UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3924-CIV-LENARD

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs/Appellants,

vs.

NATIONAL GEOGRAPHIC SOCIETY,
a District of Columbia corporation,
NATIONAL GEOGRAPHIC
ENTERPRISES, INC., a corporation,
and MINDSCAPE, INC., a California
corporation,

Defendants/Appellees.
_____/

PLAINTIFFS' NOTICE OF APPEAL

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG, give notice of appeal, to the Eleventh Circuit Court of Appeals, of the district court's Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment, dated May 14, 1998 (attached as Exhibit A). The appeal is limited to those portions of the aforesaid Order directed to Count III and Count V of the Amended Complaint.

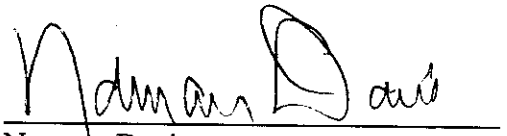
In its Order of May 14, 1998, the district court granted the defendants' motion for summary judgment as to Counts III, IV and V, and dismissed those claims with prejudice.

On June 30, 1998, the plaintiffs filed a Motion for Summary Judgment on Liability as to Count I and Count II of the Amended Complaint. The district court entered an order granting that motion on June 8, 1999, but did not enter a final judgment because damage issues as to those

counts remained to be determined. On December 28, 1999, after a Settlement Conference, the parties filed a stipulation for dismissal with prejudice of Count I and Count II (attached as Exhibit B). That filing disposed of all remaining claims in this action[1] and arguably made the May 14, 1998 summary judgment a final judgment as of December 28, 1999.

The plaintiffs/appellants recognize that Federal Rule of Civil Procedure 58 requires that a judgment be "set forth on a separate document," but have filed this notice in an abundance of caution because nothing remains to be decided by the district court in this action.

STEEL HECTOR & DAVIS LLP
Attorneys for Plaintiffs/Appellants



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[1] On October 19, 1999, the plaintiffs filed a Motion to Vacate Order Granting in Part Defendants' Motion for Partial Summary Judgment, and for Other Relief. On December 10, 1999, the district court denied that motion without prejudice.

Certificate of Service

I hereby certify that a copy of the foregoing notice was served by mail on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131 and by facsimile and mail on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 26th day of January, 2000.

Norman Davis

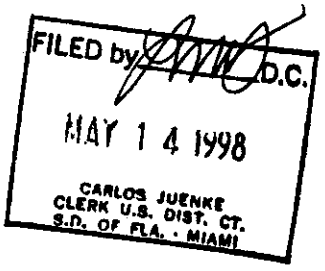
RECYCLED PAPER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 97-3924-CIV-LENARD

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,



vs.

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR PARTIAL SUMMARY JUDGMENT

NATIONAL GEOGRAPHIC SOCIETY,
a District of Columbia corporation,
NATIONAL GEOGRAPHIC
ENTERPRISES, INC., a corporation,
and MINDSCAPE, INC., a California
corporation,

Defendants.
_____/

THIS CAUSE comes before this Court upon Defendants' motion to dismiss and/or for summary judgment (D.E. 18), Plaintiff's cross-motion for summary judgment (D.E. 26), Plaintiff's motion for voluntary dismissal (D.E. 24), and Defendants' motion for oral argument (D.E. 28).

In 1990, Jerry Greenberg (Greenberg) provided National Geographic Society (Society) with a photograph he had taken of a sea fan, for publication in the July 1990 issue of Society's magazine. Without Greenberg's permission, in 1996 Society reprinted the photograph in a promotional brochure. In 1995 and 1996, also without Greenberg's authorization, Society supplied other photographs taken by Greenberg, including those of a redband parrotfish, a spotlight parrotfish, and a green moray, to Educational Insights, Inc. (Insights), which used them in one of its products.

In 1997, Society, through National Geographic Enterprises, Inc. (Enterprises) and Mindscape, Inc. (Mindscape), produced and began to sell a 30 disc CD-ROM set, entitled The Complete National Geographic, which contains every issue ever published of Society's magazine. A number of the magazines published by Society over the years apparently contain photographs taken by Greenberg. At the beginning of each of the 30 discs in the CD-ROM set is an introduction to The National Geographic which consists of a sequence of ten of the magazine's covers. On one of those covers, from the magazine's January 1962 issue, is a photograph, taken by Greenberg, of a woman scuba diving around a coral reef.

On December 5, 1997, Plaintiff Greenberg filed an action in this Court for

copyright infringement against Society, Enterprises and Mindscape. Greenberg alleges that Society infringed his copyright by providing his photographs of a redband parrotfish, a spotlight parrotfish and a green moray to Insights for use in its products (count I), and by reprinting his photograph of a sea fan in a 1996 promotional brochure (count II). Greenberg also alleges that Society, Enterprises and Mindscape infringed his copyright by reproducing a number of his photographs in The Complete National Geographic. On January 30, 1998, Defendants filed a motion to dismiss counts II through V of Greenberg's complaint and, in the alternative, a motion for summary judgment on counts III through V. As Greenberg and Defendants have supplemented their pleadings with evidence, the Court will treat both of these motions as requests for summary judgment.

A motion for summary judgment may be granted only if no genuine dispute exists as to any material fact. Fed. R. Civ. P. 56(c). In deciding whether there is a genuine issue of material fact, the Court must view the pleadings, affidavits and other evidence in the record "in the light most favorable to the non-moving party." Retina Associates, P.A. v. Southern Baptist Hosp. of Florida, Inc., 105 F.3d 1376, 1380 (11th Cir. 1997).

Defendants first contend that counts II through V of Greenberg's complaint

must be dismissed, pursuant to 17 U.S.C. §411(a), because there is no evidence that he registered his copyright in the photograph of the sea fan which Society printed in its 1996 promotional brochure, or in any of the photographs published in Society's magazines, including that of a woman scuba diving around a coral reef. Indeed, "[c]opyright registration is a pre-requisite to the institution of a copyright infringement lawsuit." Arthur Rutenberg Homes, Inc. v. Drew Homes, Inc., 29 F.3d 1529, 1532 (11th Cir. 1994). Greenberg has provided the Court with evidence, however, that on December 18 , 1995 Society assigned to him the copyrights in these photographs, and that he subsequently renewed those copyrights prior to the time of their expiration. Exhibit B, 1-3, Plaintiff's Memorandum in Opposition to Defendants' Motion to Dismiss or for Summary Judgment.

Defendants next argue, pursuant to 17 U.S.C. §201(c), that counts III through V of Greenberg's complaint must be dismissed because Defendants are permitted to reproduce and distribute, in The Complete National Geographic, photographs taken by Greenberg, including his photograph of a woman scuba diving around a coral reef, which were previously published in Society's magazines. Under 17 U.S.C. §201(c):

Copyright in each separate contribution to a collective work is distinct from

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

17 U.S.C. §201(c). Defendants concede that the previous issues of Society's magazines in which Greenberg's photographs were published are collective works in which Defendants were permitted to reproduce Greenberg's photographs. They submit, however, that The Complete National Geographic constitutes a 'revision' of that collective work within the meaning of 17 U.S.C. §201(c). Greenberg disagrees.

The Court has only been able to locate one published opinion, Tasini v. New York Times Co., 972 F. Supp. 804 (S.D.N.Y. 1997), in which a court has addressed the issue whether a collective work is a revision within the meaning of this statute. In that case, a number of feelance writers whose articles were published in several widely read periodicals sued those periodicals and two companies to which the periodicals sold the writers' articles, one of which provided its subscribers with the texts of the articles electronically and the other of which distributed the texts on CD-ROM, for copyright infringement. The defendants argued that the electonic databases and the CD-ROM's promulgating

the writers' articles were 'revisions' of the periodicals, collective works, within the meaning of 17 U.S.C. §201(c).

The court observed that:

> If defendants change the original selection and arrangement of their newspapers or magazines, however, they are at risk of creating new works, works no longer recognizable as versions of the periodicals that are the source of their rights. Thus, in whatever ways they change their collective works, defendants must preserve some significant original aspect of those works -- whether an original selection or an original arrangement -- if they expect to satisfy the requirements of Section 201(c). Indeed, it is only if such a distinguishing original characteristic remains that the resulting creation can fairly be termed a revision of "that collective work" which preceded it.

Tasini, 972 F. Supp. at 821. In order to determine whether the electronic databases and CD-ROMs constituted a 'revision' of the periodicals, the court explained that a two-pronged inquiry is necessary. First, a court must identify any original selection or arrangement of materials in the collective work. Second, if the court concludes that the collective work possesses any such original selection or arrangement of materials, it must determine whether these characteristics are preserved electronically. Tasini, 972 F. Supp. at 821. The Tasini court then concluded that:

> If the disputed periodicals manifest an original selection or arrangement of materials, and if that originality is preserved electronically, then the electronic reproductions can be deemed permissible revisions of the publisher defendants' collective works. If, on the other hand, the electronic

> defendants do not preserve the originality of the disputed publications, but merely exploit the component parts of those works, then plaintiffs' rights in those component parts have been infringed.

Tasini, 972 F. Supp. at 822. This Court finds the Tasini Court's reasoning sound and therefore adopts the legal framework developed by that court to analyze the legal question currently before this Court.

Society indisputably selected and arranged the articles and photographs in each issue of its magazines. The question therefore arises whether this original selection and arrangement is preserved in The Complete National Geographic. In order to answer this question in the affirmative, the Tasini court noted that the electronic work "cannot differ in selection by more than a trivial degree from the work that preceded it." Tasini, 972 F. Supp. at 823.

As evidence that The Complete National Geographic does not differ by more than a trivial degree from Society's magazines, Defendants have supplied the Court with the declarations of Thomas Stanton, Society's Director of CD-ROM Product Management, who states that: (1) The Complete National Geographic contains an "exact image of each page as it appeared in the Magazine;" (2) The Complete National Geographic draws from the northeastern edition of Society's magazine; (3) the 30 to 40 regional editions of the magazine which Society publishes are identical except for the advertisements; and (4) at the

beginning of each CD-ROM in The Complete National Geographic, there is a short display of images from ten different magazine covers, including the January 1962 cover showing the picture taken by Greenberg of a woman scuba diving around a coral reef. Declaration of Thomas Stanton, ¶ 5 - 7; Reply Declaration of Thomas Stanton, ¶ 4. Greenberg has not adduced any evidence to contradict Stanton's statements.

He submits, however, that the image display and Society logo at the beginning of each disc, the credit display at the end of each disc, and Society's selection of one edition of the many editions of the magazine, render The Complete National Geographic more than trivially different from Society's magazines. This Court disagrees, and concludes that the evidence produced by Defendants indicates that the Complete National Geographic "retain[s] enough of [D]efendants' periodicals to be recognizable as versions of those periodicals." Tasini, 972 F. Supp. at 824. Consequently, The Complete National Geographic constitutes a 'revision' of Society's magazines within the meaning of 17 U.S.C. §201(c). Defendants therefore did not improperly reproduce or distribute, in The Complete National Geographic, Greenberg's photographs.

Accordingly, it is hereby ORDERED AND ADJUDGED that:

(1) Defendants' motion to dismiss and/or for summary judgment as to count

II, be DENIED;

(2) Defendants' motion for summary judgment as to counts III, IV and V, be GRANTED. Counts III, IV and V are therefore DISMISSED with prejudice.*

(3) Plaintiff Greenberg's cross-motion for summary judgment as to count III, be DENIED;

(4) Plaintiff Greenberg's motion to voluntarily dismiss count IV, be DENIED as MOOT; and

(5) Defendants' request for oral argument, be DENIED.

DONE AND ORDERED in Chambers, at Miami, Florida on this 14 day of May, 1998.

Joan A. Lenard
United States District Judge

cc: Valerie Itkoff, Esq.
Norman Davis, Esq.

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*Defendants also contend that counts III through V should be dismissed because their use in the image display at the beginning of each disc of The Complete National Geographic of Greenberg's 1962 cover photograph of a woman scuba diving around a coral reef is: (1) de minimus; and (2) fair use within the meaning of 17 U.S.C. §107. In light of its conclusion that Defendants are permitted to use the cover photograph at issue pursuant to 17 U.S.C. §201(c), the Court need not entertain these arguments.

Exhibit B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 97-3924-CIV-LENARD/TURNOFF

FILED by RG D.C.
DEC 28 1999
CLARENCE MADDOX
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S.D. OF FLA. - MIAMI

JERRY GREENBERG and
IDAZ GREENBERG,

Plaintiffs,

vs.

NATIONAL GEOGRAPHIC SOCIETY
and NATIONAL GEOGRAPHIC
ENTERPRISES, INC. and
MINDSCAPE, INC.,

Defendants.

RECEIVED
DEC 28 1999
JUDGE JOAN A. LENARD

_____/

STIPULATION AND ORDER

IT IS HEREBY STIPULATED AND AGREED that Counts I and II of this action are dismissed with prejudice and without costs.

Dated: December 3, 1999

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Counsel for Plaintiffs

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(212) 310-8000

Counsel for Defendants

DONE AND ORDERED in Chambers in Miami-Dade County, Florida this 28 day of December, 1999.

United States District Judge