UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

v.

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

Defendants.

_____/

CASE NO. 97-3924
CIV-LENARD
Magistrate Judge Turnoff

DECLARATION OF THOMAS STANTON

Thomas Stanton affirms as follows, under penalty of perjury:

1. I am the Director of CD-ROM Product Management at National Geographic Interactive, a division of NGE, Inc., which is a wholly-owned for-profit subsidiary of the National Geographic Society (collectively, the "Society"). I make this declaration based upon personal knowledge.

2. The National Geographic Society is the world's largest nonprofit scientific and educational organization, with 9.5 million members, and is dedicated to the diffusion of geographic knowledge in its broadest sense. The Society and its subsidiaries produce periodicals, television programs, maps and atlases, educational games, and like products. Its flagship publication, National Geographic Magazine (the "Magazine"), is the

monthly journal of the Society containing articles and photographs which explore the cultural, geographical and organic richness of the world around us.

3. In 1996, the Society decided to reproduce all issues of the Magazine published between 1888 and 1996 in CD-ROM format (hereinafter "CD-ROM 108") (attached hereto as Exhibit A). The Society's primary motivation in republishing the Magazine in CD-ROM 108 was, in light of the growing significance of electronic media, to bring the convenience of digital archiving to the Magazine's readership, which consists largely of educators, librarians, students and families. The Society believed that the completeness and accessibility of this vast collection of the Magazine would enhance its mission for the diffusion of geographic knowledge. In 1997, the Society produced and began to sell CD-ROM 108.

4. As Director of CD-ROM Product Management, I supervised all aspects of CD-ROM 108's development. I drafted the initial development proposal, interviewed, hired and supervised a vendor to conduct the scanning process, conducted beta testing, and participated in all technical aspects of the product's development.

5. After careful consideration, the Society elected to develop this archive through the process of digital scanning. Each issue was thus scanned, page by page, into a computer system. The scanning process created an exact image of each page as it appeared in the Magazine. CD-ROM 108 provides no tools to the user for cutting, pasting or altering any of the digital pages. The Society made absolutely no changes to the content, format or appearance of the Magazine. Each page of each issue remains perfectly intact, including all articles, photographs, graphics, advertising, notices of copyright, and attributions

cut & paste available on all computers. Take a photo of the desktop and it is then available on your computer

6. A short multimedia sequence (the "Moving Cover Sequence") is contained on each of the 30 disks in CD-ROM 108. This sequence displays a series of images representing the covers of ten issues of the Magazine which transition from one into another. The sequence plays the first time a user boots up CD-ROM 108. When the user opens the program on subsequent occasions, he or she can skip the sequence by mouse-clicking on it once. The sequence is not referenced on the outside packaging of CD-ROM 108, nor has it been highlighted in any advertising.

Some photos from the sequence are featured on the box ←

7. The cover of the January 1962 issue of the Magazine is one cover in the Moving Cover Sequence. It depicts a female scuba diver swimming among corals and fishes (the "Cover"). To facilitate the visual effect of the Cover transitioning into the next cover in the sequence, the figure of the female diver is repositioned to align itself with the body of the female dancer in the next cover. The Cover is visible for less than one second.

8. None of the images in the Moving Cover Sequence can compete qualitatively with an actual photograph or with a color copy taken from the Magazine itself. The Moving Cover images are much smaller than their hard copy counterparts. Moreover, while the scanning process selected by the Society resulted in an exact copy of each page, it could not reproduce the same high resolution as the original Magazine. Even a cursory glance at CD-ROM 108 reveals that the digital images appear somewhat "fuzzy" compared to paper copies of the Magazine. Thus, even if a consumer wanted to attempt to capture an image from the Moving Cover Sequence and print it out, that consumer could never reproduce the quality of, for example, a color copy taken from the Magazine. Thus, it is

w/o any changes, additions or modifications ←

← inferior quality

virtually inconceivable that an image taken from the Moving Cover Sequence could ever supplant demand for the plaintiffs' photograph.

9. As a courtesy to the Society's many contributors, I wrote a letter dated May 21, 1997 notifying all contributors to the Magazine of CD-ROM 108's pending release (attached hereto as Exhibit B). In the letter, I explained that the Society's continuing copyrights in the Magazine entitled it to publish CD-ROM 108 without making further payments for the use of individual contributions. Exh. B. at p. 2. This letter was meant to reassure contributors that although the Society was not required to make additional payments for CD-ROM 108, the possible use of their contributions in other CD-ROM products might entitle them to such payment. Id.

He admitted later that they did not send a copy to JG

10. I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 30, 1998

Thomas Stanton

A good line of questioning could be developed what "further" editorial use" has the CD Rom in common with NGS Photo Gallery ? ?

TOTN p.05

RECYCLED PAPER

EXHIBIT "A"

The Complete National Geographic
108 Years of National Geographic Magazine on CD-ROM

Actual Set Filed With the Court Only

Exhibit B

NATIONAL
GEOGRAPHIC
INTERACTIVE

TOM STANTON
Director, CD-ROM Product Management

May 21, 1997

XXXXXXX
XXXXXXX
XXXXXXX
XXXXXXX
XXXXXXX
XXXXXXX

Dear Magazine Contributor:

As you know, the Society is making a digital archive of NATIONAL GEOGRAPHIC magazine from 1888 through 1996. *The Complete NATIONAL GEOGRAPHIC: 108 Years of NATIONAL GEOGRAPHIC Magazine on CD-ROM* contains a digital image of every page of the magazine, including advertisements, without any changes, additions, or modifications.

This CD-ROM contains a search engine based on the National Geographic Society proprietary indexing scheme. It does not allow users to cut and paste photographs or text, and while photographs and text can be printed, the quality is inferior to a photocopy of the magazine itself.

The NATIONAL GEOGRAPHIC on CD-ROM was designed as a low-cost reference tool for educators, librarians, students, and families. Producing a CD-ROM of this size is an expensive proposition. We have deliberately priced the 30-volume set at $199 to make it more affordable for educational institutions and families.

The 40-million-dollar CD-ROM marketing and distribution contract with Mindscape, Inc., that some of you have read about in the media covers 11 titles over a three-year period, including *The National Geographic Photo Gallery, Really Wild Animals, Geo Bee Challenge,* and *The Complete NATIONAL GEOGRAPHIC: 108 Years of NATIONAL GEOGRAPHIC Magazine on CD-ROM.* These four titles will be released in 1997, and seven additional products are scheduled for release in 1998. This $40 million represents the total retail sales Mindscape hopes to generate from its distribution arrangement. National Geographic's expected proceeds are a small fraction of this amount; the Society does not expect to do more than break even on these products. Kodak is identified as a sponsor of the project as part of a larger advertising arrangement with the Society.

We are aware that some photographers and writers, whose work has appeared in NATIONAL GEOGRAPHIC and, therefore, will be in the CD-ROM archive, are questioning whether they will be paid for this use of their work. As Director of CD-ROM Product Management, I want to convey to you the Society's position on this matter.

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Recycled-content paper

This does not lend itself to a simple or easy explanation, as it is a blend of copyright law, magazine publishing lore, National Geographic contract interpretation, etc., but I will attempt to summarize. Because the CD-ROM archive consists of an exact image of every page as it was originally published, this reissuance (or reprint) is not a "further editorial use" of material such as requires additional payment to the photographers whose contracts commit the Society to payment under those circumstances. The Society holds copyrights in the magazine issues as collective works, and we believe that the continuing copyrights permit the Society to republish its magazine archive in this CD-ROM delivery mechanism. This is comparable to magazines being made available on microfiche.

Beyond this, I don't want to make any blanket statement about individualized contracts. I do want to state, however, that the NATIONAL GEOGRAPHIC on CD-ROM is a unique situation. The Society does pay, where appropriate, for electronic/digital reproduction rights. For example, we will pay photographers for the digital rights to another CD-ROM—*The National Geographic Photo Gallery*—a product which is clearly a "further editorial use" of preexisting material. We have also paid for digital rights on all other interactive products including CD-ROMs and Web site content modules. It has been, and will continue to be, the Society's position to pay fair market value for the content we publish.

Sincerely,

Tom Stanton