UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 97-3924-CIV-SIMONTON

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

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

Defendants.
_____/

PLAINTIFFS' NOTICE OF FILING PROPOSED JURY INSTRUCTIONS

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (together "Greenberg"), hereby file their proposed jury instructions pursuant to the Court's pretrial order.

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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; on Stephen N. Zack, Boies, Schiller & Flexner LLP, 2800 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131; and on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 31 day of January, 2003.

Norman Davis

PLAINTIFF'S REQUESTED INSTRUCTION NO. 1

(Preliminary Instructions/Statement of the Case)

The plaintiff in this case is Jerry Greenberg ("Greenberg"). Greenberg is a photographer who performed photographic services for the defendant, National Geographic Society ("the Society"), over the course of 30 years. In the course of performing those services, Greenberg generated 64 photographs that were incorporated within the National Geographic Magazine in four separate issues.

For each of those photographs taken by Greenberg, Greenberg is the owner of a "copyright" as to each photograph. The Court will instruct you that those copyrights have been infringed by the defendants and that your mission in this case will be to determine the amount of damages that Greenberg should receive from the defendants as a result of those infringements. Let me explain some of the legal terms that you will hear during this trial.

Definition of Copyright

Copyright is the exclusive right to copy. The owner of a copyright has the right to exclude any other person from reproducing, preparing derivative works, distributing, performing, displaying, or using the work covered by copyright for a specific period of time.

Copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, photograph, motion picture, audiovisual work, sound recording, architectural work, or a computer program.

In this case, you will be asked to determine the amount of damages that resulted from infringement of 64 separate copyrighted works, which are each of the photographs that Greenberg owns that have been copied in a product produced by the defendants called the "Complete National Geographic", which is a CD-ROM electronic version of the entire collection of National Geographic magazines.

Copyright Interests

As a copyright owner, Greenberg may sell or license to another person all or part of the owner's property interest in the copyright, that is, the right to exclude others from reproducing, preparing a derivative work, distributing, performing, displaying, or using the copyrighted work.

How Copyright Is Obtained

A Copyright automatically exists in a work the moment it is created. The owner of the copyright may register the copyright by delivering to the Copyright Office of the Library of Congress a copy of the copyrighted work. After examination and a determination that the material deposited constitutes copyrightable subject matter and that legal and formal requirements are satisfied, the Register of Copyrights registers the work and issues a certificate of registration to the copyright owner.

Liability For Infringement

One who reproduces, prepares derivative works, distributes, or displays a copyrighted work during the term of the copyright, infringes the copyright, unless licensed by the copyright owner. You will be instructed that Greenberg has already proven, and you should therefore assume, that the defendants had access to Greenberg's copyrighted works and that there were substantial similarities between the defendants' work and Greenberg's copyrighted work. In this case, Greenberg's copyrighted photographs were reproduced in the CD-ROM "Complete National Geographic" without his consent.

Adapted from Ninth Circuit Manual of Model Jury Instructions § 20.0

PLAINTIFF'S REQUESTED INSTRUCTION NO. 2
Introduction

Members of the Jury:

I will now explain to you the rules of law that you must follow and apply in deciding this case.

When I have finished you will go to the jury room and begin your discussions -- what we call your deliberations.

Pattern Jury Instructions, Civil Cases, U.S. Eleventh Circuit District Judges Assoc., Basic Instruction 1 (1999).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 3

Consideration of the Evidence -- Duty to Follow Instructions

In deciding on damages in this case you must follow and apply all of the law as I explain it to you, whether you agree with that law or not; and you must not let your decision be influenced in any way by sympathy, or by prejudice, for or against any one. A corporation and all other persons stand equal before the law and must be dealt with as equals in a court of justice.

In your deliberations you should consider only the evidence -- that is, the testimony of the witnesses, the exhibits I have admitted in the record, and any facts on which the lawyers agreed or which I instructed you to accept -- but as you consider the evidence, both direct and circumstantial, you may make deductions and reach conclusions which reason and common sense lead you to make. "Direct evidence" is the testimony of one who asserts actual knowledge of a fact, such as an eye witness. "Circumstantial evidence' is proof of a chain of facts and circumstances tending to prove, or disprove, an ultimate conclusion.

Remember that anything the lawyers say is not evidence in the case. It is your own recollection and interpretation of the evidence that controls.

Adapted from Pattern Jury Instructions, Civil Cases, U.S. Eleventh Circuit District Judges Assoc., Basic Instruction 2.2 (1999).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 4

Credibility of Witnesses

Now, in saying that you must consider all of the evidence, I do not mean that you must accept all of the evidence as true or accurate. You should decide whether you believe what each witness had to say, and how important that testimony was. In making that decision you may believe or disbelieve any witness, in whole or in part. Also, the number of witnesses testifying concerning any particular dispute is not controlling. You may decide that the testimony of a smaller number of witnesses concerning any fact in dispute is more believable than the testimony of a larger number of witnesses to the contrary.

In deciding whether you believe or do not believe any witness I suggest that you ask yourself a few questions: Did the person impress you as one who was telling the truth? Did the witness have any particular reason not to tell the truth? Did the witness have a personal interest in the outcome of the case? Did the witness seem to have a good memory? Did the witness have the opportunity and ability to observe accurately the things he or she testified about? Did the witness appear to understand the questions clearly and answer them directly? Did the witness's testimony differ from other testimony or other evidence?

Adapted from Pattern Jury Instructions, Civil Cases, U.S. Eleventh Circuit District Judges Assoc., Basic Instruction 3 (1999).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 5

Impeachment of Witnesses

You should also ask yourself whether there was evidence tending to prove that the witness testified falsely concerning some important fact; or, whether there was evidence that at some other time the witness said or did something, or failed to say or do something, which was different from the testimony he or she gave before you during the trial.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and the significance of that may depend on whether it has to do with an important fact or with only an unimportant detail.

Adapted from Pattern Jury Instructions, Civil Cases, U.S. Eleventh Circuit District Judges Assoc., Basic Instruction 4.1 (1999).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 6

Expert Witnesses

When knowledge of a technical subject matter might be helpful to the jury, a person having special training or experience in that technical field -- one who is called an expert witness -- is permitted to state his or her opinion concerning those technical matters.

Merely because an expert witness has expressed an opinion, however, does not mean that you must accept that opinion. The same as with any other witness, it is up to you to decide whether to rely upon it.

Adapted from Pattern Jury Instructions, Civil Cases, U.S. Eleventh Circuit District Judges Assoc., Basic Instruction 5.1 (1999).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 7

Multiple Parties

In your deliberations, you are to consider several distinct parties. Although these parties are being tried together, each is separate from the other, and each party is entitled to have you separately consider each claim as it affects that party. Therefore, in your deliberations, you should consider the evidence as it relates to each party separately, as you would had each party been tried before you separately.

Adapted from Florida Standard Jury Instruction, 2.4

PLAINTIFF'S REQUESTED INSTRUCTION NO. 8

(Statement of the Case)

As we discussed at the beginning of the case, a copyright is the exclusive right to copy. The owner of a copyright has the right to exclude any other person from reproducing, preparing derivative works, distributing, performing, displaying, or using the work covered by copyright for a specific period of time.

Copyrighted work can be a literary work, musical work, dramatic work, pantomime, choreographic work, pictorial work, graphic work, sculptural work, photograph, motion picture, audiovisual work, sound recording, architectural work, or a computer program.

The plaintiff in this case is Jerry Greenberg ("Greenberg"). Greenberg is a photographer who performed photographic services for the defendant, National Geographic Society ("the Society"), over the course of 30 years. In the course of performing those services, Greenberg generated 64 photographs that were incorporated within the National Geographic Magazine in four separate issues. Each of those 64 photographs constitutes a copyrighted work.

In this case, you are being asked to determine the amount of damages that resulted from the infringement of those 64 separate copyrighted works, which are each of the photographs that Greenberg owns that have been copied in a product produced by the defendants called the "Complete National Geographic", which is a CD-ROM electronic version of the entire collection of National Geographic magazines. The Court previously instructed you to assume that those copyrights have been infringed by the defendants and that your mission in this case would be to determine the amount of damages that Greenberg should receive from the defendants as a result of those infringements. What that means is that the Court has already determined that the

defendants had access to Greenberg's copyrighted works and reproduced them in the CD-ROM "Complete National Geographic" without Greenberg's consent.

Adapted from Ninth Circuit Model Civil Jury Instructions, Basic Instructions 7.1, 20.22

PLAINTIFF'S REQUESTED INSTRUCTION NO. 9

Damages

Your task is to determine how much in damages Greenberg will recover from each defendant. The Copyright Act provides that a copyright owner may elect to recover, instead of actual losses to him, an award of what are called "statutory" damages. A statutory damage award was established by Congress for each work infringed, regardless of the number of infringements of each work. Its purpose is to penalize the infringer and deter future violations of the copyright laws. You may award as statutory damages for the infringement of Greenberg's copyrighted works an amount that you feel is just under the circumstances, provided that amount is not less than $500, nor more than $20,000, for each work infringed.

Here, the number of works infringed is 64, based on the number of Greenberg's photographs included in the Complete National Geographic. You must base your damage award on that number of works.

Adapated from Model Ninth Circuit Jury Instr. 20.25

PLAINTIFF'S REQUESTED INSTRUCTION NO. 10

Willful Infringement

Greenberg also contends that the defendant willfully infringed the 64 copyright photographs. If Greenberg proves by a preponderance of the evidence willful infringement, the money which you may award as statutory damages changes to a wider range, from $500 up to $100,000 for each work infringed.

An infringement is willful if the defendant knew that the works -- the photographs -- were protected by copyright and that republishing them would be infringing. Alternatively, the infringement is willful if the defendants showed reckless disregard for Greenberg's copyrights. Greenberg is not required to show that the defendants had knowledge that their actions constituted an infringement.

Willfulness can be proven directly, or you can infer it from the defendants' conduct.

If you find that the defendants continued to use the photographs in the CD-ROM product after a court of law ruled that the defendants were liable for infringement, the law requires that you conclude that the infringements were willful.

Twin Peaks Productions, Inc. v. Publications International, 996 F.2d 1366, 1382 (2d Cir. 1993); N.A.S. Import Corporation v. Chenson Entertainment, Inc., 968 F.2d 250, 252 (2d Cir. 1992); Kepner-Tregoe, Inc. v. Vroom, 186 F.3d 283, 288 (2d Cir. 1999); National Football League v. PrimeTime 24 Joint Venture, 131 F.Supp.2d 458, 479-80 (S.D.N.Y. 2001).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 11

Calculating Statutory Damages

How you measure the amount of damages to be awarded is discretionary with you. You are to compensate Greenberg for injury resulting from the infringement, i.e, the unauthorized use of his photographs. You may consider any evidence of the defendants' profits from the infringement, and evidence of Greenberg's losses, although you are not required to do so. You may consider what Greenberg may have negotiated at the outset if given the opportunity. You are not bound to follow any of those things. That is because the law provides the owner of the copyrights recompense for injury done to him, even if the proof of his actual damages is difficult or impossible. You have wide latitude to determine an amount that is just in the circumstances. The amount of your award for each work, within the limits of $500 to $20,000, or up to $100,000 if the infringement was willful, may, in addition to compensating for injury, also serves the purpose of deterring the defendants or others from further infringements. You may consider a defendant's size and financial resources in arriving at an appropriate level of statutory damages.

F. W. Woolworth Co. v. Contemporary Arts, 344 U. S. 228, 231-33, 97 L.Ed. 276, 280-81 (1952); Stevens v. Aeonian Press, Inc., 2002 WL 31387224 * 2-3 (S.D.N.Y.) UMG Recordings, Inc. v. MP3.Com, Inc., 2000 WL 1262568 * 6 (S.D.N.Y.); National Football League v. PrimeTime 24 Joint Venture, 131 F. Supp. 2d 458 (S.D.N.Y. 2001).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 12

Defenses

The defendants are relying on advice from their legal counsel as a defense to willful infringement. That defense requires the defendants to show that the advice was sufficiently related to Greenberg's copyrights and that the advice was timely. If you find that the legal guidance was obtained after infringing activity had occurred, you must ignore the advice-of-counsel defense. Moreover, the advice-of-counsel defense can be asserted only if the reliance by the defendants on such advice was reasonable. In 2001, a federal appellate court ruled in this case that the defendants had infringed the Greenberg copyrights. If you find that the defendants, after that decision was rendered in 2001, continued to use the Greenberg photographs without authorization, you must conclude that the infringement was willful.

Greenberg v. National Geographic Society, et al., 244 F.3d 1367 (11th Cir. 2001); Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381, 1392 (6th Cir. 1996); Comark Communications, Inc. v. Harris Corporation, 156 F.3d 1182, 1191 (Fed.Cir. 1998); 3 Nimmer on Copyright § 14.04[B][3] at 14-57 (2002).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 13

Deliberations

Any verdict you reach in the jury room must be unanimous. In other words, to return a verdict you must all agree. Your deliberations will be secret; you will never have to explain your verdict to anyone.

It is your duty as jurors to discuss the case with one another in an effort to reach agreement if you can do so. Each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury. While you are discussing the case do not hesitate to re-examine your own opinion and change your mind if you become convinced that you were wrong. But do not give up your honest beliefs solely because the others think differently, or merely to get the case over with.

Remember that in a very real way you are judges--judges of the facts. Your only interest is to seek the truth from the evidence in the case and you must not be swayed by sympathy for either party.

Adapted from U.S. Eleventh Circuit District Judge's Association, Pattern Jury Instructions: Civil Cases, Jury Inst. 7.1 (Basic Instructions) (2000).

PLAINTIFF'S REQUESTED INSTRUCTION NO. 14

Deliberations

When you go to the jury room you should first select one of your members to act as your foreperson. The foreperson will preside over your deliberations and will speak for you here in court.

A special verdict form has been prepared for you. Answer the questions on the form very carefully, and try to answer them in the order they are presented to you on the form.

You will take the verdict form to the jury room and when you have reached unanimous agreement you will have your foreperson fill in the verdict form, date and sign it and then return to the courtroom.

If you should desire to communicate with me at any time, please write down your message or question and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution, however, with regard to any message or question you might send, that you should not tell me your numerical division at the time.

U.S. Eleventh Circuit District Judge's Association, Pattern Jury Instructions: Civil Cases, Jury Inst. 8 (Basic Instructions) (2000).