilations for use on a PC, not electronic transmissions, so there arguably is no

potentially infringing ìpublicî display of the works at issue in that case. ìBut if the magazine database were available online, there would be a problem.î she suggested.

Lutzker, on the other hand, suggested that, even on the Internet. publishers could have a fair use argument in Greenberg as to the technological necessity of ìdisplayingî the magazine revision in order to make it available online.

Copyright Office Again Speaks Up. As with the Tasini case, the Copyright Office found itself drawn into the Greenberg dispute, and it again responded indirectly but thoroughly,

National Geographic objected to the Greenberg courtís comment in a footnote that National Geographic may have ìperpetrated a fraud on the Copyright Officeî by registering the entire contents of its CD-ROM magazine series as a compilation, rather than the computer program that enabled users to gain access to the compilation content., When the magazine failed to persuade the court to delete the footnote, Carson related, it asked the Copyright Office to write an amicus brief in support of its appeal to the Supreme Court.

Although it sympathized with National Geographicís position on the registration issue and on the merits of the infringement claim in general, Carson said, the Copyright Office didnít feel it was appropriate to support a private partyís petition for certiorari. Even without an amicus filing, however, Carson indicated that he anticipated that the high court might ask the Copyright Officeís views should the Greenberg case be granted review. Accordingly, Carson related, the agency spelled out its objections to the courtís comment in a lengthy letter to National Geographicís Executive Vice President Terrence B. Adamson.

Authors Guild Offers Solutions. Paul Aiken, executive director of the Authors Guild suggested that the publIshersí purging of freelance material may only be temporary because the databases could be restored when fine pending class actions for damages are resolved, Settlement of those cases will produce licenses for the archival works that reflect the value of reuse, he predicted. According to Aiken, the Authors Guild registry, which already has signed up 30,000 authors and paid out $1.5 million in royalties, is a good starting point for handling future licensing of freelance works.

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1997
D.D. RAISING HELL

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"NATIONAL GEOGRAPHIC" AND "300,000"

Artistic couple demands and gets credit for work

GREENBERGS, FROM 11

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

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

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

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

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

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

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

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

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

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

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

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

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

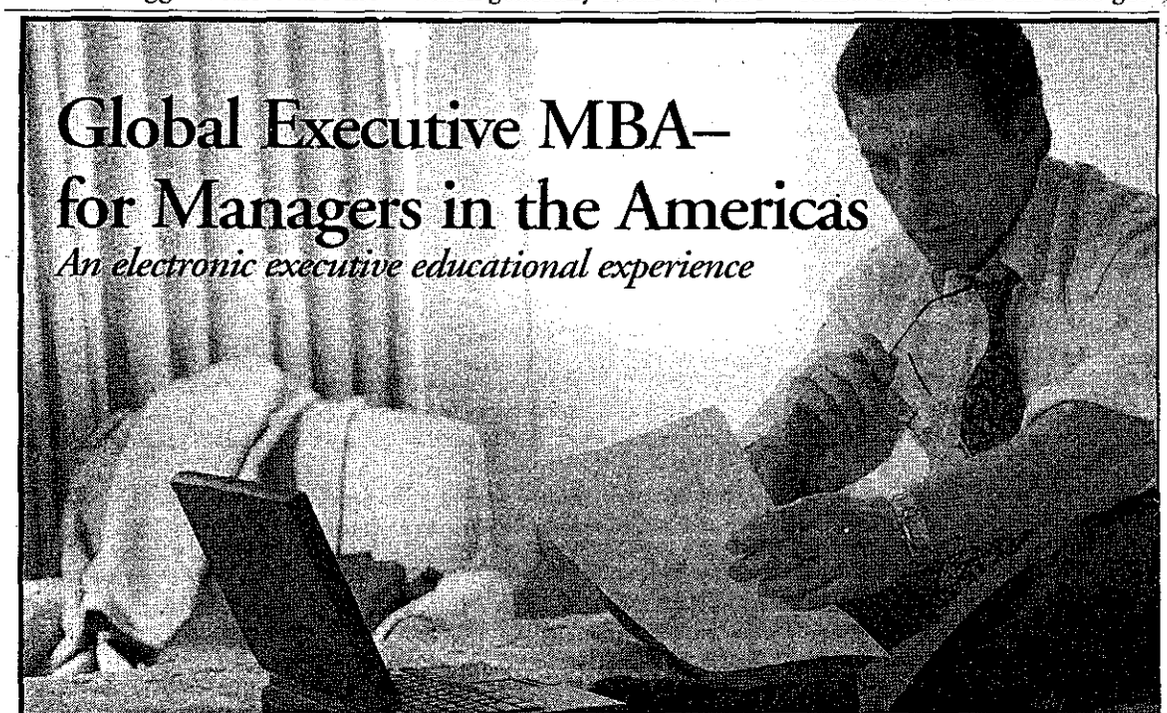
"But most of the time," adds Idaz, "it's just Don Quixote," with the Greenbergs tilting at legal windmills simply because they believe it's the right thing to do.

Among those who have paid up: The Herald. Twice, they say, the newspaper has used their images without prior submission. Each time, they sent a complaining letter and received payment.

Jerry says their legal success is because they copyright all their work. In the mid-1980s, Jerry asked National Geographic for the copyright on the photo spreads he had shot for the magazine over the years. The magazine complied.

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

This may have been the Greenbergs' biggest case, but it likely won't be their last. "This isn't about revenge," says Jerry. "It's protecting our rights."





Precedent-setting artists

BY JOHN DORSCHNER

Judge Joan Lenard in Miami ruled against him, but the 11th Circuit Court of Appeals disagreed, saying the magazine had made an unauthorized use of his copyrighted photos. The magazine appealed to the Supreme Court, which refused without comment to hear the case, which means the 11th Circuit's decision stands.

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

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

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

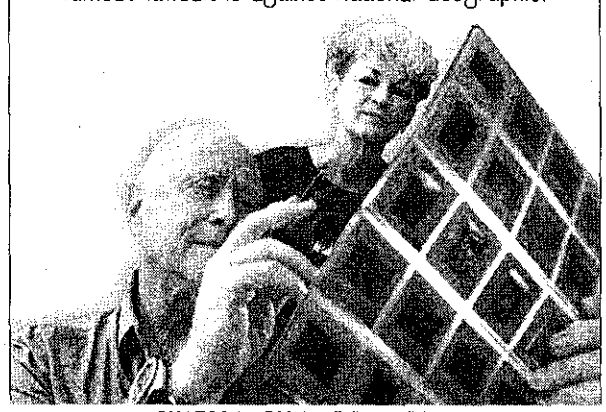
The film studio paid, says Idaz, for the movie rights only. When the film appeared on TV, with the Greenberg photo still there, they wrote another letter, and again they were paid.

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

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

Greenberg claimed the CDs were a new medium, and he was entitled to an additional fee. U.S. District

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



PHOTOS BY RICHARD PATTERSON/HERALD STAFF

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

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Married for 46 years, they've been working

▶ PLEASE SEE GREENBERGS, 12

Artistic couple demands and gets credit for work

GREENBERGS, FROM 11

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

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

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

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

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

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

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

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

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

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

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

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

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

"But most of the time," adds Idaz, "it's just Don Quixote," with the Greenbergs tilting at legal windmills simply because they believe it's the right thing to do.

Among those who have paid up: The Herald. Twice, they say, the newspaper has used their images without prior submission. Each time, they sent a complaining letter and received payment.

Jerry says their legal success is because they copyright all their work. In the mid-1980s, Jerry asked National Geographic for the copyright on the photo spreads he had shot for the magazine over the years. The magazine complied.

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

This may have been the Greenbergs' biggest case, but it likely won't be their last. "This isn't about revenge," says Jerry. "It's protecting our rights."

news maker



Precedent-setting artists

BY JOHN DORSCHNER

Judge Joan Lenard in Miami ruled against him, but the 11th Circuit Court of Appeals disagreed, saying the magazine had made an unauthorized use of his copyrighted photos. The magazine appealed to the Supreme Court, which refused without comment to hear the case, which means the 11th Circuit's decision stands.

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



PHOTOS BY RICHARD PATTERSON/HERALD STAFF

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

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

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

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

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

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

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

Greenberg claimed the CDs were a new medium, and he was entitled to an additional fee. U.S. District

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

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Married for 46 years, they've been working

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Freelancers get lift on digital rights

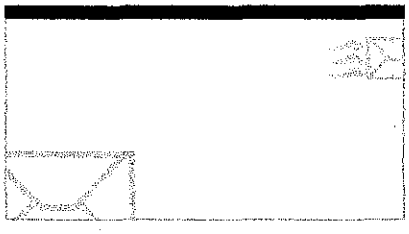
Federal appeals court unanimously finds that a National Geographic CD-ROM infringed a photographer's rights

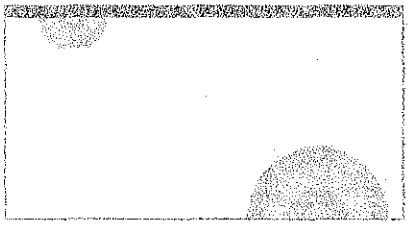
By Roger Parloff
INSIDE.COM

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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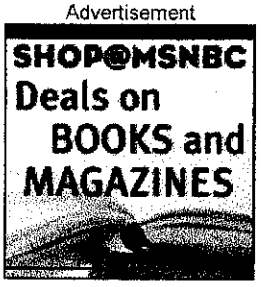


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REVERSING THE RULING of a Miami federal district judge, a three-judge panel of the U.S. Court of Appeals for the Eleventh Circuit unanimously concluded on Thursday that the National Geographic Society had infringed the copyrights of freelance photographer 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.

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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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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 sophisticated digital technology in order to faithfully 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

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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.

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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."

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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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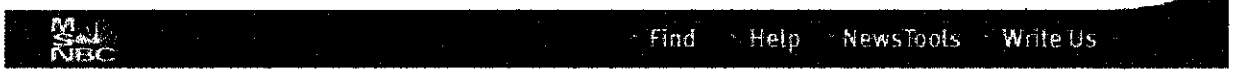
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Showdown at the Lexis-Nexis Corral

Keith Perine
The Industry Standard
March 26, 2001



photo: Newsmakers
Harvard Law School's Laurence Tribe

On Wednesday, the U.S. Supreme Court will hear oral arguments in a copyright case that has fast become a landmark for the digital age. Much as the Napster imbroglio will help determine the future of the intersecting worlds of music and technology, the high court's decision in *The New York Times (NYT) v. Tasini* could reshape the electronic publishing of written work and photographs.

The case pits the venerable Gray Lady, along with publications such as *Sports Illustrated* and the Lexis-Nexis database firm, against six free-lance writers, led by Jonathan Tasini, president of the National Writers Union. The central issue: whether the *Times* and other publications are obligated to pay free-lance authors for electronically redistributing, via a computerized database, such as Nexis.com, or on CD-ROM, work that was originally published in newspapers and magazines.

When the case was originally filed in 1993, electronic databases and reproductions were still largely the province of research librarians and special computer terminals. But as the dispute wound its way up to the high court, the popularity of businesses such as Lexis-Nexis has skyrocketed, largely because of the ease of access afforded by the Internet. Currently, 2.2 million subscribers conduct more than 700,000 searches on the database each day, with the majority of searches coming via the Web. On tap are 11,900 databases filled with content from 31,300 sources, including thousands of newspapers and magazines.

That's quite a cash cow for publishers, and free-lancers say they just want a fair piece of the action.

"This shows the greed and the arrogance

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and the disrespect on the part of the industry," says Tasini, who is personally involved because of four pieces he wrote that were published in the *Times* and *Newsday*. "These businesses simply do not want to pay writers."

Tasini says the solution is to track reuses of individual works and compensate authors accordingly, much as the American Society of Composers, Authors and Publishers does for music composers. The National Writers Union has struck a deal with literary database Contentville, establishing a Publications Rights Clearinghouse for free-lancers that transfers 30 percent of Contentville's download fee whenever a registered free-lance piece is accessed via Contentville.

That model can be extrapolated to other computerized databases. But the publishers in the case, which are supported by a host of companies, from Dow Jones to Knight Ridder (KRI) to the National Geographic Society, say publishing articles through outlets such as Nexis.com qualifies as a "revision" of the original work, e.g., of a particular issue of the *Times*. Thus, say the companies, the Copyright Act of 1976 protects it as part of a publisher's collective copyright. The free-lancers counter that such redistribution isn't merely a revision of the original publication because customers can download articles written over a number of years in any combination they choose.

The publishers' case was dealt a blow Thursday, when a federal appeals court ruled that the National Geographic Society had violated the individual copyright of a free-lance photographer when it republished his photographs in a CD-ROM compilation.

The Times, Lexis-Nexis and the other petitioners have found support from the likes of documentary-maker Ken Burns, historian Doris Kearns Goodwin and Pulitzer Prize-winning author David McCullough. Renowned constitutional lawyer Laurence Tribe will argue the publishers' case. The publishers say that if the Supreme Court rules against them, they'll be forced to strip free-lance work out of Lexis-Nexis and destroy CD-ROMs containing such work. Tasini says that claim is a specious "doomsday scenario" that the publishers invoke because they don't want to treat free-lancers fairly.

The free-lancers are backed by the American Library Association, the Authors Guild and writers such as Jean Strouse and Tracy Kidder. Marybeth Peters, the U.S. Copyright Office's register of copyrights, also supports the writers. In a letter to Congress, Peters wrote that reproducing free-lance articles on Nexis and CD-ROM without further compensation "interferes with authors' ability to exploit secondary markets. The result would be an unintended windfall for publishers of collective works."

Since the case was filed in 1993, publishers have revised their free-lance agreements specifically to include language authorizing them to reproduce works in computer databases and online. That revision led to a class action against *The Boston Globe*, which is owned by the New York Times Co. In the lawsuit, the National Writers Union and other unions allege unfair and deceptive trade practices. Richard Gulla, a *Globe* spokesman, declined to comment on the pending case but said his newspaper's free-lance agreements are "more free-lancer-friendly" than those of many other publications.

Bruce Keller, another of the publishers' lawyers in the Supreme Court case, says the *Globe* lawsuit, and others awaiting the outcome of the Supreme Court ruling, show that free-lancers are motivated by little more than a desire to soak the publishers.

"It has very little to do with copyright," says Keller. "It has to do with free-lancers trying to change the conditions with which they deal with publishers [and] bootstrap themselves into a better position than they have."

The publishers won at trial, but an appeals court ruled for the writers. Now it's up to the Supreme Court to decide how to apply decades-old copyright law to an entirely new, digitized world.

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March 25, 2001

Two More Freelancers Urge High Court to Uphold 2nd Circuit Ruling in 'Tasini'

Mealey Publications
March 21, 2001

A freelancer's copyright "is not abrogated by its inclusion in a collective work" and the author of a collective work "is necessarily in the position of a prospective licensee with respect to the freelance material," authors Barbara Garson and Sonia Jaffe Robbins argued in a brief to the U.S. Supreme Court last month (The New York Times Co. Inc., et al. v. Jonathan Tasini, et al., No. 00-201, U.S. Sup.)

Garson and Robbins joined fellow respondents Jonathan Tasini, Mary Kay Blakely, Margot Mifflin and David S. Whitford in urging the high court to uphold the 2nd U.S. Circuit Court of Appeal's ruling vacating judgment in their copyright action against The New York Times Co. Inc., Newsday Inc., Time Incorporated Magazine Co., Lexis-Nexis and University Microfilms International.

The high court agreed to hear the case in an order issued Nov. 6. Argument is scheduled for March 28.

INFRINGEMENT ALLEGED

The writers alleged infringement of copyrights in 21 articles published between 1990 and 1993. Twelve of the articles were published in The New York Times; eight appeared in Newsday; and one appeared in Sports Illustrated, owned by defendant Time.

The publishers had contracts with Lexis-Nexis for distribution of the contents of their publications on the Nexis system. In addition, The New York Times contracted with University Microfilms (UMI) for production of a CD-ROM product, "The New York Times OnDisc," which contains electronic copies of issues of the Times. UMI also produces "General Periodicals On Disc," which contains reproductions of The New York Times Book Review and Sunday Magazine.

In a suit filed in the U.S. District Court for the Southern District of New York, the authors argued that the conduct of the publishers and services infringes the copyrights in each individual article. The publishers and services moved for summary judgment; U.S. Judge Sonia Sotomayor granted the motion, finding that Section 201(c) of the Copyright Act gives the publishers the right to reproduce the articles as part of a revision to a collective work.

Section 201(c) provides that in the absence of an express transfer of copyright, "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."

2ND CIRCUIT RULING

On appeal, the 2nd Circuit's finding that the electronic databases do not constitute revisions of the collective works in which the authors' individual contributions first appeared within the meaning of Section 201(c).

The appeals court said that "[t]he most natural reading of the 'revision of that collective work' clause is that the Section 201(c) privilege protects only later editions of a particular issue of a periodical, such as the final edition of a newspaper. Because later editions are not identical to earlier editions, use of the individual contributions in the later editions might not be protected under the preceding clause. Given the context provided by the surrounding clauses, this interpretation makes perfect sense. It protects the use of an individual contribution in a collective work that is somewhat altered from the original in which the copyrighted

article was first published, but that is not in any ordinary sense of language a 'later' work in the 'same series.'"

PETITIONERS' BRIEF

In their brief on the merits of the action, the petitioners told the high court that, in enacting Section 201(c), Congress intended publishers to be able to make their publications, and any revisions of them, available to researchers and the public.

The legislative history of Section 201(c) "also establishes that Congress did not intend to interfere with publishers' long-recognized rights to reproduce and distribute their publications," the petitioners said.

Moreover, the petitioners said, Congress twice rejected legislation that would have adopted the authors' reading of Section 201.

Both the text and legislative history establish, the petitioners argued, that the electronic copies at issue are privileged under Section 201(c).

The 2nd Circuit's analysis also conflicts with fundamental copyright principles, the petitioners argued.

BRIEF OF GARSON, ROBBINS

Garson and Robbins told the high court that the privilege laid out in Section 201(c) "is non-assignable, non-transferable and non-exclusive." It "represents a personal exemption from liability and not a transferable ownership interest in property," the authors said.

Moreover, the authors said, Section 201(c) merely gives publishers "a privilege to include a contribution in a particular 'series'" and "publishers are not given the privilege of public 'display.'"

The legislative history of Section 201(c) "confirms that the privilege was only meant to be exercised within the same 'series,'" Garson and Robbins said. And, they said, the claim of the publishers and online services that Section 201(c) was intended to apply to electronic information storage and retrieval systems "is erroneous."

Garson and Robbins are represented by Emily Maruja Bass, Linda A. Backiel and Michael J. Gaynor of Gaynor & Bass in New York.

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Showdown at the Lexis-Nexis Corral

Keith Perine
The Industry Standard
March 26, 2001

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because they don't want to treat free-lancers fairly.

The free-lancers are backed by the American Library Association, the Authors Guild and writers such as Jean Strouse and Tracy Kidder. Marybeth Peters, the U.S. Copyright Office's register of copyrights, also supports the writers. In a letter to Congress, Peters wrote that reproducing free-lance articles on Nexis and CD-ROM without further compensation "interferes with authors' ability to exploit secondary markets. The result would be an unintended windfall for publishers of collective works."

Since the case was filed in 1993, publishers have revised their free-lance agreements specifically to include language authorizing them to reproduce works in computer databases and online. That revision led to a class action against The Boston Globe, which is owned by the New York Times Co. In the lawsuit, the National Writers Union and other unions allege unfair and deceptive trade practices. Richard Gulla, a Globe spokesman, declined to comment on the pending case but said his newspaper's free-lance agreements are "more free-lancer-friendly" than those of many other publications.

Bruce Keller, another of the publishers' lawyers in the Supreme Court case, says the Globe lawsuit, and others awaiting the outcome of the Supreme Court ruling, show that free-lancers are motivated by little more than a desire to soak the publishers.

"It has very little to do with copyright," says Keller. "It has to do with free-lancers trying to change the conditions with which they deal with publishers [and] bootstrap themselves into a better position than they have."

The publishers won at trial, but an appeals court ruled for the writers. Now it's up to the Supreme Court to decide how to apply decades-old copyright law to an entirely new, digitized world.

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RAY FISHER
PHOTOGRAPHER

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.

PDNEWS

By David Walker

LEGAL DEVELOPMENTS

Supreme Court Lets Ruling For *Greenberg* Stand

WASHINGTON, D.C.—The U.S. Supreme Court gave freelancers another victory October 8 when it declined without comment to review a lower court's copyright infringement ruling against the National Geographic Society (NGS).

The 11th Circuit Court of Appeals ruled last March that NGS violated photographer Jerry Greenberg's copyright by including several of his images in a CD product without permission. The CD, which was created in 1997 and has since sold millions of copies, reproduces each back issue of the magazine page by page.

The appeals court ruled that the NGS CD "is in no sense a revision. The Society. . .has created a new product, in a new medium, for a new market."

The Supreme Court's refusal to review that ruling, combined with its recent ruling against publishers in *The New York Times v. Tasini*, "provides a pretty clear message to publishers as to the limits of what they can do with pre-existing works that they don't own," says Greenberg's attorney, Norman Davis.

"The facts were different [in the two cases], but the meaning is quite the same," Davis continues. The 11th Circuit's ruling on Greenberg "was so obviously consistent with *Tasini*," he adds.

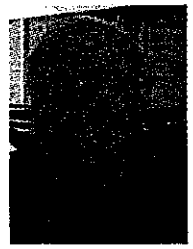
Under U.S. copyright law, publishers can revise existing collective works without permission from freelance contributors. But publishers must get permission from authors to create new collective works or compilations.

In the *Tasini* case, publishers argued unsuccessfully that database compilations of articles amounted to revisions rather than new collective works.

NGS also sought to convince the high court that its CD was a revision rather than a new collective work. It tried to distinguish its CD from the databases at issue in the *Tasini* case by pointing out that the databases re-used articles in isolation, while the NGS CD re-used Greenberg's pictures in their original context. NGS compared its CD to microfilm and microfiche, which are generally considered revisions.

But Greenberg countered that it didn't matter that his pictures were re-used in their original context. The NGS CD "is as comparable to microform as a race car is to a horse," Greenberg argued, because the CD includes an opening montage, a sophisticated search engine, sound, animation and new advertising. All those features add up to a new work, he asserted.

Greenberg also argued that NGS's copyright registration for the CD amounted to evidence that the CD was a new work. "If the [CD] is nothing more than a huge bundle of reprints of magazines," he asked, "why would registration of the entire new product be necessary?"



Photographer Jerry Greenberg.

Greenberg dismissed the Geographic's warnings that publishers wouldn't be able to create electronic archives if the 11th Circuit decision wasn't overturned. "Lost in all of the alarms about the handcuffing of publishers is the necessity to preserve the copyright balance set forth in the Constitution by protecting authors' legitimate rights," Greenberg said. Publishers could simply pay to re-use the work of freelancers, he suggested.

Greenberg's case has been sent back to a federal court in Miami to set damages.

Meanwhile, the Supreme Court's decision to let the *Greenberg* ruling stand could help other photographers with similar claims now pending against NGS.

"This is great news for us," says Fred Ward, who is suing NGS for unauthorized use of his pictures on the same CD. "It reinforces the copyright act and lets publisher know they cannot get away with what they've been doing—which is expropriating material without payment to content providers."

NGS spokesperson Mary Jeanne Jacobsen said the Society "is disappointed" by the high court's decision, but not surprised. "The Society knew that it was a long shot to persuade the Supreme Court to agree to hear the case," she says.

In the face of the other claims, though, NGS is holding fast to its legal position despite the *Greenberg* ruling. "Since the [CD] is a faithful reproduction of every page of the magazine as it originally appeared," Jacobsen says, " we continue to believe it is the same product in a different medium, comparable to microfilm copies of *National Geographic* magazine."

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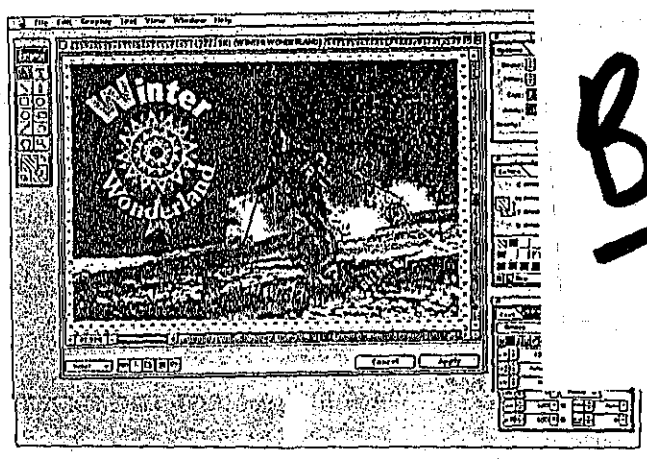
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BEST

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See PHOTOGRAPHICS, *page 10* ▸

CASE STUDY

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Society scans its archives for digital consumption

BY ERIC A. TAUB

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Continued from page 8

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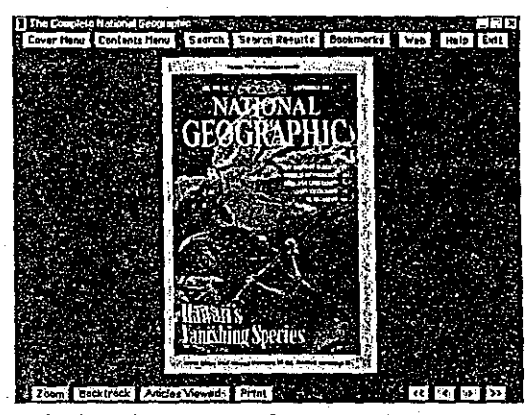
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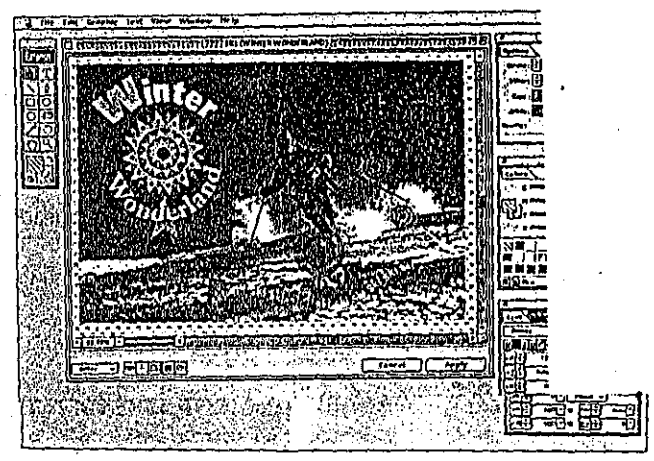
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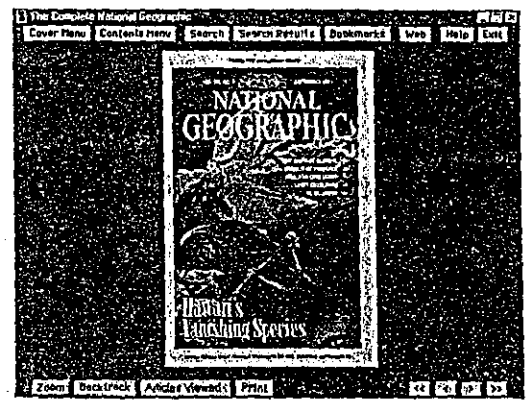
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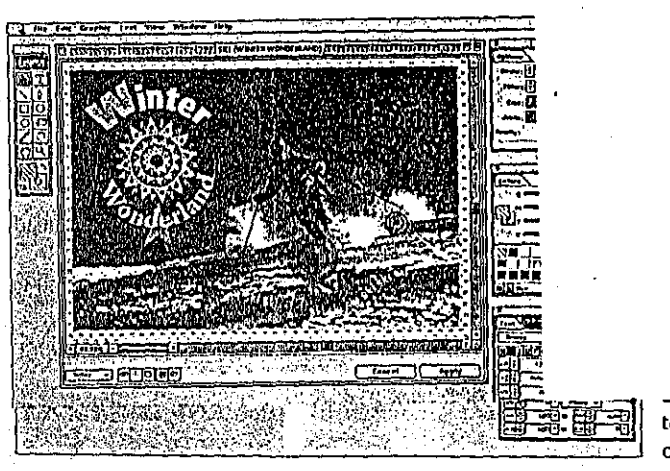
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BY ERIC A. TAUB

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Archives

Continued from page 8

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

Beginning the ascent

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

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

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

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

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

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

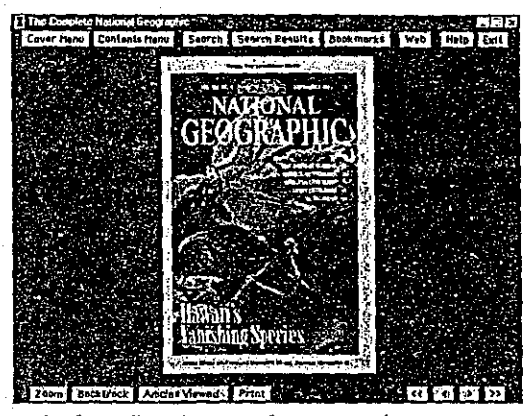
National Geographic and Dataware chose Document Automation Development of Overland Park, Kan., to scan the magazine's pages. That company's propriety software, DocuTrak, indexes and tracks images and information, which helps automate the workflow.

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

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

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

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



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

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

Reaching the summit

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

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

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

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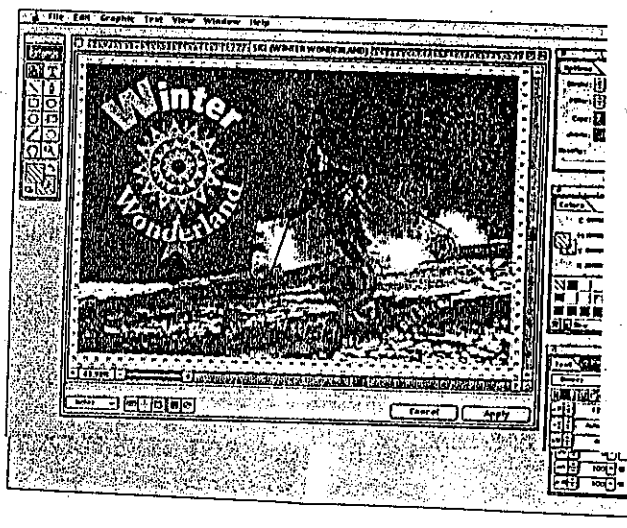
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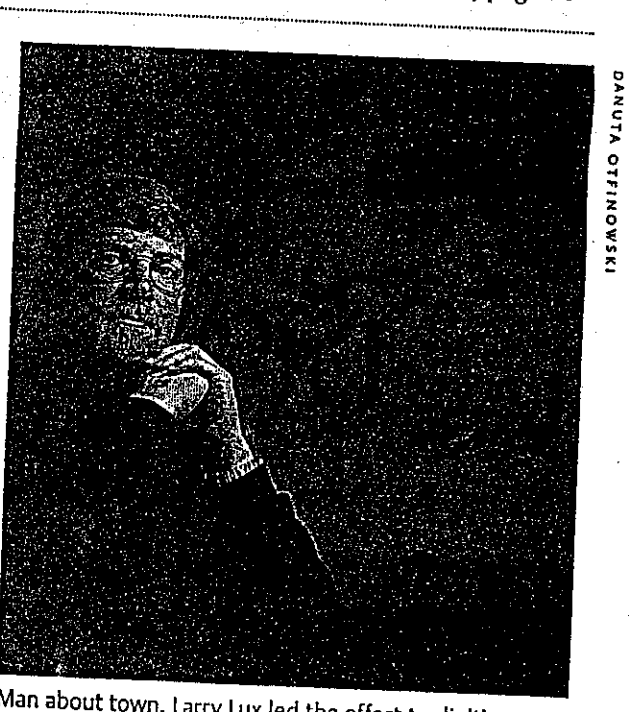
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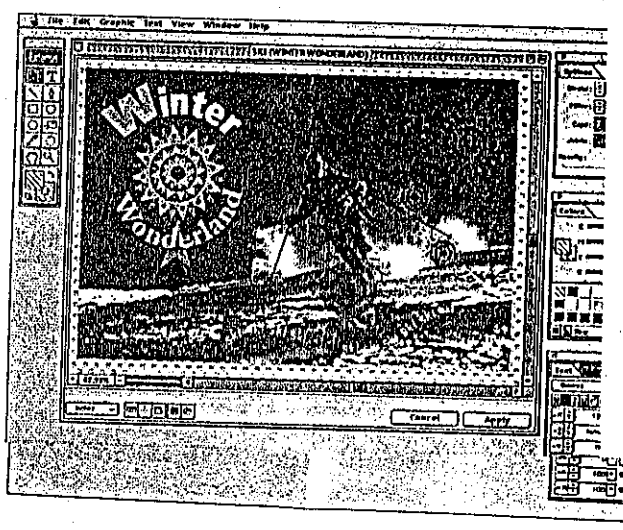
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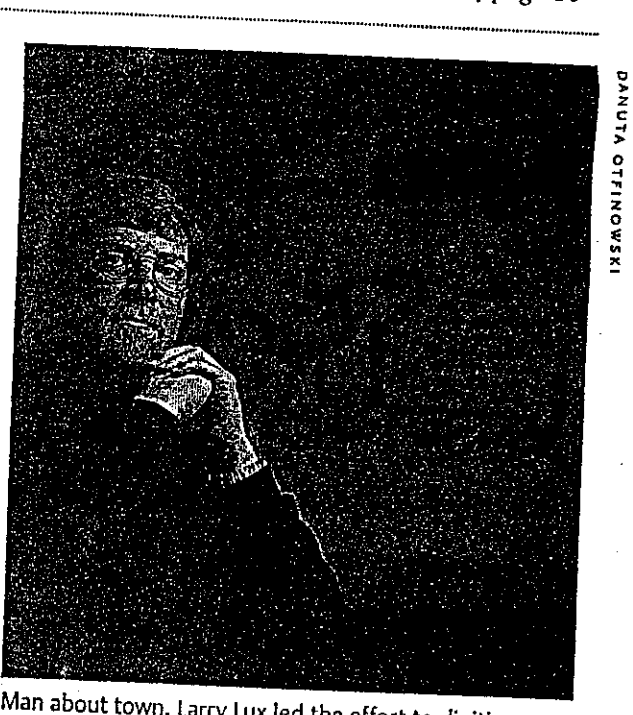
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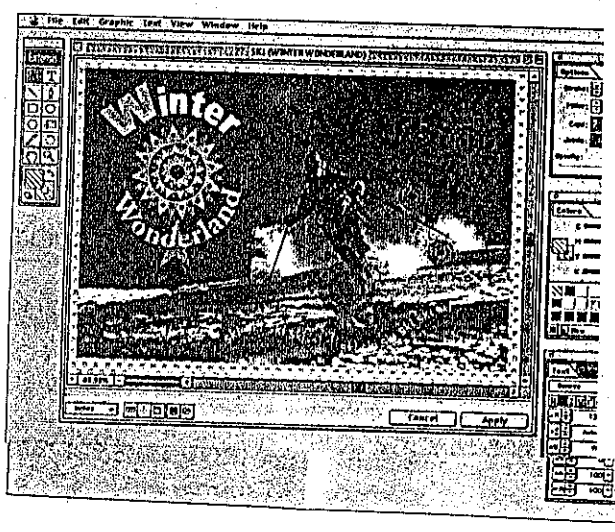
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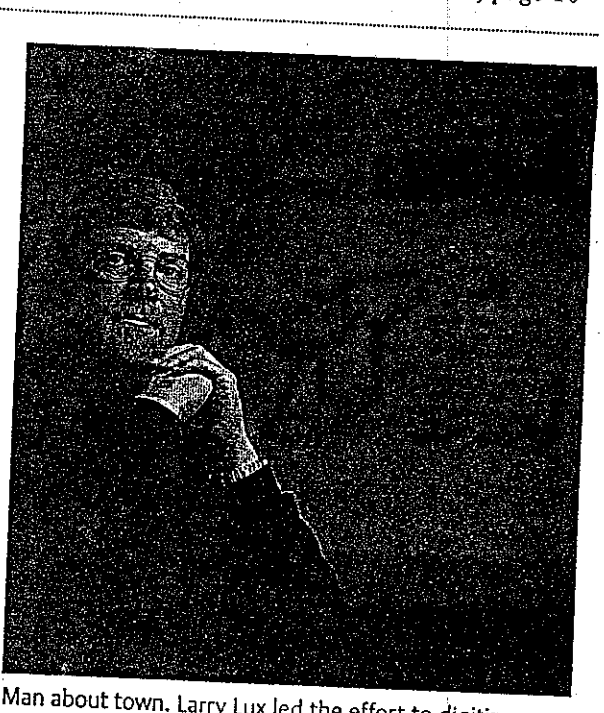
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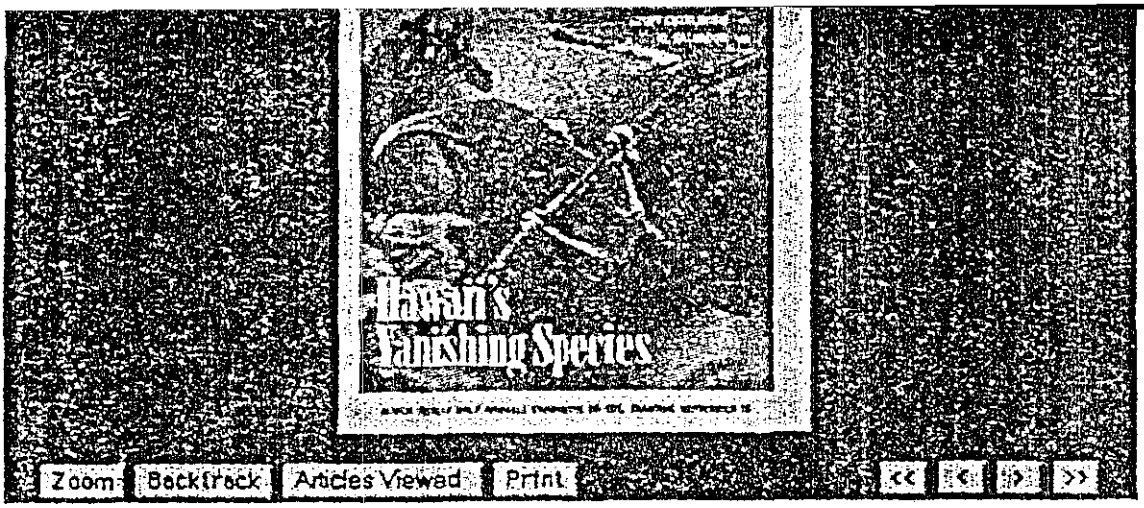


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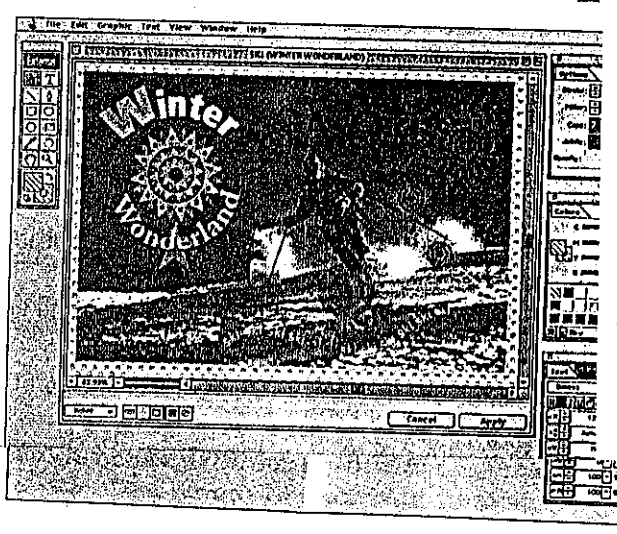
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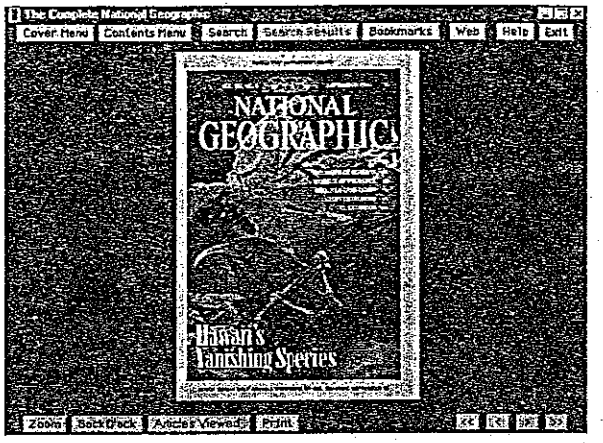
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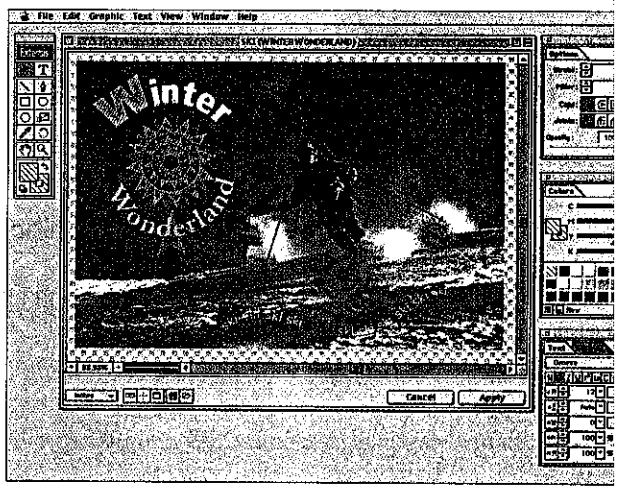
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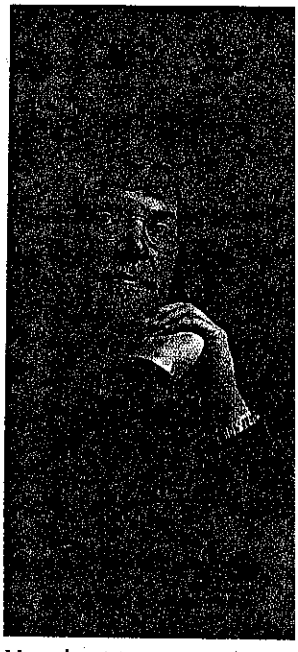
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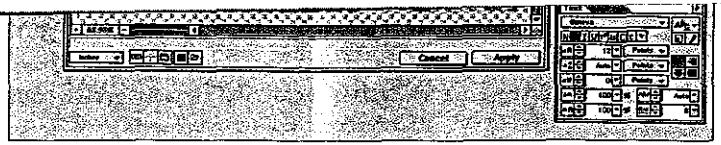
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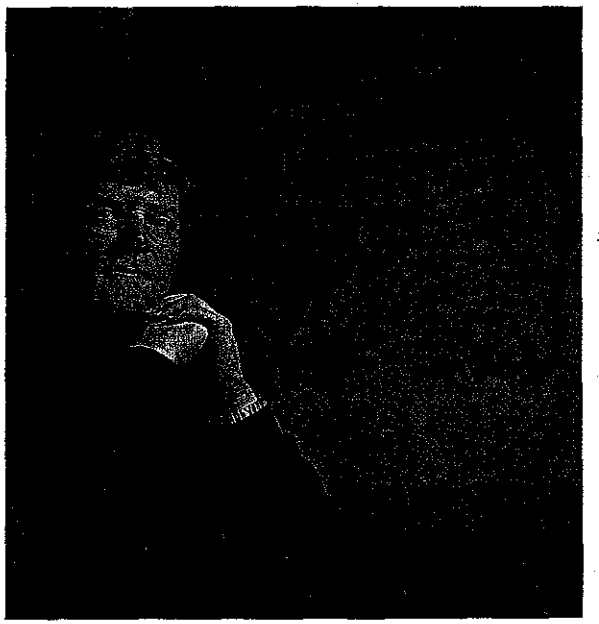
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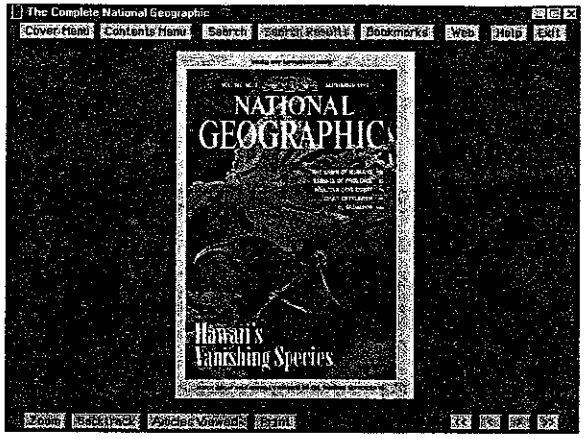
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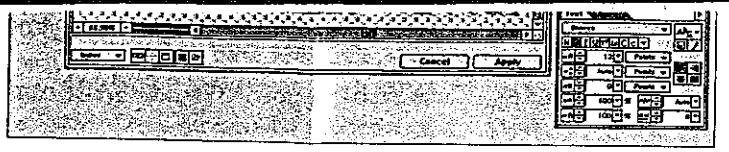
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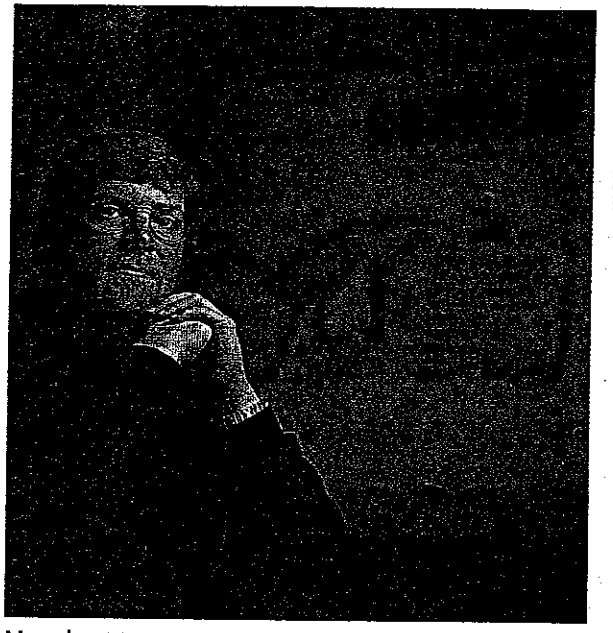
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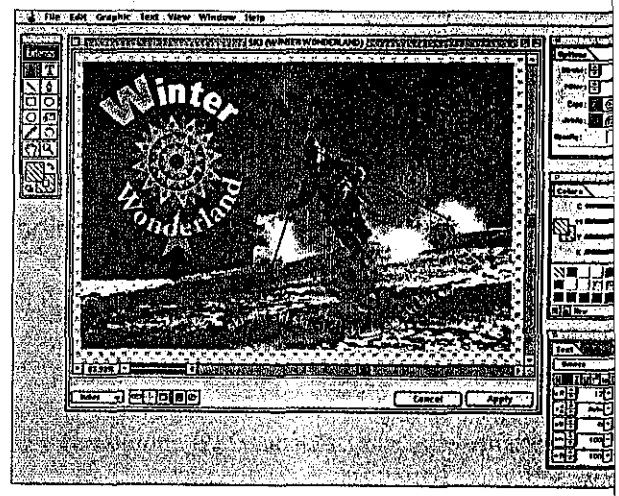
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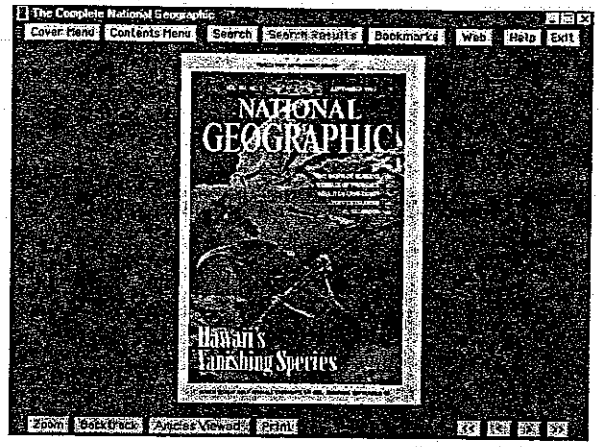
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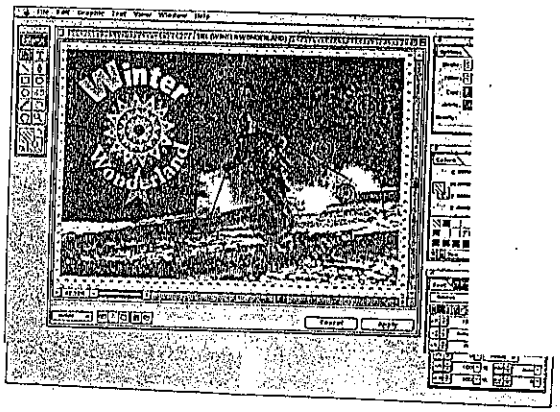
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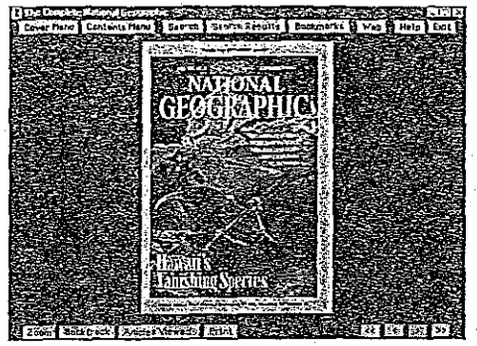
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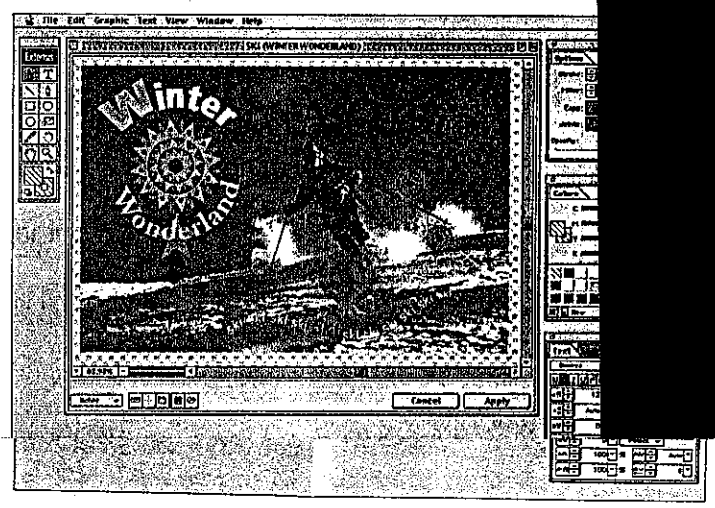
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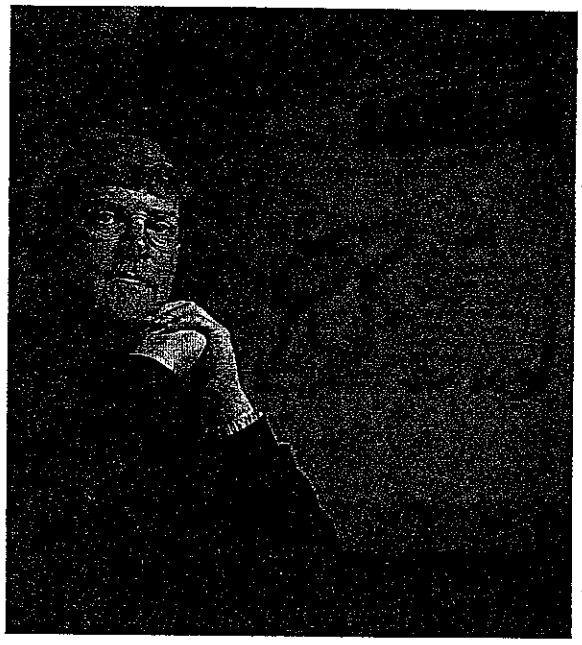
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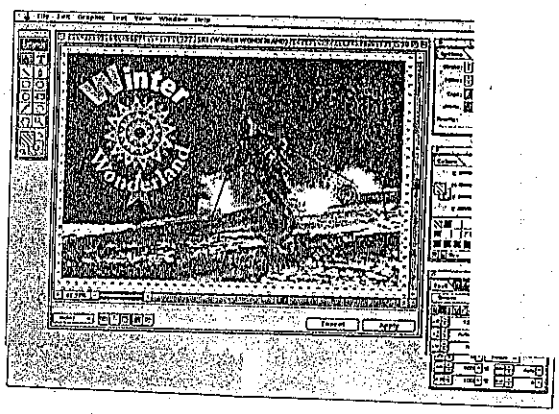
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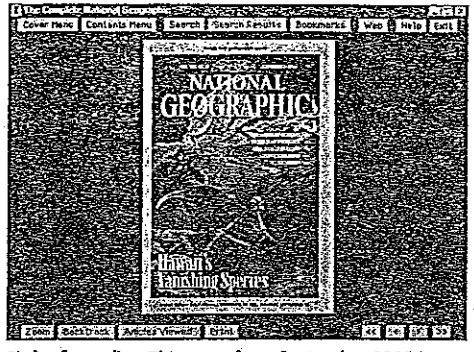
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Morrison SoftDesign of Charlotte, N.C., is at (704) 597-3789 or (800) 583-2917; www.morrisonsoftdesign.com.

PhotoAlto ships collections

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

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

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

PhotoGraphics 1.0 exp

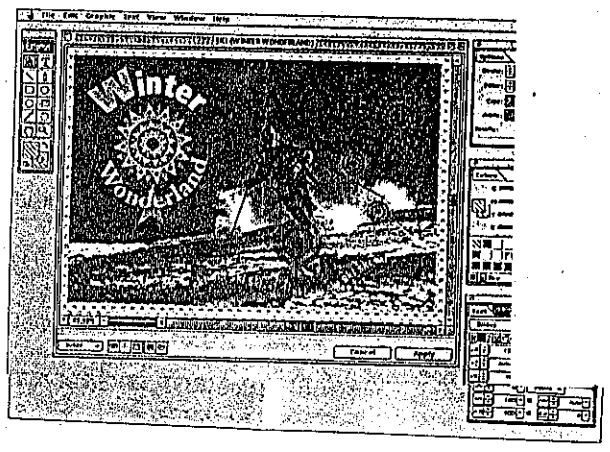
Photoshop plug-in from Extensis offers vector drawing, text handling

BY DANIEL DREW TURNER

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

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

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



...text along a path or object.

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

See PHOTOGRAPHICS, *page 10* ▸

CASE STUDY

National Geographic scans a century of issues for CD

Society scans its archives for digital consumption

BY ERIC A. TAUB

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

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

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

Setting up base camp

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

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

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

Although they said they wanted to

See ARCHIVES, *page 11* ▸



DANUTA OTFINOWSKI

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

Archives

Continued from page 8

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

Beginning the ascent

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

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

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

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

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

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

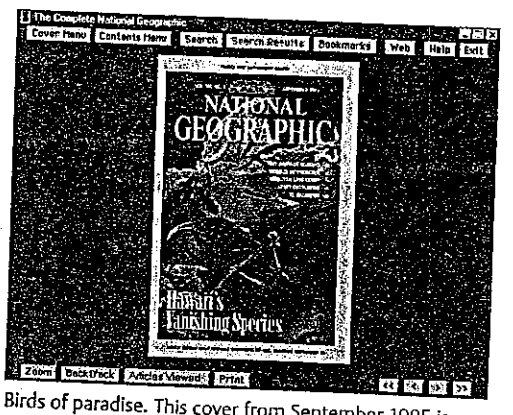
National Geographic and Dataware chose Document Automation Development of Overland Park, Kan., to scan the magazine's pages. That company's propriety software, DocuTrak, indexes and tracks images and information, which helps automate the workflow.

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

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

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

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



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

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

Reaching the summit

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

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

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

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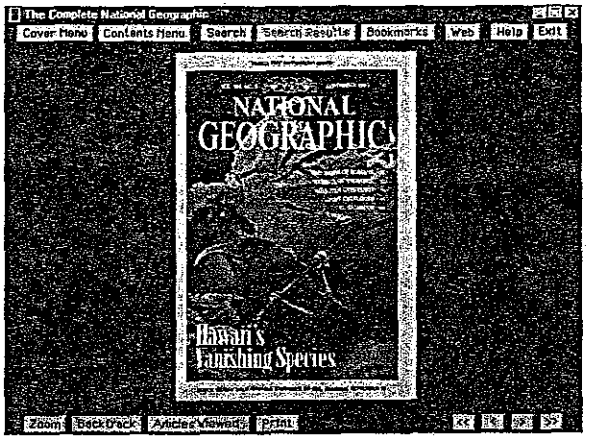
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Case Could Alter Copyright Law for Internet, CD Use
R. Robin McDonald
Fulton County Daily Report

October 5, 2000

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

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

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

Among the legal issues raised by the judges:

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

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

• Does translating the published material to a new computer medium and adding a separately copyrighted search engine that functions as an index sufficiently alter the freelancer's work so that it is derivative
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Greenberg has been selling photos for publication in The National Geographic since 1961. According to Greenberg's attorney, Norman Davis of the Miami firm Steel Hector & Davis, the photographer's contracts generally included a copyright clause stating that, after publication, all rights to his photos reverted to him. In addition, in 1985, Greenberg wrote to the magazine, asking for a letter clarifying his ownership of the rights to his published photos. The magazine's attorney complied in a notarized letter reassigning the rights to Greenberg's published photos to the photographer, Davis said.

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

The CD-ROM set, in addition to containing reprints of each magazine

cover and contents, also included a video sequence of moving covers, including one shot by Greenberg.

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

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

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

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

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BIRCH: MEDIUM MATTERS

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

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

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

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

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

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

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

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

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

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

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

October 5, 2000

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

fit today's high-tech era.

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

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

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

compiled by this nation's magazines and newspapers."

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

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

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

and computer copyright suits across the country.

SIMILAR CASE BEFORE HIGH COURT

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

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

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

Among the legal issues raised by the judges:

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

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

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

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

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

PHOTOGRAPHER'S CONTRACTS

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

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

The CD-ROM set, in addition to containing reprints of each magazine

cover and contents, also included a video sequence of moving covers, including one shot by Greenberg.

'A NEW ANTHOLOGY'

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

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

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

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

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

IS CD SET A REPRINT?

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

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

Anderson also questioned whether a collective work refers to a single

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

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

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

a different collective work."

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

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

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

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

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

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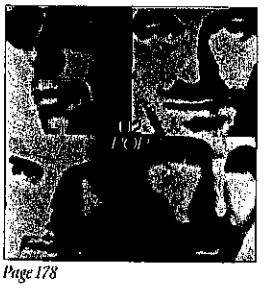
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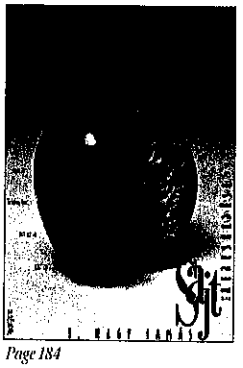
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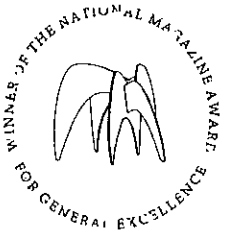

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Editorial & Advertising
104 Fifth Ave.
New York, NY 10011
Phone: 212-463-0600
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Web site: http://www.printmag.com

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Direct phone line:
212-463-0600, Ext. 114
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DESIGN & NEW MEDIA

FAIR USE REVISITED

By Frank Martinez

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Continued on page 202

Frank Martinez is an intellectual property attorney in New York.

legible, and more economical than Helvetica. Although designed as an alternative to Helvetica (it is 10 per cent narrower), Parisine is actually closer in feeling to Frutiger. This similarity is especially noticeable in the open counters of *C, G, S, a, c, e,* and *s*. But the resemblance stops there. Parisine has a taller x-height than Frutiger and is darker in weight. It also has a true italic. Finally, Parisine's *g* (in both the roman and the italic) is two-storied.

What sets Porchez apart from his French contemporaries is the typishness of his fonts. Typishness refers to qualities of letterforms that differ from calligraphy in their repetitiveness and self-effacement. Pure calligraphy is often a poor model for type because it is too beautiful, too self-aware. Unlike the work of Puyfoulhoux, Jalleau. and Arin, all of Porchez's fonts—including FF Angie and Apolline—keep their calligraphic influences in check. In addition, his fonts—with their full complement of weights, small caps, and old style figures—are geared more toward reading than display. His calligraphic knowledge has been used to aid legibility, as well as to temper functionality with beauty. Porchez Typofonderie has achieved an enviable balance between calligraphy and type, between utility and beauty, between the past and the present.

Porchez's fonts can be purchased through several sources:

FF Angie is available from FontShop and other FontFont resellers at http://www.fontfont.de.

Angie Sans and the Le Monde family are available exclusively from the Porchez Typofonderie at http://www.porcheztypo.com. Phone and fax: 33-1-46-54-26-92.

Apolline and Parisine are available from both the Porchez Typofonderie and the AgfaType Creative Alliance Library.

Anisette is available from the Porchez Typofonderie and the Font Bureau: http://www.fontbureau.com.

Fair Use Revisited

Continued from page 32

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

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

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

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

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

Nicholas Callaway

Continued from page 38D

first Christmas—wandering the aisles of Toys R Us, appalled by the bad design, cheap manufacturing, and ugly packaging. I went to Mythology [now closed], an offbeat store on the Upper West Side of Manhattan, and was dumbstruck by a wooden pull toy called a Sneaking Baby Alligator. Everything about it was original, clearly the result of a single, and singular, creative mind, as opposed to a marketing committee: brilliant, strange palette, beautifully engineered, and in a box with a painted label that stimulated the child's imagination by placing the three-dimensional toy in a little story context. It was also an immediate, huge hit with my daughter. I wanted to find out who was behind this Hoobert Toy, so I called the company and asked to speak to the president. It was David Kirk on the line, and he said, "That's me." I told him how impressed my daughter and I were with his toy, and asked who painted his packaging. He said, "That's me—I used to be a painter before becoming a toymaker." I asked if he had ever thought of illustrating a children's book, and he said he had indeed done one; it was called *Miss Spider's Tea Party*, about a lonely spider's quest to make friends against the odds. "Do you have a publisher?" I inquired. "Yes," he said quietly. Not knowing what to say, I blurted out, "Well, are you happy with your publisher?" He said that he wasn't because he had been paid a tiny advance and then his editor orphaned him by going to another house. I asked him to send any materials—and it was a moment I will remember all my life, because I knew that he was literally a visionary.

Heller: How would you describe Kirk's vision?

Callaway: I describe it as David's toll-free 800 number into the collective unconscious of children. I called him and said that his was one of the most amazing children's books I'd ever seen. I offered him an advance four times what he had been paid. This was more than David had ever made in a year, so he was pleased. We went to the publisher, and they let him out of his contract. Four years and three books later, the *Miss Spider* books [published by Scholastic] have become the biggest-selling non-movie, non-TV children's picture books of our time. David and I are partners in a family entertainment company, Callaway & Kirk. Four new books are in the works (not about bugs), plus three more *Miss Spider* titles, two computer-animated feature films (one starring Miss Spider) for Universal, a learn-to-read CD-ROM with Scholastic, and many toys.

Heller: Do you see the children's book field expanding creatively?

Callaway: From a field of approximately 5000 children's books published each year, there are about ten I find interesting. I don't see it expanding creatively, especially in relation to the enormous creative potential. We are trying.

National Geographic Tips $500 Million revenue

in Australian Newspaper

National Geographic tip

Brook Turner

The Washington-based National Geographic Society, publisher of the famous yellow-bordered magazine, expects its revenue this year to reach the magical $500 million mark that has eluded it for so long.

In Sydney yesterday for the society's 110th birthday, its 15th president, Mr Reg Murphy, said that after languishing "in a revenue band of $415-430 million" for five years, the society saw strong growth ahead.

Set up in 1888 with the simple, scholarly charter of "increasing and diffusing geographic knowledge", the society has covered a lot of ground since Mr Murphy's appointment as vice-president in 1993 after a newspaper career that included stints as publisher of the *San Francisco Examiner* and *Baltimore Sun*.

Membership had fallen from a 1989 peak of 10.8 million to just over 9 million. The non-profit society had "a wonderful brand, one of the best-recognised in the world", said Mr Murphy, in Australia for last night's Melbourne opening of *The Photograph*, an exhibition of the best images from National Geographic's archives.

But to keep doing what it did best, it had to come to terms with the business of doing business in the late 1990s. "At its best [the NGS] was very professional and thoughtful. At its worst, it was over-staffed and had pretty well convinced itself that it didn't have a lot of competition," Mr Murphy said.

In May last year, he became the first president appointed from outside the ranks of the Grosvenor dynasty which had headed the society for five generations. "There were some hard decisions that had to be made. Most organisations fall into long-term habits that an outsider can see more easily," he said.

During his stewardship of the society, with the support of retiring president Mr Gilbert M. Grosvenor, Mr Murphy almost halved the staff to about 12,000, expanded the magazine into Japanese and Spanish-language editions, bolstered the publishing arm and propelled the society into for-profit pay-television, internet and film subsidiaries.

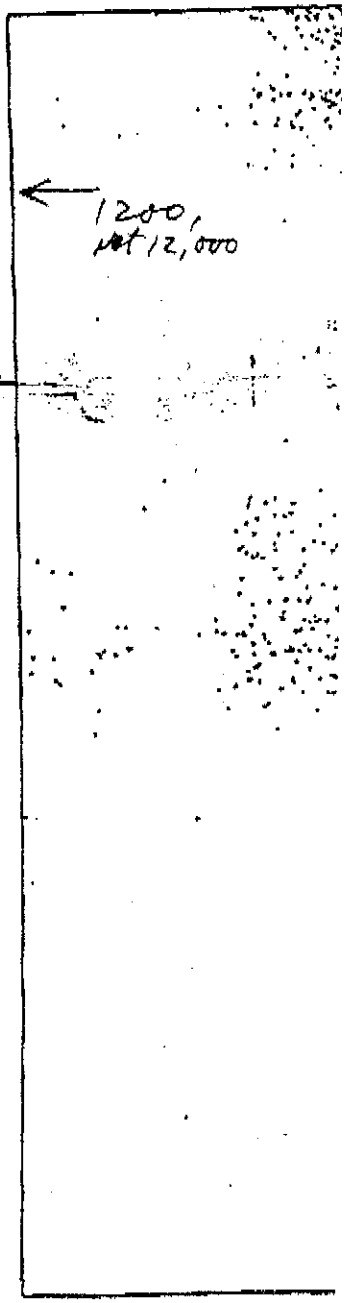
The National Geographic Channel, established last September, is already among Foxtel's top three channels. The NGS's publishing arm, established 30 years ago, has increased its list from 12 titles a few years ago to about 60 this year.

National Geographic Television's first production, *Stanley and Livingstone*, a $6 million television film starring Aidan Quinn and Nigel Hawthorne, aired in the US three weeks ago. There are plans for another six productions. The society has expanded its cartographical activities and made tentative moves into merchandising.

The underlying strategy was simple, Mr Murphy said. "We tried to create a wedge. We would go into another country and lead with the channel and then try and expand our hold with the magazine or books, instead of just dotting our activities all around the world. We didn't have the money to do that."

It is a long way from the society's original 1888 charter of "increasing and diffusing geographic knowledge", and Mr Murphy admits there was "great resistance" to the moves.

"But change is the rock in everybody's shoe," he said. "Some people stop to get the rock out and some people just keep limping. I didn't want the society to just limp on."



1200, not 12,000

Mr Murphy sees National Geog

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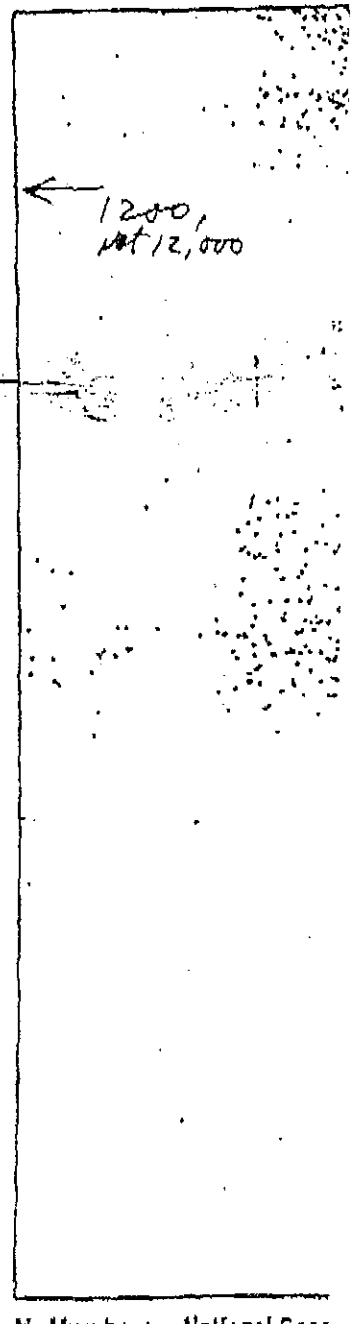
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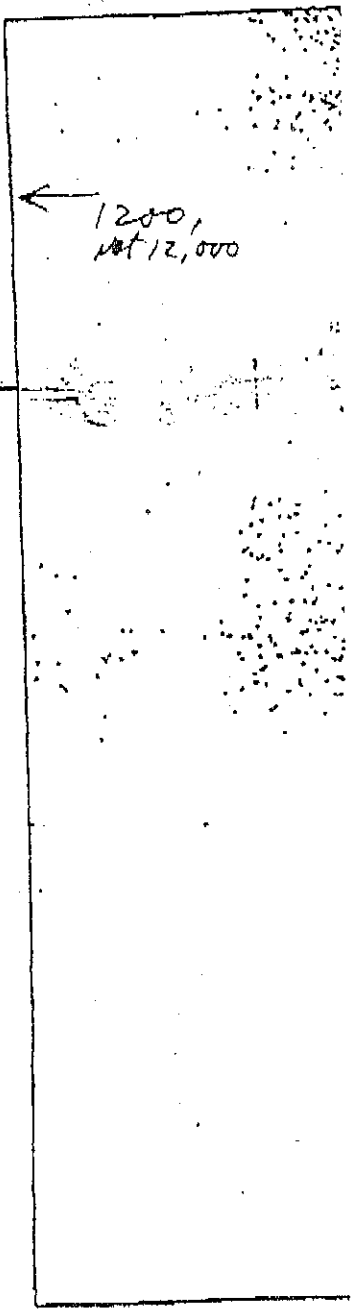
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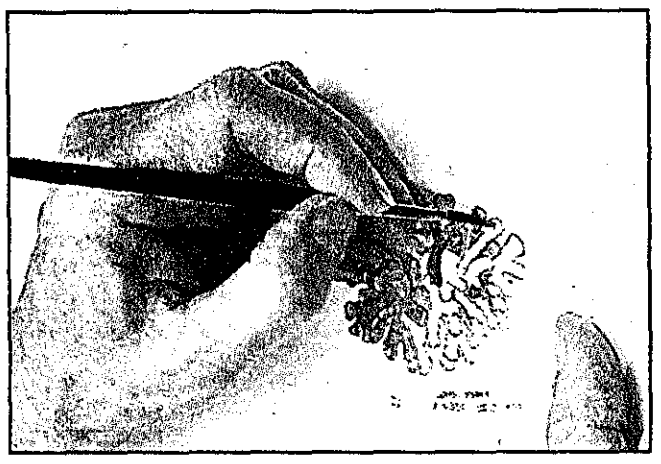
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DETAIL WORK: The cards look like photos of sea life, but they're not. Idaz Greenberg draws and paints each one by looking at photos by husband Jerry.



FINISHED PRODUCTS: The couple's Seahawk Press sells about 100,000 marine life cards to distributors each year. The cards are tailored to regions around the world.

Sea life is their living

■ A husband-wife team's waterproof cards help divers worldwide identify fish. The cards are popular on land, too.

Knight-Ridder Newspapers

MIAMI — Jerry and Idaz Greenberg's business is a house of cards — fish cards, that is.

For 16 years, the Dade County couple have been creating colorful plastic fish cards that help divers, tourists and students learn about marine life.

Their home business, 40-year-old Seahawk Press — which began with marine books — sells about 100,000 cards annually to 11 distributors, Jerry Greenberg said.

The distributors sell them to shops, which price the cards at about $5.50 apiece. Cruise lines order the copyrighted cards by the thousands, and dive shops sell them throughout the world.

"I don't like to put money values on anything personal and private," Idaz Greenberg said when asked about profits. "We've raised three children and put them through college, and we have a nice home.... We have no worries financially."

Divers take the waterproof cards underwater to identify fish. Beachcombers use them to search for shells. Teachers display them in science classes.

The cards are so exact they look like photographs of fish, but they're not. Idaz draws and paints each one by looking at photographs taken by husband Jerry.

The couple began making the cards in 1979, the first to make them of that size and format. They fit in a diver's life vest.

Because it's a home business, overhead costs are low. How low? They won't say, because the way they run the business is a family secret — there's no outside help, not even a secretary.

Son Michael, 37, sometimes takes pictures for the couple and is working on a video project on the coral reef. Keeping the business at home brings personal benefits, the Greenbergs said.

"This is a mom-and-pop business," Idaz said. "All our hats are worn by all of us. We keep the business at a size we can manage. We're not greedy. Once, we were tempted to open an office and hire a secretary, but we chose not to do it."

She said she wouldn't give up her home business for anything.

"We got married with a total dedication first of all to each other and secondly (to) doing work that we love and not doing work for anyone else," she said.

There are several editions of the fish cards. The couple produced five cards for the Florida, Bahamas and Caribbean area, which includes shells, game fish, marine invertebrates, reef fish and common fish. Some cards are available in Spanish. They have six cards for the Pacific Ocean and IndoPacific area and a card for the Red Sea — in Hebrew.

Norwegian Cruise Lines gives the fish cards to their passengers for souvenirs. They've proved so popular that many teachers ask for more cards to use in their classes.

Besides the fish cards, the Greenbergs have published several books on marine life: *Guide to Corals and Fishes,* which was translated into Spanish and has a waterproof version; *The Living Reef,* which the Greenbergs say is the first all-color book on coral reefs; *Beneath Tropic Seas: the Fishes, The Coral Reef and Coral Reef Coloring Book.*

Then there was another Greenberg success story.

Jerry Greenberg produced a book on sharks after working on an assignment for *National Geographic* magazine. *Sharks and Other Dangerous Sea Creatures* became an instant success when the movie *Jaws* was released in the late 1970s.

"We couldn't print those books fast enough," Jerry Greenberg said. "They're still selling."



Photos by Paul Rubiera/Miami Herald

MEET MOM AND POP: Jerry and Idaz Greenberg produce the fish cards from their Dade County home. "This is a mom-and-pop business," Idaz said. "All our hats are worn by all of us."

INSIDE THIS EDITION

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Photographer Jerry Greenberg: A Man and His Mangroves

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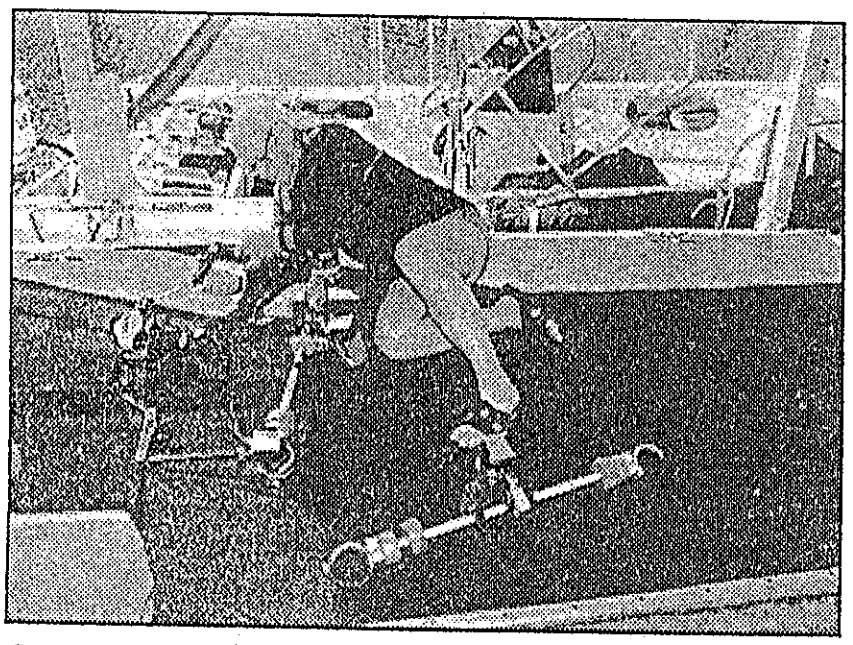
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Greenberg prepares his cameras for a photo shoot.

-Harlen Brown photo

Mangroves -

Continued from Page 3

Why it happened I don't know," he said. "Ask the experts. I just documented it."

Greenberg said he cut back on his work for *National Geographic* as it began to take too much time away from his family.

And so, with his wife Idaz, they began publishing some of their own books, doing the first as a spin-off of the John Pennekamp Park photos entitled "Adventures of a Reefcomber." Then came "The Living Reef" in 1972 followed by "Coral Reef' in 1977.

Next, "A Guide to Coral and Fishes, Florida, Bahamas and the Caribbean" written and illustrated by Idaz Greenberg was published.

In 1979, Idaz created the first of twelve waterproof plastic cards identifying almost all the reef and game fish in the world, and in various languages.

Using photos taken by her and Jerry, Idaz literally duplicates the appearance of the fish and their colors with amazing realism.

"People can use them for all the warm water snorkeling in all the areas of the world," Greenberg said.

After seeing his most recent publication, "Mangroves," a man approached Greenberg and said he thought the name should be changed to "Mangroves, The Land Builders."

"Number one, they don't build land," I told him, "they build swamps. It is we who come along and dig canals and use the landfill to fill the swamp and do away with the mangroves. You just try to walk through the mangroves and you will find it's impossible.

Preparing to go out on a shoot in the mangroves, you quickly learn that here is a man who has done this before as he methodically prepares for everything. The camera and bank of electronic flashes is made ready and thoroughly checked over. Other flash units used to light up under the water's surface are given a once over before being loaded into the Boston Whaler. The wet suit goes on after a quick wet down from an outdoor shower as the final preparations are complete.

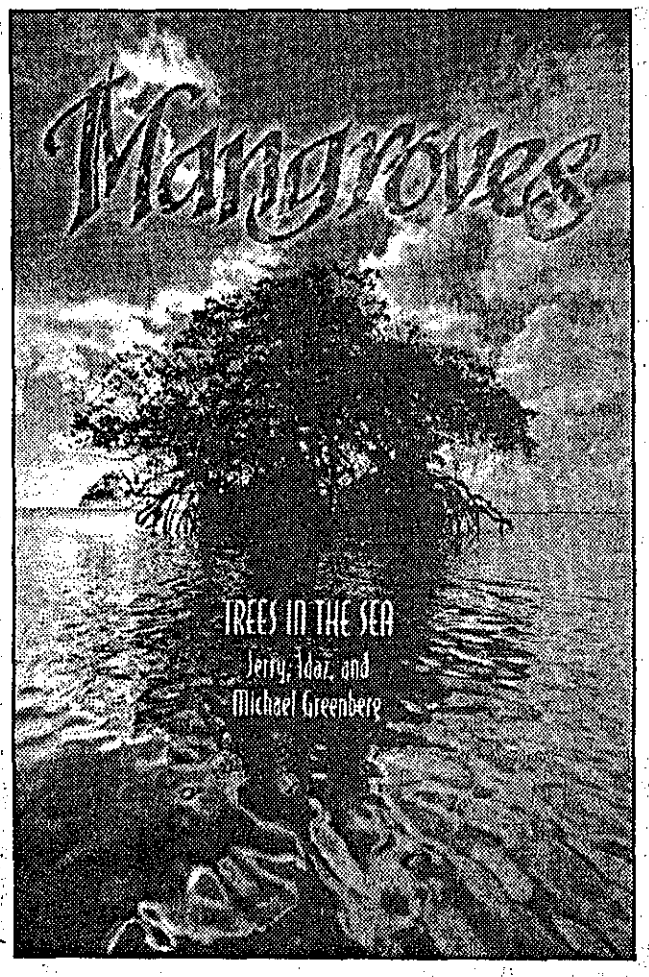
Then it's into the boat and a slow waveless trip up the creeks near his second home in Key Largo.

As we drift along, Greenberg points out the spots where some of the photos in Mangroves were taken. At one place he slows down even more as he points out where he took the photograph of "Perpetual Autumn."

"I had to pick up the empty Coca Cola and beer cans to get a shot of what appears to be a Persian carpet of leaves that fall from the Red Mangroves. What a shame," he added.

Sometimes when the weather is bad, Greenberg says he will pack up his equipment and head for the mangroves where he finds no winds blowing and no waves to disturb the water.

He anchors the boat and throws overboard an inner tube with several ropes attached. To each rope he snaps into place a piece of camera equipment, then treads the water as he moves along the mangrove line going deeper and deeper into the undergrowth until he finds that place where he can lower himself below the surface and find solitude among the roots and the beauty of the "Mangroves."



The cover of the Greenbergs' new book.

- Harlen Brown photo

A Man and His Mangroves

By HARLEN BROWN
News Editor

Sixty years ago a young boy from the South Side of Chicago was shuffling through some magazines found in a neighbor's storeroom in the basement.

"I came across a batch of *National Geographic* magazines, from the 30's and the 40's," said Jerry Greenberg of Key Largo. "Boy was I hooked!"

Greenberg and his family moved to Miami in the 40's and there he discovered Florida's wonderful marine environment. Thus began a lifetime of love of photography and the water above, but mainly below the surface.

It was a combination that would lead him to have several articles published in the magazine he so admired, *National Geographic*, then go on to publish several books, and this year to publish what may be his greatest work, "Mangroves, Trees in the Sea."

THE BOOK

The book, composed of 65 full-color photographs, portrays the beauty of the Florida Keys that many people never get the opportunity to see. If you are one of them this book is for you. It will help you to understand why so many are concerned about the fragile Keys and what has happened to them over the years as well as what could happen.

But at the same time it gives you a perception of what is still there and why millions of people from all over the world flock here each year to get just a two to three hour glimpse of a part of our undersea world and the beauty that still remains.

Greenberg, his wife Idaz and son Michael, with a lot of help from many people, have brought the Keys to life in "Mangroves" with photos taken over the past seven years, mostly in the shallow waters along the creeks that wind through the mangroves in Key Largo and in the Everglades around Florida Bay.

Over on the bayside, up Dusenbury Cut which runs from Tarpon Basin to Blackwater Sound, there is a creek where an old boat has been anchored for years. Greenberg traveled up that creek and captured a panoramic view of a Red Mangrove forest which he calls the "Grotto."

"One of those Red Mangroves I saw had to be a thousand years old," he said. "But you would have to cut it to count the rings to determine its age."

One photo in his new book reveals what Greenberg describes as "a once in a lifetime shot." "Everything had to be just right. I had my camera handy, it was on auto focus, I was there and the timing was perfect." The photo depicts two Bluestriped Grunts, approaching each other with open mouths as though preparing for a kiss.

As you flip slowly through the pages of this 6x9 soft-cover book, you will be amazed at what you are seeing and how each photo looks better then the one before. Greenberg did not have to make a heavy hardcover coffee table book to display his talent with a camera. He calls it "a labor of love." And it shows.

Idaz created the drawings that appear in the book. They depict the various mangroves, their leaves, root systems and the colors which make each different from the other and certainly more recognizable to the rookie environmentalist.

"Idaz, along with others, spent countless hours writing and rewriting then reading and correcting," Greenberg said. She wrote the words detailing information about each photograph and giving us a more thorough knowledge of the mangrove and what it means to the Keys, as a thing of beauty and as a natural link to the underwater fish, lobsters and other species that draw life from the mangroves."

This book is one that every library in the Keys should have and one that the whole family can enjoy and learn from.

"Mangroves," suggested retail price is only $7.95, and can be found in most bookstores in the Keys and in many of the dive shops.

THE MAN

It was in the late 40's when Jerry Greenberg began coming to the Florida Keys, not to shoot photographs but to spearfish for grouper with his companions whom he referred to as "The Dead End Kids."

"I started spearfishing here off Molasses Reef in 1948," Greenberg said. "We fished commercially for grouper taking our catch back to Miami and selling to some of the finest restaurants in town for 25 cents a pound."

They would get to the Keys early and rent a boat from Gordon's Mandalay. "He had some real good skiffs," Greenberg recalled. They would go out and spearfish bringing their catch back in old banana boxes. "There was plenty of fish out there and we thought they would last forever ... but then we also thought we would stay young forever.

"The fish and the lobster petered out and of course we got older."

Many people spearfished off the bridges at that time, while others gathered coral off the bottom to take it home or sell it. Greenberg remembers one time when a large Jewfish they had caught began thrashing around the boat.

"Back then, the Dead End Kids made a gas gun out of a fire extinguisher which had a blunt driver and they would use that to get Grouper. It was so powerful I once saw them blast it through a piece of Dade County Pine, and you know how hard that is.

"Well this Jewfish kept thrashing around and chewing up the seats so one of the guys takes aim and shoots the Jewfish. Killed him dead but that blunt driver went right through the fish and the bottom of the boat. We could not rent boats from that livery anymore!"

In the early fifties the aqualung came out and Greenberg who had fashioned and built his own underwater camera housings began shooting underwater scenes, still in black and white of course.

Prior to the early 60's Greenberg had amassed a large collection of black and white and color photos. Then one day the call came from *National Geographic*. They wanted him to shoot a piece on John Pennekamp Park which was still not open to the public. He was given the assignment in 1960 and began to put it all together, using a lot of photos shot at Carysfort Reef, which he described at the time as one of the most beautiful in the shallow waters off Key Largo.

The Geographic article published in January of 1962 began with a panoramic view of Carysfort Reef which was six overlapping photos and became the first underwater panoramic photo in the world. The article was published as a two-part story using all color photos. It was chosen as the most popular piece of the year to appear in *National Geographic*.

In 1989 he was assigned to work with author Fred Ward, as co-photographer on another article about John Pennekamp Park. It was published in April of 1990, using some of the photos taken at the same spots Greenberg had shot 30 years earlier.

"It really showed the deterioration that had occurred on the reef over that long period of time," Greenberg said.

In a personal photo log book that he keeps at home, Greenberg tracks the deterioration of the reef over the past 20 years. "Notice how it seems to get much worse during the years between 1997 and 98. Everything started to go.

Turn to Mangroves, Page 13



Greenberg in a Mangrove swamp on a recent photo shoot.

-Harlen Brown photo

E-mail us at keysindependent@aol.com.

National Geographic maps out licensing strategy

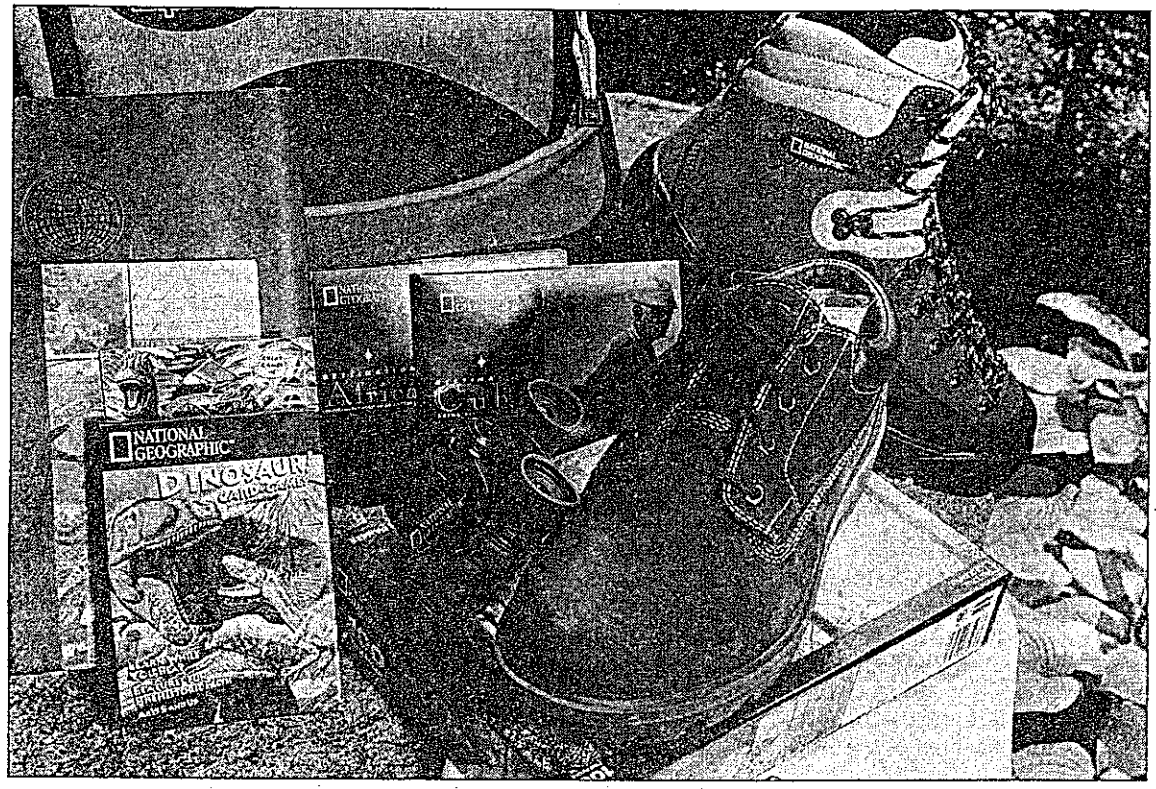
BY MARTHA MCNEIL HAMILTON
Washington Post Service

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

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

Coming soon: rugged backpacks and luggage; casual and high-performance jackets designed by an Italian manufacturer; fanciful umbrellas designed to withstand winds of up to 74 m.p.h.; and yellow-and-black hiking boots. The boots, by outdoor equipment manufacturer Rugged Shark and footwear manufacturer K-Swiss, are part of a line of National Geographic footwear that eventually will include 110 styles.

Linda Berkeley, president of the National Geographic licensing arm, and John Dumbacher, vice president for licensing, both worked for Walt Disney Co. and Universal Studios before National Geographic



JAHI CHIKWENDIU/THE WASHINGTON POST

MORE THAN BOOKS AND MAPS: Washington-based nonprofit National Geographic plans to continue expanding its line of licensed merchandise.

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

National Geographic has the Museum [illegible] and First USA Bank, which issues a National Geographic MasterCard.

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

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

Dumbacher, who handles

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

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

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

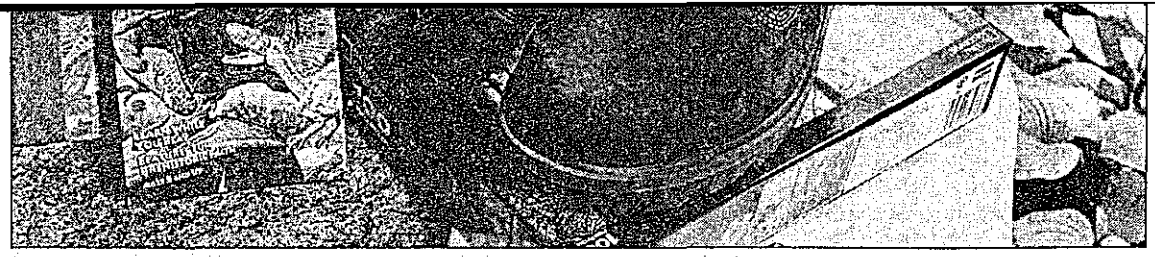
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JAHI CHIKWENDIU/THE WASHINGTON POST

MORE THAN BOOKS AND MAPS: Washington-based nonprofit National Geographic plans to continue expanding its line of licensed merchandise.

Nonprofits often profit from profit-making ventures

BY MARTHA MCNEIL HAMILTON
Washington Post Service

While the IRS has required that nonprofits create taxable subsidiaries for unrelated businesses, other activities have been allowed to operate under the organization's nonprofit status.

Nonprofits turning to profit-making activities is not new; museums have been profiting from museum stores for decades. National Geographic has long sold books and maps, plus a wider range of products through its catalog since the 1970s.

While the IRS has required that nonprofits create taxable subsidiaries for unrelated businesses, other activities have been allowed to operate under the organization's nonprofit status — if they are related to the organization's exempt purpose and don't get too big, said Lisa LaMontagne, communications manager of the National Center for Nonprofit Boards.

Nonprofits turning to business ventures results from a combination of reduced government spending, economic uncertainty and the desire to raise funds outside of grant money that often is given for specific programs, LaMontagne said. Money from profit-making ventures can be used for overhead and administrative expenses or for new programs.

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

National Geographic products are sold at about 150 outlets, including national parks, zoos and JCPenney Co., which carries its T-shirts. Other popular items are puzzles and arts-and-crafts kits with themes such as dinosaurs. "Dinosaurs have the longest life for an extinct species," said Linda Berkeley, president of the National Geographic licensing arm.

National Geographic maps out licensing strategy

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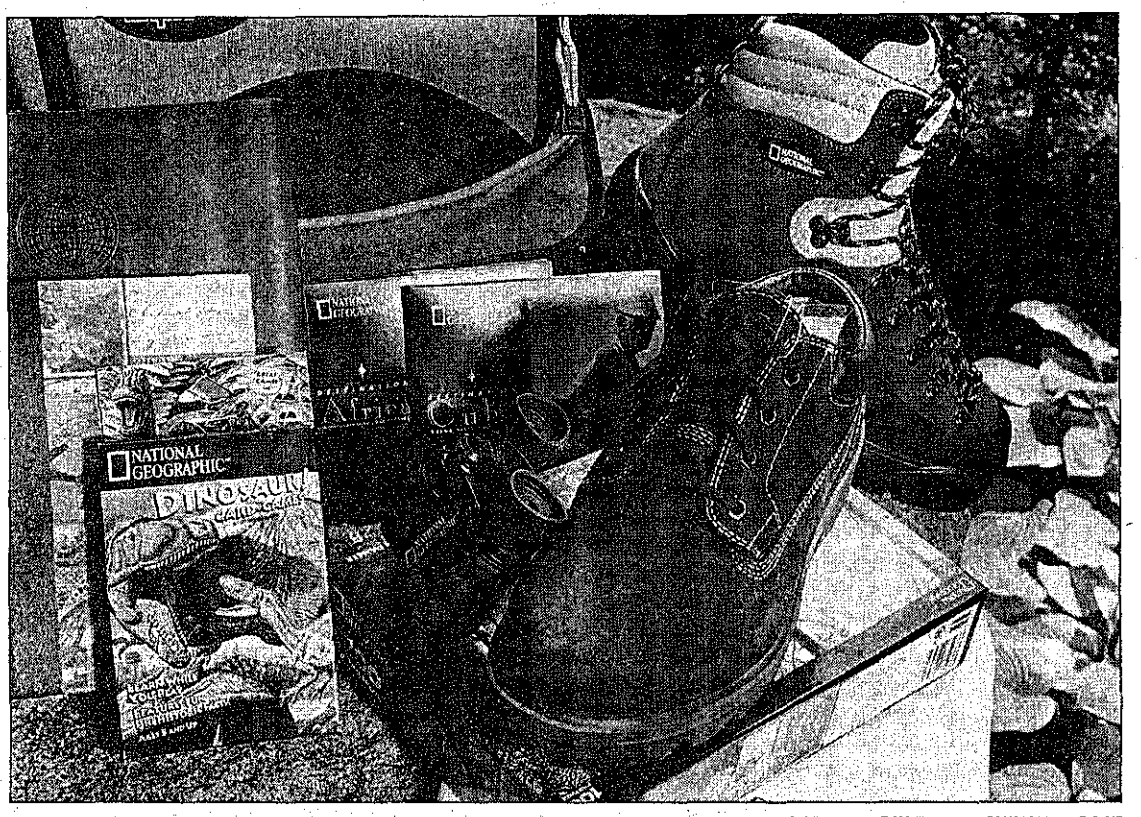
National Geographic is venturing into new territory, exploring additional ways to turn its prestigious name and black-and-yellow trademark into green.

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

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Davis, Norman

From: Robin McDonald [Robin.McDonald@incisivemedia.com]
Sent: Wednesday, December 10, 2008 2:32 PM
To: Davis, Norman
Subject: Here's the story

Thanks again for always being willing to talk to me about this case.

Robin .

Supreme Court Closes Book on Photographer's Case

R. Robin McDonald
12-10-2008

The U.S. Supreme Court has closed the book on an 11-year-old copyright case that, in its final form, granted The National Geographic Society -- and by extension, other publishers -- the right to reproduce its magazine archive in digital format without paying additional royalties to freelance contributors.

The high court on Monday denied a petition for a writ of certiorari from Florida undersea photographer and former *National Geographic* magazine contributor Jerry Greenberg. In July, the full 11th U.S. Circuit Court of Appeals voted 7-5 in favor of *National Geographic*.

Greenberg petitioned the high court for a hearing, claiming that the 11th Circuit, and the 2nd Circuit in a nearly identical case, had misinterpreted the Supreme Court's 2001 landmark copyright ruling, *Tasini v. New York Times*.

But the high court, without comment, let stand rulings that *Tasini* -- which bars publishers from selling published articles to Internet databases without securing new copyright permissions from freelance contributors -- did not prohibit publishers from selling their digital archives on CD-ROMs without securing new copyright contracts.

In 1997, Greenberg challenged *National Geographic*'s use without permission of more than 60 of the photographer's photos, which had appeared in the magazine, in a 30-disk CD-ROM compilation of the society's entire magazine archive.

Greenberg's suit caused *National Geographic* to pull the archive off the market in 2003, after Greenberg, with the approval of the 11th Circuit, was awarded damages by a Florida district court. But the 11th Circuit's final of three rulings favored the magazine.

Terry Adamson, executive vice president of the National Geographic Society, said Tuesday that the magazine is considering issuing a new version of the CD archive.

Greenberg's attorney, Squire, Sanders & Dempsey senior counsel Norman Davis, said that his client, "did this not only for himself but to try to look after the interest of others who were also creative people. In pursuing this cause, he has exhausted virtually all of his means."

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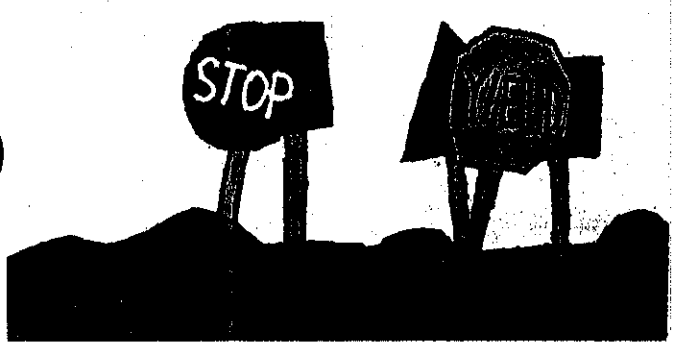
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So far, the memos appear in court papers filed by photographers Douglas Faulkner and Fred Ward in a New York federal court.

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

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

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

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

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

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

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

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

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

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

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

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

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> —*ROBERT POOLE, APRIL '97*

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

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

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

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

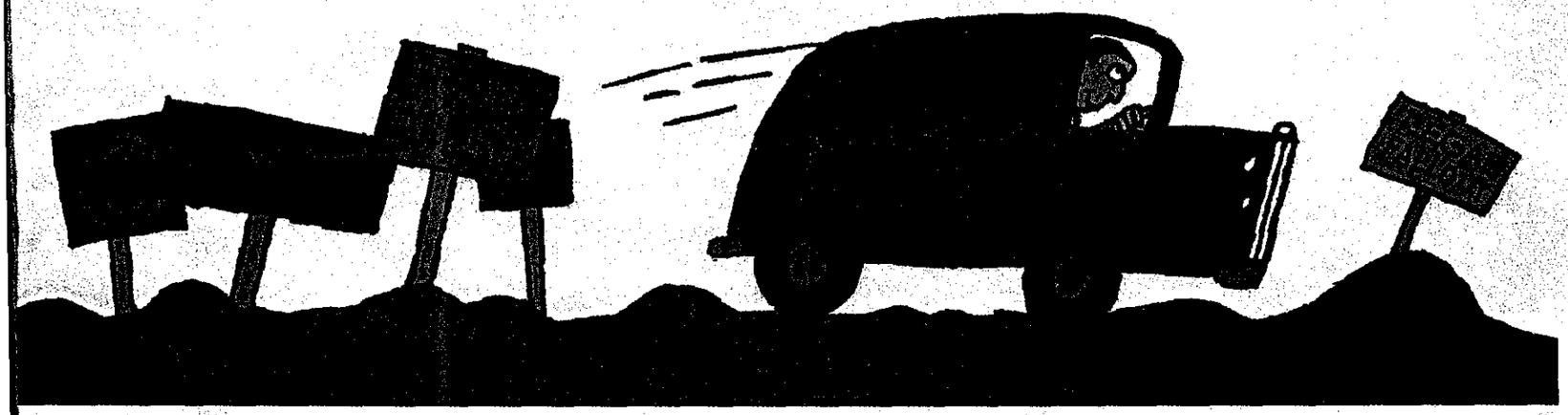


ILLUSTRATION © SCOTT MENCHIN

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

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

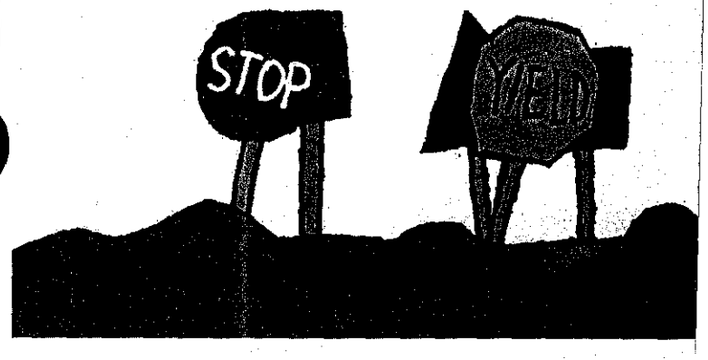
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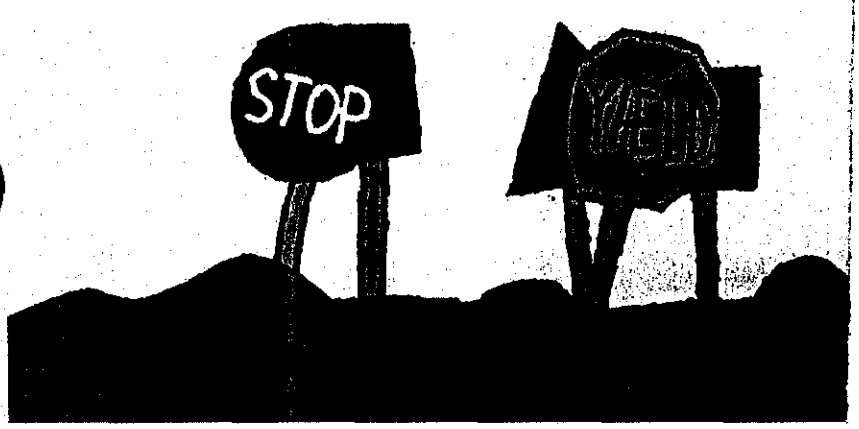
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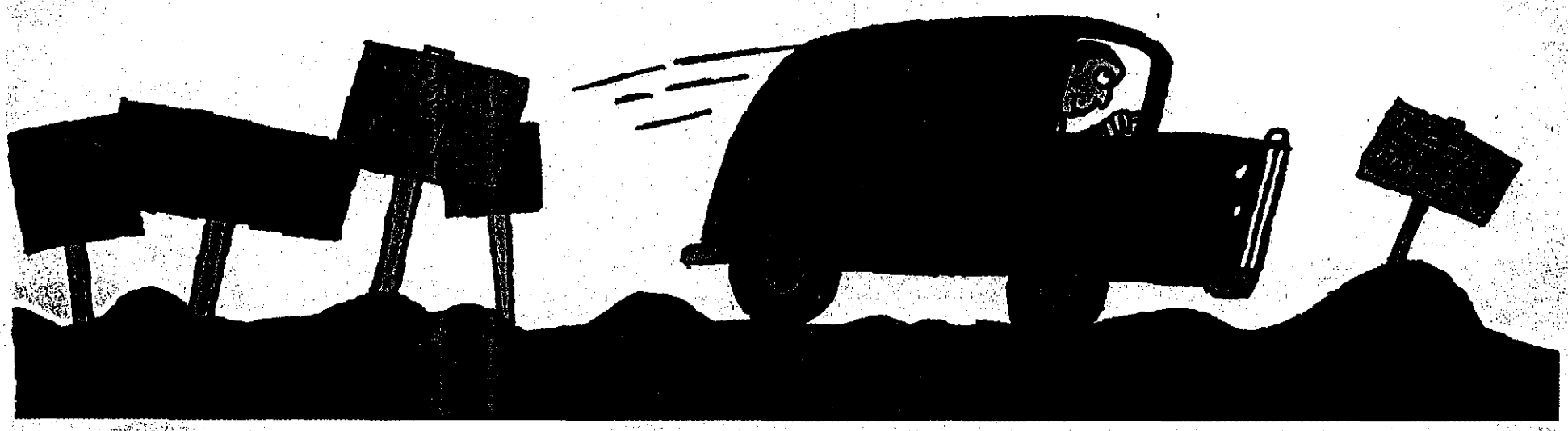


ILLUSTRATION © SCOTT MENCHIN

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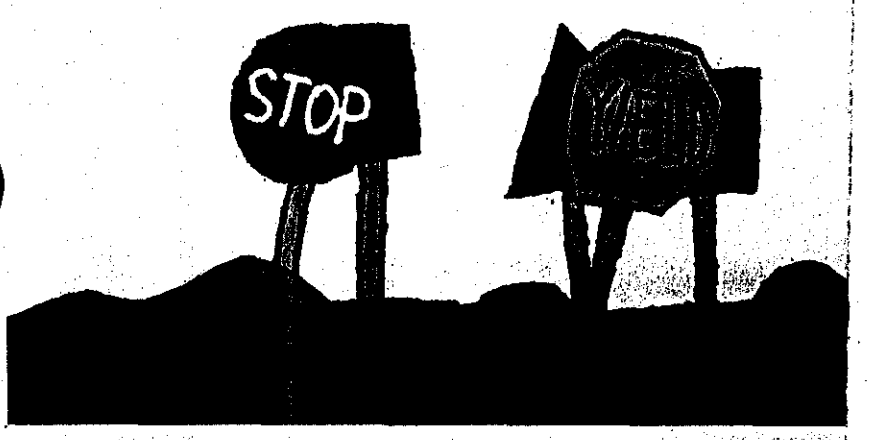
The National Geographic Society (NGS) was warned repeatedly in advance by outside attorneys and its own editorial staff that its archival CD product would infringe the copyrights of photographers and expose the publisher to legal liability, according to court documents filed in May by two photographers.

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

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

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

NGS'S INCRIMINATING MEMOS



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

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

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

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

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

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

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

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

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

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

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

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

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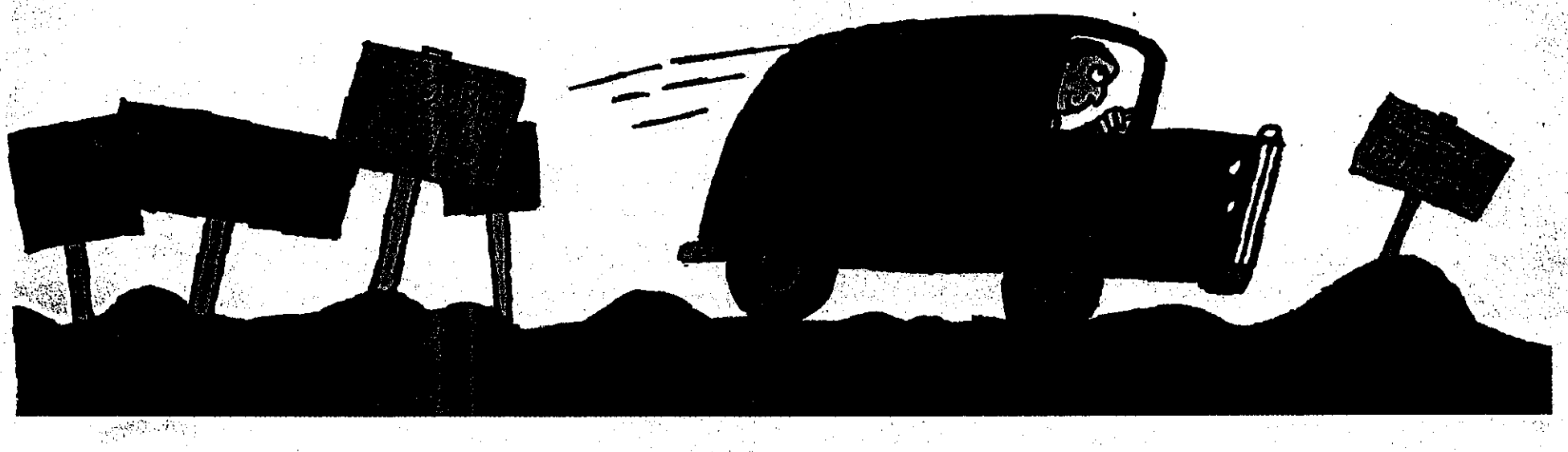


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Story 231

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

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

October 5, 2000

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

fit today's high-tech era.

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

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

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

compiled by this nation's magazines and newspapers."

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

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

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

and computer copyright suits across the country.

SIMILAR CASE BEFORE HIGH COURT

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

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

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

Among the legal issues raised by the judges:

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

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

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

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

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

PHOTOGRAPHER'S CONTRACTS

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

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

The CD-ROM set, in addition to containing reprints of each magazine

cover and contents, also included a video sequence of moving covers, including one shot by Greenberg.

'A NEW ANTHOLOGY'

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

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

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

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

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

IS CD SET A REPRINT?

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

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

Anderson also questioned whether a collective work refers to a single

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

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

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

a different collective work."

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

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

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

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

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

BIRCH: MEDIUM MATTERS

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

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

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

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

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

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

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Subject: Fwd: Geographic Guilty of Copyright Infringement
Date: Mon, 21 Jun 1999 10:23:43 -0600
From: "Howard M. Paul" <hmpaul@ecentral.com>
To: STOCKPHOTO@PEACH.EASE.LSOFT.COM
Newsgroups: bit.listproc.stockphoto

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Howard

>The following is a story I posted last week on my Selling Stock site.
>Jerry Greenberg want to be sure that you saw it. The case number is
>97-3924-CIV-Lenard/Turnoff if you would like more information and the
>decision was filed on June 8th.
>
>Jim Pickerell
>
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GREENBERG PREVAILS AGAINST NGS

MIAMI—A federal judge has ruled that the National Geographic Society infringed photographer Jerry Greenberg's copyright by reproducing six of his images without permission. One of the images appeared on a poster promoting the Society's Jason Project. The other five appeared in a educational toy titled "World Oceans and Seas."

In 1994, the Geographic entered into a licensing agreement with Educational Insights, a for-profit California company, to produce and distribute "World Oceans and Seas. "Greenberg alleged that the Geographic rendered his photos as illustrations, then incorporated those drawings into the product. For the Jason Project poster, the Geographic reproduced one of Greenberg's images directly.

In a summary judgment, Judge Joan Lenard ruled that the illustrations were "substantially similar" to Greenberg's copyrighted photographs, despite some changes.

She also rejected the Geographic's fair use defense on the grounds that both products in question copied the substantial elements of Greenberg's images without transforming them in any significant way, and because both products adversely affected Greenberg's market for his images. Lenard also noted that the spiral-bound "World Oceans and Seas" is a commercial product, another factor that disqualified it as a fair use.

Damages will be set by a court-supervised mediator.

Previously, Lenard rejected other copyright infringement claims that Greenberg filed against the Geographic for unauthorized use of his images on a CD product called "The Complete National Geographic." That ruling was based on the controversial Tasini decision, which held that publishers may reproduce articles in databases and on CDs without permission from the authors.

>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 the "Tasini" cecision in the
>Southern District of New York confirmed their right to make uses in the
>"108 Years" project without compensating photographers in any way. The
>Greenberg's argued that "Tasini" should have no bearing on their case
>bacause that decision was being appealed.
>
>On this point the judge agreed with National Geographic and issued a
>partial summary judgment on the two counts. Thus, the arguments relating
>to the use of the Greenberg's images in the "108 Years" project were never
>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
>Greenberg's ultimate decision.
>
>Jim Pickerell
>Selling Stock
>
>www.pickphoto.com/sso
>jim@chd.com

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

NORMAN DAVIS

said they wanted to use one his images for a CD-ROM and that they were offering $100 for the use.

Photographer: "What are the rights you're asking for?"
NGI: (She laughs) and then explains the rights.
Photographer: "Send me that in writing and I'll get back to you."

It would appear that they may have been getting the question about rights a lot, and they know that anyone who asks the question is not likely to accept their offer.

108 Years of National Geographic CD-ROM

NGI is planning to also offer the "108 Years of National Geographic" on DVD in the near future. Many photographers and stock agents think this is another new use, and that another fee should be paid for this use. Of course two times $0 is still $0.

As reported in March, Jerry and Idaz Greenberg have filed suit in federal court in Miami against National Geographic for copyright infringement in connection with the use of their images on the 108 years CD-ROM project, as well as a previous infringement by National Geographic.

There are 4 counts to the Greenberg's case -- 2 in connection with the 108 years and 2 with the other infringement. In a preliminary hearing the judge dismissed the two counts that were connected with the 108 years project taking the position that Tasini vs. NY Times was controlling on these issues.

The judge ruled that copying is permitted under Tasini's interpretation of 201(c) of the Copyright Act as a revision of each issue of the magazine.

The Greenbergs believe the judge erred in this decision and will appeal. However, they can not appeal this aspect of their case until the other two counts of the case are settled at the lower court level. They are proceeding with discovery and taking depositions, but it seems unlikely that the 108 Years issue will go to appeal before sometime later next year.

ASMP has agreed to supply an amicus brief to the Appeals Court, and has told their members, "ASMP feels this is an important issue with far reaching consequences."

Lost Transparency Settlement

Photo Resources Hawaii recently received a settlement from National Geographic of between $750 and $1500 per image for the loss of 43 transparencies.

Tami Dawson reports that she had submitted 43 images at the request of National Geographic Traveler magazine. Traveler's records show that the package arrived in the building, but from that point on no one can remember seeing the images.

When Traveler magazine finally acknowledged that the images were lost they turned the matter over to their insurance company. Initially, the insurance company contacted Dawson with a very low and unacceptable offer. At that point Dawson called the National Geographic legal department. She suggested that their insurance company might not really understand the value of transparencies. She pointed out, in a friendly way, that she really didn't want to take the matter to court, but she would if she couldn't get a better offer.

Within 48 hours she had an acceptable offer. They were able to negotiate different fees that ranged between $750 and $1500 per transparency depending on the value of transparency. All this was taken care of without the necessity of Dawson hiring a lawyer.

RE: PICKERELL NEWS LETTER

Council of America (PACA), American Society of Picture Professionals (ASPP), North American Nature Photography Association (NANPA), American Institute of Graphic Arts, American Society of Journalists and Authors, Authors Guild, Garden Writers Association of America, Graphic Artists Guild, Independent Writers of Southern California, Outdoor Writers Association of America, PEN Center USA West, Science Fiction and Fantasy Writers of America, Society of American Travel Writers Freelance Council, Volunteer Lawyers for the Arts, Washington Independent Writers, Writers Guild of America East and Writers Guild of America West.

According to Patricia Fetch of the Chicago law firm of Peterson & Ross, who is directing the appeal, final paperwork from both sides is due April 7, to be followed by oral arguments, probably in April or May.

Geographic CD-ROM

In December, Jerry and Idaz Greenberg filed suit against National Geographic for copyright infringement in connection with the use of their images in Geographic's 30-disc set of CD-ROMs. The case was brought in federal court in the Southern District of Florida.

Geographic refused to settle and has chosen to move ahead with litigation. It appears that Geographic believes any settlement will result in a landslide of claims from hundreds of photographers who would expect similar treatment. Therefore, it appears Geographic intends to force litigation of every claim.

The Greenbergs and their lawyer, Norman Davis, have a history of successful litigations against other infringers. In one case reported in the March 1994 issue of Taking Stock Stanley Michael's Inc. a T-shirt manufacturer settled for $195,000 just prior to the case being heard in federal court.

The Greenberg case will probably be the first to go to trial, and this might take place as early as sometime this summer. Another suit has been filed in New York by Douglas Faulkner, Louis Psihoyos and Matrix stock agency There are at least 40 other claimants who have retained counsel and will be closely watching the results of the Greenberg case.

Rules for supplying feedback

Input Feedback

Subject: Fwd: Geographic Guilty of Copyright Infringement
Date: Mon, 21 Jun 1999 10:23:43 -0600
From: "Howard M. Paul" <hmpaul@ecentral.com>
To: STOCKPHOTO@PEACH.EASE.LSOFT.COM
Newsgroups: bit.listproc.stockphoto

Forwarded with permission of Jim Pickerell. My thanks to Jim -- on behalf of all subscribers -- for allowing me to forward this, which originally appeared in his Selling Stock newsletter.

Howard

>The following is a story I posted last week on my Selling Stock site.
>Jerry Greenberg want to be sure that you saw it. The case number is
>97-3924-CIV-Lenard/Turnoff if you would like more information and the
>decision was filed on June 8th.
>
>Jim Pickerell
>
>GEOGRAPHIC GUILTY OF COPYRIGHT INFRINGEMENT
>
>Judge Joan A. Lenard has found that National Geographic Society infringed
>the copyright of underwater publishers 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

Subj: **Law.com report on Greenberg Case**
Date: Friday, October 6, 2000 10:14:48 AM
From: fward@erols.com
To: Berger@tanhelp.com, lulukiku@aol.com, dausten@hoosier.net, DWALKER@EPIX.NET, psihov@aol.com

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

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

October 5, 2000

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Among the legal issues raised by the judges:

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

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

• Does translating the published material to a new computer medium and adding a separately copyrighted search engine that functions as an index sufficiently alter the freelancer's work so that it is derivative
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At stake are royalties that publishers could be forced to share with freelancers whenever they reproduce and sell the freelancers' published works in merchandise designed for computer access.

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

PHOTOGRAPHER'S CONTRACTS

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

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

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

'A NEW ANTHOLOGY'

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

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

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

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

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

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

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

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

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

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

BIRCH: MEDIUM MATTERS

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

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

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

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

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

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

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Subject: Law.com report on Greenberg Case
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Subj: **Law.com report on Greenberg Case**
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To: Berger@tanhelp.com, lulukiku@aol.com, dausten@hoosier.net, DWALKER@EPIX.NET, psihov@aol.com

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Received: from smtp01.mrf.mail.rcn.net (207-172-4-60.in-addr.mail.rcn.net [207.172.4.60]) by rly-zd02.mx.aol.com (v75_b3.9) with ESMTP; Fri, 06 Oct 2000 10:13:55 -0400
Received: from 209-122-244-67.s639.tnt3.lnh.md.dialup.rcn.com ([209.122.244.67] helo=erols.com)
by smtp01.mrf.mail.rcn.net with esmtp (Exim 3.15 #2)
id 13hYG1-0002uA-00; Fri, 06 Oct 2000 10:13:53 -0400
Message-ID: <39DDDF1F.32EF13CD@erols.com>
Date: Fri, 06 Oct 2000 10:18:08 -0400
From: Fred Ward <fward@erols.com>
Reply-To: fward@erols.com
Organization: Gem Book Publishers
X-Mailer: Mozilla 4.7 (Macintosh; I; PPC)
X-Accept-Language: en,pdf
MIME-Version: 1.0
To: "Berger, Andrew" <Berger@tanhelp.com>, lulukiku@aol.com,
dausten@hoosier.net, DWALKER@EPIX.NET, psihov@aol.com
Subject: Law.com report on Greenberg Case
Content-Type: text/plain; charset=iso-8859-1; x-mac-type="54455854"; x-mac-creator="4D4F5353"
Content-Transfer-Encoding: 8bit

Subj: **List of organizations filing briefs against Greenberg**
Date: Tuesday, May 30, 2000 4:59:16 PM
From: fward@erols.com
To: Adlernovel@aol.com, ben@blackstar.com, billgarret@aol.com, lulukiku@aol.com, neweramik@aol.com, dirck.halstead@pressroom.com, mgsret@megatropic.com

Some photographers on the list asked for the names of the organizations filing Amici Curiae, Friends-of-the Court briefs, on behalf of National Geographic and against underwater photographer Jerry Greenberg in Miami. Jerry's case against NGS for copyright infringements related to the CD108 CD product is on appeal in federal court.

Such a list shows who is interested in Tasini and other cases where creators want to protect themselves against the unauthorized use of their material. Such a list suggests who has the most to gain in the current wave of "rights grab" activities.

Those filing against photographer Jerry Greenberg and in favor of National Geographic's position to publish every picture and text ever printed in the magazine without compensation to the thousands of writers and photographers are:

Magazine Publishers of America, Inc.

Newspaper Association of America, Inc.

Gannett Co., Inc.

Hachette Filipaccchi Magazines, Inc.

The New York Times Company

Time Inc.

Times Mirror Co. (Newsday)

Tribune Company

Now you know.

Fred Ward

---------- Headers ----------
Return-Path: <fward@erols.com>
Received: from rly-yg02.mx.aol.com (rly-yg02.mail.aol.com [172.18.147.2]) by air-yg04.mail.aol.com (v73.13) with ESMTP; Tue, 30 May 2000 16:59:16 -0400
Received: from smtp01.mrf.mail.rcn.net (207-172-4-60.in-addr.mail.rcn.net [207.172.4.60]) by rly-yg02.mx.aol.com (v74.10) with ESMTP; Tue, 30 May 2000 16:59:03 -0400
Received: from 209-122-220-248.s502.tnt5.lnh.md.dialup.rcn.com ([209.122.220.248] helo=erols.com)

LEGAL DEVELOPMENTS

TASINI RULING THWARTS GREENBERG VS. NATIONAL GEO

MIAMI—A federal judge has thrown out part of photographer Jerry Greenberg's copyright infringement claim against *National Geographic*, saying the publisher did not improperly reuse the photographers' pictures on a CD compilation of its printed magazines.

The Florida court based its ruling on the 1997 Tasini ruling, in which a New York federal court said that electronic databases and CD-ROMS are revisions of original printed works—rather than derivative works—if they preserve an original selection or original arrangement of content and don't differ "by more than a trivial degree" from the preceding work.

Under copyright law, revisions are permitted without the permission of contributors; derivative works are not.

The *National Geographic* argued that its CD product, called *The Complete National Geographic*, was a revision of the printed magazines. The CD contains an exact image of each page as it appeared in the magazine.

Greenberg argued that the CDs constituted derivative works because each CD begins with a short display of images from ten different magazine covers. (One of those displays includes the January 1962 cover showing Greenberg's picture of a woman scuba diving around a coral reef.) The CD product is also copyrighted as a separate work, he says.

But the court disagreed, saying that the CDs are recognizable versions of the periodicals, and therefore "revisions."

Greenberg intends to appeal the ruling. "I think the judge made a serious error in applying Tasini," says his attorney, Norman Davis. "The facts of that case are totally different from this one."

Greenberg has also claimed infringement against the *Geographic* for unauthorized use of his images in other products. Those claims were unaffected by the summary ruling on the CD compilation, and are still pending.

PAPARAZZO WINS JUDGEMENT

LOS ANGELES—A California jury awarded celebrity shooter Alan Zanger $4,500 in damages on July 22 in his civil suit against actor Alec Baldwin.

The suit stemmed from a 1995 incident in which Zanger photographed Baldwin and his wife, actress Kim Basinger, returning home with their newborn daughter. Zanger had accused Baldwin of assaulting him, but Baldwin was acquitted of criminal assault charges in 1996.

Zanger subsequently filed a civil claim against Baldwin for assault, battery and negligence. Baldwin counter-sued Zanger for assault, invasion of privacy and negligence. The jury rejected all but the negligence claims of both parties.

Baldwin's negligence caused Zanger $6,000 worth of damages, the jury found. Zanger's negligence caused Baldwin no monetary damage, but it contributed to Baldwin's negligence, the jury said. As a result, Zanger's damage award was reduced 25 percent.

Zanger says he was vindicated by the jury's rejection of Baldwin's invasion of privacy claim. "I won the right to be able to take my photos," he says. "Celebrities can't pick and choose when they want to be photographed."



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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.

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ASMP amicus brief support is sought

As this issue of the BULLETIN was going to press, the Society had been approached to file amicus briefs in two important cases. Costs for these briefs would be met from the Legal Action Fund.

The first case, Chavez v. Arte Publico Press et al started in the Southern District of Texas and is before the 5th Circuit. It deals with the issue of whether states are immune from copyright infringement suits and will be the first case dealing with that issue since the 1990 amendment to the Copyright Act. The general understanding of that amendment was that states could be sued under the Copyright Act. However, the 5th Circuit has held that provision to be unconstitutional. If that decision stands, ASMP believes that every state and local government, including school boards, will be free to use copyrighted material, without restrictions and without licensing fees. ASMP has been asked to participate in the amicus brief being filed by the Association of American Publishers, the Association of American University Presses, the Authors Guild, the National Music Publishers Association, and the Software Publishers Association. ASMP is also expected to participate in a companion case, Rodriguez v. Texas Commission on the Arts dealing with the same issue.

The second case involves the *National Geographic* CD-ROM project in which more than 100 years' issues of *National Geographic* were scanned and placed on a set of CDs. While the magazine owns the rights to much of the material, some individuals, including ASMP member Jerry Greenberg, own some rights to some of it. A number of Greenberg's pictures appear in the CD collection. Greenberg sued for copyright infringement in the U.S. District Court for the Southern District of Florida where the judge dismissed most of the counts in the complaint, taking the position that Tasini v. NY Times is controlling. The judge ruled that copying is permitted under Tasini's interpretation of Section 201 (c) of the Copyright Act as a revision of each issue of the magazine. Greenberg is appealing and has sought an ASMP amicus brief. ASMP feels this is an important issue with far reaching consequences.

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Story 231

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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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Senate Press Photographers' Gallery. The Senate rule against pictures dates back to the glass plate days of photography, he says. Even for a temporary exception, photographers would need the unanimous consent of the Senate. The Senate has granted an exception on only one or two occasions, including the January 7 trial opening.

Against long odds of success, the Senate Press Photographers' Gallery is continuing to lobby for access. Several sympathetic Senators are appealing on photographers' behalf. The gallery is also urging photographers and news photo editors to call or write their own Senators.

Meanwhile, news organizations will have to settle for frame grabs from TV cameras, which senators allowed into their chambers more than a decade ago—and which are also controlled by the Senate.

LEGAL DEVELOPMENTS

PHOTOG COLLECTS FOR REPRINTS

MIAMI—Photographer Jerry Greenberg has collected $1,500 from *Audubon* after catching the magazine selling reprints of his pictures without permission.

Audubon published Greenberg's photos of mangroves in its March '97 issue. "I gave them one-time print rights only. That's it," says Greenberg. In early 1998, the photographer learned from the American Society of Journalists and Authors that *Audubon* was selling article reprints through University of Michigan Imprints, a reprint service. Greenberg called UMI and found that the mangrove article, including his photos, was available for $7.

Greenberg, who was paid $3,500 for the original article, complained to *Audubon* and billed the magazine an additional $3,500. *Audubon*'s in-house lawyer said the re-use was allowed under the recent Tasini ruling, but offered $400 to settle the matter.

Greenberg's lawyer responded that the Tasini ruling, which allows for re-use of articles in electronic format under certain conditions, doesn't apply at all to unauthorized print uses. Greenberg then asked for $1,500 to settle the matter, which *Audubon* agreed to.

"Once it was brought to our attention, we corrected the oversight," says *Audubon* spokesperson John Bianchi. "UMI no longer sells excerpts of *Audubon* magazine. They have to sell the entire edition."

PUBLISHING NEWS

NEW DONORS RESCUE DOUBLETAKE

DURHAM, N.C—*DoubleTake* magazine averted shutdown in December after two new donors committed a total of $2.25 million to keep it open, says publisher David Parker. The quarterly magazine nearly folded after Duke University's Center for Documentary Studies decided last fall to shut off funding. [see "*DoubleTake* Magazine to Lose Funding," PDNews, January 1999]