DENNIS DIMICK DEPO.

Jerry,

Here is the amazing deposition of Dennis Dimick, illustrations editor who wrote the damning memo before CD108 was made saying it was an infringing product and should not be made without paying photographers.

I have copied portions I think you will find interesting and useful.

Fred

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6 Q. Please don't take umbrage at this.
7 This is not a personal attack, but I just need
8 to ask this, Mr. Dimick, and I've asked this
9 question to other people before:
10 Are you taking any drugs that might
11 impair your memory?
12 A. Oh, no, sir.
13 Q. Are you under the care of a doctor
14 at this point that has prescribed for you any
15 drugs that might at all affect your ability to
16 recall events of four years ago?
17 A. No, sir. I am on an allergy
18 medicine in season, but it's not in season.
19 Q. Again, fine. I don't mean to make
20 that as a personal attack.

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2 Q. Well, did you tell Mr. Royce that
3 you believed that National Geographic had the
4 right to publish the CD-ROM 108?

A. Not that I'm aware.

Q. Did you tell him that you believe that National Geographic did not have the right --

A. Not that I'm aware.

Q. So you don't remember anything at all that you told Mr. Royce during those discussions?

MS. GRAY: Objection. Asked and answered.

A. Not four years ago, sir.

Q. O.K. What did Mr. Royce tell you in those discussions?

A. My response would be the same. I don't remember the details of the conversation.

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Tell me what happened at the meeting

that you and he attended with Ms. Dupre to discuss copyright issues regarding the CD 108?

A. The central issue that was raised was if the publication of the magazine in the

CD-ROM format was a residual use or if it was an archival use.

Q. Who raised that issue?

A. Mr. Royce and I did.

Q. So you raised it as a question?

A. Yes, sir.

Q. What was the response?

A. We were told by legal counsel that they had been advised that publication of CD-ROM 108 was an archival use.

Q. Did you agree with that conclusion?

A. Well, that was the considered legal opinion of those who had the responsibility for doing so.

Q. That wasn't the question I asked.

Did you agree with that opinion?

A. Personally, no.

Q. Why not?

A. Well, mostly because I had not been informed of the rationale for their coming to

the conclusion that it was deemed, deemed an

archival use.

Q. What rationale are you referring to?

A. That the view was that the CD-ROM 108 product for purposes of copyright was viewed as, as not a residual use.

Q. Is that the rationale that you just referred to?

A. Correct.

Q. When were you advised of this rationale?

A. I'm sorry?

Q. Who advised you of this rationale?

A. They did.

Q. Who's they?

MS. GRAY: He said Suzanne Dupre.

A. Suzanne Dupre of Mr. Royce and me of that rationale in a meeting in 1997.

Q. O.K. So, to try to fairly summarize, you and Mr. Royce were wondering whether the CD 108 was a residual or an archival use, and you raised that issue with Ms. Dupre and she said it was an archival use.

Am I fairly summarizing what took

D. Dimick

place in that meeting?

MS. GRAY: Objection to form.

You can answer.

A. That's correct.

Q. Did she give you any reason why she believed that the CD 108 was an archival use?

A. No that I'm aware.

Q. Did you ask her what her reason might be?

A. Yes.

Q. What was the response?

A. That because the magazine was being duplicated in its entirety, in context, all pages, all issues, that it was an archival use and it was an archive of the existing magazine, and it was not a residual or secondary use.

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Q. Now, take a look, if you will, at the paragraph that follows paragraph 5 which starts: I said in one swoop.

See that, sir?

A. I do.

Q. Is what you wrote in that paragraph

what you said at the meeting?

A. I do not remember if I said that at that meeting.

MR. WEINGRAD: Could you read it into the record what paragraph 5 says, because I don't have it in front of me?

MR. BERGER: Sure.

Q. This paragraph says:

I said in one swoop we could destroy

all the goodwill and trust those of us who deal with photographers have tried to build up, and that to take this work without compensation would jeopardize our future ability to acquire the necessary rate of work to publish a magazine.

Do you recall saying that, sir?

A. I recall writing it.

Q. You wrote this memo shortly after the meeting?

A. That's correct.

Q. And you never changed it, did you,

after you wrote it?

A. What you're reading is what I wrote on that date.

Q. Now, it says:

Further, I said if we proceeded without trying to compensate end-license use, we should expect copyright infringement suits from ASMP and National Writers' Union.

When you said that, what was the response?

MS. GRAY: Objection. You have no foundation.

D. Dimick

You can answer.

A. If there was a response, I do not remember what it was.

Q. Why were you concerned that groups like ASMP and National Writers' Union might sue?

A. It might have an adverse effect on the business of the Society.

Q. Now, did you show this memo to Mr. Fahey?

A. I did not.

Q. Did Mr. Royce?

A. Not that I'm aware.

Q. What about Mr. Allen, did he respond to this memo at all?

A. I did not receive a specific response from Mr. Allen.

Q. What about a general response? When you say specific, it suggests that --

A. I sent by e-mail. I did not get any e-mail in return.

I do not remember having a conversation with him after I wrote this memo about this memo.

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Q. So when you wrote this memo -- by the way, how long after the meeting did you write it?

A. Immediately.

Q. Let's go through it a little bit more.

Now, take a look at point 1 about Mr. Stanton.

Had you and he discussed the CD-ROM 108 before this meeting?

A. Not that I remember.

Q. Now, the first point says that Mr. Stanton was interested in trying to find out which pictures we had purchased from agencies that in the contracts excluded electronic rights.

Why was he interested in trying to find that out?

MS. GRAY: Objection.

D. Dimick

You can answer.

A. Because the contracts that we had negotiated with the sources specifically excluded electronic writing.

Q. Yes, but why was he interested in trying to find those contracts?

A. I don't know.

Q. You say further in point 1 that Mr. Stanton said, quote, and that we would compensate them, end quote.

Why did Mr. Stanton indicate that he would compensate those agencies whose contracts

had specifically excluded electronic rights?

MS. GRAY: Objection.

You can answer.

A. I don't know.

Q. Did you ask him?

A. No.

Q. Did he give any reason?

A. Not that I remember.

Q. Did you agree with his determination that agencies whose contracts had specifically excluded electronic rights should be compensated for the reuse of their works in the CD 108?

D. Dimick

MS. GRAY: Objection. No foundation, and misstating documents.

But you can answer.

MR. BERGER: I don't think it misstates the document. That's exactly what Mr. Stanton is saying here as Mr. Dimick recites it.

MS. GRAY: My objection stands.

You can answer.

MR. BERGER: If you want to tell me how I'm misstating it, I'll be glad to rephrase it. If you don't want to do that, he can go ahead and answer.

MS. GRAY: For one thing, you are calling for speculation. And for another thing, you refer to Stanton concluding that contracts to electronic rights should be paid for.

That's not what the document says. It just says we would compensate them. Those are the bases of my objections. You can either rephrase or he can answer the question as of that.

Q. Let me see if I can rephrase so I

can satisfy your counsel, Mr. Dimick.

Mr. Dimick, who is Mr. Stanton referring to when he said we would compensate them?

A. National Geographic Society.

Q. But who would be compensated?

A. Who would be compensated?

Q. Right.

A. Well, if the sentence, as it's written, it would be those who had purchased contracts which specifically excluded electronic rights.

Q. Did you agree with that position?

A. I have no opinion on that position. I was just reporting the position.

Q. Now, next, in paragraph 2, the second sentence says, quote: I said my cursory reading of copyright law said we could not assume this.

What sort of reading of copyright law had you done as of this point?

A. I had done some reading of, of the copyright law in, in an Internet archive.

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A. Whether I was satisfied or not was irrelevant to what occurred.

Q. Well, Mr. Dimick, these questions are not directed at the third parties. They're not directed at Ms. Dupre or at your superiors. They're directed to you. And I'm seeking to find out whether you, Dennis Dimick, were

satisfied with the decisions made by legal counsel with respect to the treatment of photographers regarding the CD 108. So those questions seek to find out your satisfaction level, if any.

Were you satisfied --

A. They made a legal decision. I'm not an attorney.

Q. Yes, but were you satisfied with their decisions?

A. I don't really know.

Q. Did you ever think about resigning?

A. Nope.

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The next sentence of that paragraph says that Susan -- which I assume you mean Suzanne Dupre. Correct?

A. Yes, sir.

Q. O.K. You say: Susan pointed out -- I'm quoting -- that she was the attorney here, and that it had been decided more than a year ago that we would not pay assignment photographers for this use.

Did she tell you who had made that decision?

A. No.

Q. Did she tell you why that decision had been made a year ago?

A. No.

Q. Was this the first time that you had

become aware that a decision had been made a year ago not to pay assignment photographers?

A. Was this the first time I found out?

Q. Right.

A. As you will see in the second sentence of paragraph 2, that is, yes, the case.

Q. Were you surprised?

A. Was I surprised?

Q. Yes.

A. I don't know. Surprise was not an emotion that I registered at that time.

Q. What emotion did you register?

A. I do not know.

Q. Were you disappointed?

MS. GRAY: Objection.

He just said he didn't know.

A. I don't know. I mean, four years ago, what were you doing four years ago?

Q. Now, paragraph 5 refers to the moral issues of not making good-faith efforts to find and compensate.

Did you believe at the time that you wrote this memo that Georaphic was not making a good-faith effort to find and compensate

copyright holders?

A. I was not aware if they were or not.

Q. But weren't you pointing out the moral issue that arose from not making such a good-faith effort?

MS. GRAY: Objection.

He just testified that he wasn't aware if they were or not making the effort.

Q. So if you weren't aware, then, why did you write what appears in paragraph 5, Mr. Dimick?

A. To try and lay out what I believed

as a layperson what were possible hazards going forward.

Q. What was the response to your laying out those hazards from those --

A. I do not remember.

Q. Did anyone say anything in response to, you know, this kind of, you know, if you were pointing out hazards to your colleagues, they had no response?

A. As I said, I don't remember.

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Q. What about Ms. Clewell? I think I'm pronouncing her name correctly.

A. No.

Q. You had no discussions with her about the ethical issues after the conversation

that you refer to here. Correct?

A. No, sir.

Q. Now, you say as well that, and I quote: Carolyn said Maura can talk herself blue in the face on these issues but no one listens.

Did you agree with that?

A. Agree with what, the statement that I wrote?

Q. Correct, that no one listens.

MS. GRAY: That no one listens to what?

MR. BERGER: To what Mr. Dimick's referring to here.

A. I'm not -- I have no opinion. That is just a statement of reporting what was told to me.

Q. So even though you've been working with National Geographic in various capacities for the last 21 years, you have no opinion as to whether anyone listens about moral and/or ethical issues. Correct?

MS. GRAY: Objection.

You can answer.

Q. Mr. Dimick?

D. Dimick

A. Yeah, I hear you.

Q. Do you want to answer the question,

please?

A. I have no opinion.

MS. GRAY: Are you talking about moral and ethical issues in general?

A. In general, or specific to this particular issue?

Q. Well, you say you have no opinion.

You've been working for your present employer for more than two decades, and I wondered if you have any opinion about whether your employer is sensitive to moral and/or ethical issues?

MS. GRAY: I'm going to object to the form of that question.

But you can answer it.

MR. BERGER: Well, I'm asking based on his personal knowledge. I'm not asking for an expert opinion.

MS. GRAY: The objection stands.

But you can answer.

A. Do I have an opinion?

Q. Right.

D. Dimick

A. I am not -- I don't have opinions on this.

Q. So you have no -- O.K., fine. Very well.

Well, when Carolyn said to you what you wrote here, did you disagree with her?

A. Did I disagree with her?

Q. Right.

A. Well, I don't know, because she just told me there was no -- what was the point in disagreeing? She just told this to me.

Q. I didn't ask about whether there was a point or not. I just asked whether or not when she said this to you, as you report here in your memo, did you disagree with her?

A. Did I disagree with Maura or Carolyn about what, these issues?

Q. Mr. Dimick, I'm not trying to make it tough for you.

You reported a statement here.

A. That's right.

Q. And the statement is pretty clear on its face.

When the statement was made to you,

D. Dimick

as you reported here, did you say to Carolyn, I disagree?

A. I do not remember what I said to her.

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Q. Good. Mr. Dimick, is this exhibit 109 a true copy of a memo that you wrote on or about March 18, 1997?

A. Yes, sir.

Q. Did you write this memo before or after the memo we just talked about?

A. Before.

Q. To whom did you address this memo?

A. No one.

Q. Did you give this memo to anyone?

A. No.

Q. Did you give it at some point to counsel for production in this case?

A. Yes.

Q. Did you give any other documents to counsel for production in this case?

A. No.

Q. Where did you keep this memo after you prepared it?

A. I found it in a stack of papers in my office.

Q. What else was in that stack that concerned the CD 108, if anything?

A. Nothing.

Q. Now the first sentence of this memo states that you have these concerns.

To whom were you addressing these concerns?

A. To myself.

Q. What's the reason that you prepared this memo before you went to the meeting?

A. So I could understand myself what were potentially some of the issues at play.

Q. O.K. Let's go down the memo as we did with the other one and see if we can talk about some of the aspects of it.

Now, the first concern that you

refer to here is copyright infringement vis-a-vis photographs purchased for one-time use.

Now, why did you have this concern?

A. Because there was concern that CD-ROM 108 itself may prove to not be an archival use.

Q. And is that, in fact, what's actually happened?

A. Not that I'm aware.

D. Dimick

Q. Are you aware of a litigation involving Jerry Greenberg and the National Geographic Society?

A. Only what I've read in the newspaper.

Q. What have you read, sir?

A. I'm sorry, sir. I read hundreds of articles a day. I cannot recount for you the detail.

Q. I'm not asking about details of all of those hundred articles. I'm just asking you

about some details about some litigation against your employer involving this very product.

Do you know whether Mr. Greenberg has prevailed at all against your employer?

A. I am aware that there is some recent court decision that was in his favor.

Q. Do you know whether the court in that case decided the issue of whether this product is an archive or not?

A. I do not know that particular issue, sir.

Q. But the issue of whether the CD-ROM was an archive or not was one that you were

concerned about on March 18, 1997. Correct?

A. Yes.

Q. O.K. Let's go to the next concern that you express here. The fact of copying copyrighted expressions into a digital form.

Why did you have that concern?

A. That was actually -- these were not necessarily my concerns. These were -- this

paper resulted from the online research that I did with copyright law, and there were aspects to the statute that I was essentially putting down on this paper as items relevant -- potentially relevant items.

Q. Right. Right.

Now, you say we are already in violation. Why?

A. Well, from a layperson's point of view, the process of the digitization of the magazine was underway.

Q. Why was that a violation?

MS. GRAY: Objection. Calls for a legal conclusion. But I will allow Mr. Dimick to answer it.

A. I mean, I don't have a legal

conclusion. All that statement, we are already in violation, was a subsequent statement that resulted from the citations that I had made from, apparently, from the law that said the act of copying copyrighted expressions into digital

form in and of itself is copying.

Q. And as of March 18, had copyrighted expression into digital form already taken place?

MS. GRAY: Objection. Calls for a legal conclusion.

But you can answer the question.

A. I do not have any specific evidence to show if it had.

MR. BERGER: So, just to go back, Ms. Gray, to your objection, I wasn't asking him for a legal conclusion. I was asking him whether the act of copying an expression into digital form had already taken place.

MS. GRAY: You asked him whether the act of copying a copyrighted expression had occurred and --

MR. BERGER: I'm just referring to

what he says here.

MS. GRAY: -- and that copying calls

for some sort of legal judgment as to whether it's a copyrighted expression.

So you're getting into an area here where you're asking the witness about legal issues and he's not a lawyer. He's already testified and I just -- I object to asking a layperson an opinion about a legal question. I haven't instructed him to not answer, and you can keep going.

MR. BERGER: Fine. I understand.

Q. Now, you say we are already in violation as of March 18, 1997.

Why was National Geographic already in violation?

MS. GRAY: Objection. Asked and answered, and calls for a legal conclusion.

But you can answer.

A. I had no specific evidence that we were at that time.

Q. So why did you say we are already in violation if you had no specific evidence?

A. I'm sorry, sir, I do not know.

Q. So are you saying that you made a mistake when you wrote this statement?

MS. GRAY: Objection.

He said he didn't know.

MR. BERGER: He says he doesn't know why he wrote it.

Q. So are you now retracting what you said?

A. No.

Q. You're not retracting what you said?

A. No.

Q. O.K.

A. I just told you that I did not know why I wrote that, absent specific evidence.

Q. Now, did you ever amend this memo after the meeting of March 18 that you attended?

A. No.

Q. Did you ever write another memo about your copyright concerns following the meeting of March 18?

A. The only other memo I wrote was the one that you had been questioning me on for about an hour or so.

D. Dimick

Q. O.K. So the only two memos that you ever wrote about copyright issues are exhibits marked as Plaintiff's 105 that we talked about before and 109 now that is in front of you. Correct?

A. That's correct.

Q. Now, referring you down to paragraph 1(c), the second sentence talks about courts having adjudged, et cetera.

What cases, court cases, are you referring to there, sir?

A. I do not -- I did not make a record of the specific court case citation. I do not know the answer to that.

Q. But I think you said before that you had gone on to the Cornell website to get some information about copyright?

A. Yes, sir, four years ago.

Q. That's where you had gotten this information. Correct?

A. Yes, I think the website is called

FindLaw. That's where I went to.

Q. O.K. Fine. So when you went to FindLaw, did you look at some court cases?

D. Dimick

A. I do not remember that, sir.

Q. O.K. Now, next it says under subparagraph (d) that aggrieved parties have been able to have all copies destroyed.

Did you learn that as well from going to FindLaw?

A. As far as I know.

Q. Now, did you bring this memo with you to the meeting of March 18?

A. I cannot, I cannot remember whether I did or not.

Q. So you don't know whether you distributed a copy of it to those who attended the meeting?

A. Oh, no, I did not distribute it.

Q. Now, moving on to paragraph 2, there is a reference to item 4 of a photographic contract. See that, sir? And there's a

statement following that paragraph that says, quote, this is an additional use.

What were you referring to when you said this?

A. That was based on, on the possibility extant that if CD-ROM 108 was not

finally adjudged an archive, that potentially there would be liability for payment on additional use.

Q. O.K. So when you say this is an additional use, you were referring to the CD-ROM 108. Right?

A. Yes.

Q. Now, had Georaphic made payment in the past for additional or further use when contracts require such payment?

A. For what use?

Q. Well, you refer to here in paragraph 2 to item 4 of subsection (b) certain photographic contracts, and then you state the contracts provided that if, quote: NGS makes

further use, paren, promotional, comma, advertising, comma, or other editorial use of a photograph selected for publication, it will make additional appropriate payment.

Had Georaphic done so, to your knowledge, in the past?

A. For publishing, say, a picture that had been in a magazine originally and was later used in promotional, advertising, or other

editorial use, you mean?

Q. Correct.

A. As far as I know?

Q. Correct.

A. As far as I know --

Q. Was CD 108 another editorial use?

MS. GRAY: Calls for a legal conclusion.

You can answer it, if you can.

A. As I said to you previously, that if it were adjudged that CD-ROM 108 were not an archival use but another editorial use, then

it's possible that then this would mean this was an additional use.

Q. Now, if it was an additional use, what kind of payment would be required to be made to a photographer who had a contract requiring further payment where the further use was editorial?

MS. GRAY: Objection. Calls for a legal conclusion.

MR. BERGER: I'm not asking for a legal conclusion. I'm asking for facts.

Q. What kind of further payment was

made to photographers when their photographs were further used editorially by Georaphic?

MS. GRAY: Same objection.

You can answer.

A. Use payment was determined by rate charts typically within the division that was making the additional use.

Q. What rate chart did you follow?

MS. GRAY: Objection to the form.

Q. Well, there was a rate chart in your division. Correct?

A. I didn't -- well, most of our work was originally commissioned assignment work.

Q. O.K. My question was, there was a rate chart in your division. Correct?

A. There was a page rate chart.

Q. And what did that page rate chart provide?

A. It provided payments based on increments of size on the page such as quarter-page, half-page, full-page.

Q. So let's assume that a photograph occupied an entire page in the magazine and that photograph was further used editorially.

D. Dimick

What did the rate chart provide with respect to further payment?

MS. GRAY: Objection to form.

You can answer.

A. If the magazine was republishing a picture that it had originally commissioned or

the magazine --

Q. Well, just referring to the contract that you referred to in your memo in front of us where NGS makes further use editorially of a photograph that had been published in the magazine.

A. O.K.

Q. And that filled the entire page of that magazine, what, if anything, did the rate chart provide with respect to further payment?

MS. GRAY: Objection to form.

You can answer the question.

A. The payment would depend upon the use, whether it was promotional, advertising, or other editorial use, such as a book, and those rate charts were not part of National Geographic magazine's purview.

Q. Well, I'm assuming in my question

that the further use was editorial, and I'm asking for what the rate chart provided in that instance?

MS. GRAY: Objection to form.

MR. BERGER: I don't know why that's objectionable.

A. No, what the page rate was during the period that particular contract was enforced.

Q. What's the rate chart now as of today in that instance?

MS. GRAY: Objection to form.

You can answer.

A. I am not involved in use payment.

Q. So you have no knowledge of what the rate chart provides, sitting here today, if someone was to ask you for payment for the reuse of a full-page photograph editorially?

MS. GRAY: Pay for what?

Objection to form.

MR. BERGER: It doesn't matter what. I'm asking if the contract provided further editorial use. I'm assuming further editorial use, and I'm asking Mr.

Dimick what the rate chart provides in that instance.

MS. GRAY: The question is asked and answered.

But you can answer it again.

A. I do not have it in front of me and I cannot quote you accurately of what it says.

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Q. Now, again going back to Plaintiff's 109, you refer here in paragraph 3 to misrepresentation to Mindscape.

How did you know that Mindscape was involved in this project as of March 18, 1997?

A. Mindscape had been mentioned in the prior meeting I had with Al Royce and Suzanne Dupre.

Q. What was said about Mindscape?

A. That they were producing the CD-ROM 108 collection.

Q. Now, you refer to in paragraph 3 to a misrepresentation made to Mindscape.

What was the misrepresentation you were referring to here?

A. That was personal conjecture on my

part.

Q. That's not the question I asked.

I'm not asking about your conjecture. I'm asking you to tell me what

D. Dimick

misrepresentation did you or were you referring to in this memo?

MS. GRAY: Objection. Asked and answered.

He can answer it again.

MR. BERGER: With all respect, it wasn't answered.

Q. But please answer, Mr. Dimick.

A. I don't know.

Q. Now, you do refer to in paragraph 3 to a misrepresentation that: We, in fact, had the rights to copy and distribute, et cetera.

Who had made that misrepresentation that you referred to in paragraph 3 in Mindscape?

MS. GRAY: Objection to the characterization.

You can answer.

A. I do not know.

Q. When you referred to in the first line of paragraph 3 to the word we, who's we?

A. We must be the Society.

Q. Now, I don't see any reference to misrepresentation to Mindscape in the summary of

your meeting that is set forth in Plaintiff's 105.

Did you raise the misrepresentation to Mindscape issue at the meeting on March 18, 1997?

A. I cannot remember.

Q. Referring to the last paragraph of the first page of Plaintiff's 109, the second line refers to the multimedia developer.

Who is that?

A. That must be Mindscape.

Q. And you say in the first line of that paragraph, quote: We are already liable for copyright infringement.

I'm asking for your lay opinion.
I'm asking why you said this.
Why did you believe that: We are already liable?
A. As I said previously, that if, in fact, the CD-ROM 108 was adjudged not to be an archive, but to be an additional editorial use, then this could be a potential liability.
Q. Since, I think you said, you were aware that it has been adjudged to be not an

D. Dimick

archive in the Greenberg case, do you know whether National Geographic made a decision about whether it wishes to continue to sell the product?

MS. GRAY: I'm going to object on two grounds.

Number one: It misstates the witness's testimony.

Number two: I've cautioned the witness not to reveal any substance of any attorney-client communication. And I

don't know if there were any, but if there were, don't.

Q. Mr. Dimick, as your counsel properly indicates, I'm not interested in finding out what discussions you may have had with Ms. Gray or anybody else who represents National Geographic with respect to this matter.

Let me ask the question a little more simply.

Is National Geographic still selling the CD 108 and its progeny? When I say its progeny, I mean the products that followed it.

A. I don't know.

D. Dimick

Q. I understand there's a new product called the CD 112, or the complete national Geographic, the last 112 years of issues.

Do you know whether your employer is still selling that product to the public?

A. I do not know, sir.

Q. Do you know whether any decision has been made not to sell any of the CD-ROM products

to the public?

A. No, sir.

Q. That's not a matter of concern to you?

A. It's not a matter or a decision that I'm party to.

Q. O.K. Now, referring to paragraph 4 of your memo on the second page, you say that the argument, quote, that: This CD-ROM is one and the same as the magazine is disingenuous.

Why did you believe it was disingenuous at the time that you wrote this memo?

A. As I've said before to you, I was trying to ascertain some of the issues that may be in play if CD-ROM 108 was adjudged to not be

an archive this would be one.

Q. Did anyone at National Geographic agree with you that the argument that the CD-ROM -- agree with your conclusion that it was disingenuous to argue that the CD-ROM is one and

the same as the magazine?

A. I actually don't know.

Q. Did you ever discuss the disingenuousness of this argument with anyone else?

A. No, sir.

Remember, this was a private memo I wrote to myself.

Q. Did you ever feel it important to disclose this memo to anyone else after you wrote it?

A. No, because it was -- all it was was used to background myself on some of the potential issues in advance of the meeting that is then described in your -- that is described in my e-mail of March 19.

Q. Right. Now referring both to that e-mail, which is Plaintiff's 105, and Plaintiff's 109, did anyone ever ask you to

destroy either or both of those documents?

A. No.

Q. My question was, I assume you never saw this document before other than in discussions with counsel.

Right, Mr. Dimick?

A. I've seen this document.

Q. Yes, but have you seen it in other than discussions with counsel?

A. Yes.

Q. When did you do so? When did you see it before?

A. This document was handed to me by Alan Royce in March of 1997, the day after I

wrote the memo, your item 105.

Q. How did Mr. Royce come and hand this document to you, sir?

MS. GRAY: Objection to form.

You can answer.

Q. Let me ask a clearer question in response to your counsel's objection.

Did you have a meeting with Mr. Royce when he presented this document to you?

A. No. He just brought it in and gave it to me.

Q. What did he say when he did so?

A. Nothing that I can remember, sir.

Q. Did he have any comments at all about your e-mail to him and to Mr. Allen which is Plaintiff's 105?

A. No, sir.

Q. When he handed this document to you, what did you say to him?

A. Thank you.

Q. Besides that, anything else?

A. No, because I had not read it.

Q. After you read it, did you and Mr. Royce have any discussions about it?

A. Based on reading what Mr. Allen wrote and based on Mr. Fahey's response to Mr. Allen and Allen's final response that we were not to concern ourselves with these issues anymore.

Q. I see. Is that what Mr. Royce told

you?

A. No, that's what I concluded from reading this memo.

Q. And did you express that conclusion to Mr. Royce?

A. I cannot remember what I said to him.

Q. O.K. Let's take a look, if we can -- by the way, did you ever have any discussions directly with Mr. Allen or not directly with Mr. Allen regarding any copyright issues?

A. Not specifically that I can remember.

Q. What about generally?

A. I would say that if generally, they are comprehensively covered in this memo as written by Mr. Allen.

Q. So you're saying that Mr. Allen, if you had discussions with him, would have -- O.K., let me ask a fresh question.

Referring you to the next to the last paragraph of this document which begins: As we discussed briefly.

See that, sir?

A. Yes, sir.

Q. Now, he goes on and says, quote:

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.

What was Mr. Allen referring to there?

MS. GRAY: Objection.

You can answer, if you know.

A. You'd have to talk to him.

Q. When he said with our fingers crossed, any idea what he meant?

A. I have no opinion.

Q. The first paragraph on this second page states, in part: What I'm still concerned about is the opinion that indicates we don't

have a problem, et cetera.

Did Mr. Allen ever express that concern to you?

A. Not that I remember.

Q. Did you have a similar concern before the meeting on March 18.

A. Did I have a similar concern?

Q. Correct. Before the meeting on March 18.

A. Yes.

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MR. BERGER: The date on that is March 20, 1997. Actually a day after Mr. Allen and Mr. Fahey's exchange.

Q. Mr. Dimick, when is the first time,

other than in discussions with counsel, that you saw Plaintiff's 21?

A. I've never seen this before.

Q. O.K. Do you ever have any discussions with Mr. Kobersteen about anything that he writes about in his memo to Mr. Allen?

A. No.

Q. The first sentence of this document states, and I quote, in part: I'm hearing more and more concern voiced by the Society's nonphotographic staff.

Now, that wouldn't be referring to you, would it, Mr. Dimick?

A. Well, I am one of many who would be included in that group.

Q. O.K. So would you be part of the Society's nonphotographic staff?

A. That's correct.

Q. O.K. Did you ever voice any concerns to Mr. Kobersteen?

A. I'm sorry. Four years ago, I cannot remember.

Q. O.K. I just wanted to finish the question, but I guess you anticipated what I was

going to ask you, which is fine.

Now, Mr. Kobersteen states, about four lines down: I know we've discussed this,

and I had been at several meetings where this has been discussed with corporate counsel.

Did you ever attend any meetings with Mr. Kobersteen at which the rights or copyright issues regarding the CD 108 were discussed?

A. No.

Q. Now, about three lines down, he refers to NGS as taking the approach that this CD-ROM product is similar to microfiche.

Did anyone say that to you?

A. No.

Q. Are you hearing it for the first time today?

A. Yes.

Q. Take a look at the second page of this document, the second line down.

Mr. Kobersteen states, quote:

Therefore, it seems to me, should there ultimately be a finding that the 108 years of NGM CD-ROM is a different product.

Did you have any concerns about whether the CD 108 was a new or different product?

MS. GRAY: Objection.

What time frame are you talking about?

MR. BERGER: This time frame, in March of 1997.

A. Well, as I have indicated to you previously if, if CD-ROM 108 were to be adjudged not an archive, but an additional editorial use, those are many of the points that you have been questioning me on in the last two hours.

Q. O.K. Now, Mr. Kobersteen says in the next paragraph, beginning with, in fact, and then goes on to say what he says there. Take a look at that. Just read that paragraph to yourself, please.

A. O.K.

Q. Do you agree with Mr. Kobersteen?

A. I have no opinion now.

Q. The next sentence begins with: In one of the meetings. And it's followed by this sentence, and I quote:

D. Dimick

I was told that there was not, as NGS is the first into this product area.

Were you ever told anything similar?

A. No.

Q. Going down about three quarters, almost to the end of the page, Mr. Kobersteen states, this is beginning with the sentence, I understand the position. It's about, maybe, ten lines from the bottom.

Do you see where that is, sir?

A. Yes, sir.

Q. O.K. And he goes on to state that and, I quote: It seems to me that the CD-ROM product is different in several areas.

And it goes on to indicate why.

Do you agree with Mr. Kobersteen's assessment set forth here?

A. I have no opinion on this.

Q. Other than your discussions with Ms. Dupre at the meeting that you testified you had with her and Mr. Royce, did you have any discussions with any other counsel representing

24 National Geographic regarding copyright
25 concerns?

D. Dimick

A. No, sir.

Q. Did you ever appear at any board meeting of either National Geographic or any of its subsidiaries to discuss any copyright concerns that you may have had?

A. No, sir.

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Q. Mr. Dimick now wants to clarify an answer.

Please do, Mr. Dimick. You can clarify any answer that you've given me so far.

A. Sir, a few minutes ago, you had made a statement regarding my knowledge of the decision on the Greenberg case, and if my memory serves, you said that it was my view that the Greenberg case had adjudged CD-ROM 108 as not being an archive, and if that's the assumption that you have made, I did not make that statement.

Q. O.K. I apologize if I misstated what you had said.

What is your knowledge of the Greenberg decision?

D. Dimick

MS. GRAY: You can answer that except for conversations you may have had with counsel about it.

A. I know very little about it.

Q. Well, what do you know about it, of the little that you do know?

A. I do know that there was a judgment in, I believe, the Second Federal Court of Appeals -- Second District Court of Appeals. I could be wrong, or if it was in Florida. I'm sorry, I just can't keep track of it all.

Q. Do you know what, what the judgment, to use your words, what the judgment provides?

A. I do not remember what the specific terms of the judgment referred to.

Q. Let me ask the question this way.

Did Mr. Greenberg win or lose?

MS. GRAY: Well, you know, I kind of object to that because it calls for a legal conclusion.

But you can answer the question to the best of your ability.

A. As far as I know, in that particular circumstance, the court looked favorably upon

his case. I don't know anything.

Q. So that's what you're aware of. O.K., fine.

As a result of the court's looking favorably on Mr. Greenberg's case, did you have any discussions with anyone at National Geographic?

A. No, I did not.

Q. Has National Geographic's conduct with respect to the CD 108 changed at all as a result of the Greenberg decision?

A. I have no knowledge whatsoever of any changes at all.

Q. So, as far as you're aware, National

16 Geographic continues to sell the CD 108 family
17 of products?
18 A. No --
19 MS. GRAY: That's asked and
20 answered.
21 You can answer it again.
22 A. Sir, that is a situation that I have
23 not paid attention to, so I do not know if we
24 continue to sell the CDs or not sell the CDs, as
25 I said previously.

1 D. Dimick
2 Q. O.K. Fine, I just wanted to make
3 sure that that's what you said and that's fine.

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21 Any idea who that corporate counsel
22 is?
23 A. Well, at that time it would have
24 been Suzanne Dupre.
25 Q. Now, I think your memo of March 18

1 D. Dimick

refers to a statement that was made at the meeting. Let me get it back in front of us here.

This is the second paragraph of page 4, the second sentence which states, in part:

Susan pointed out that she was the attorney and that it had been decided more than a year ago that we would not pay assignment photographers, et cetera.

Do you see that in your memo on --

MS. GRAY: Hold on. We're just getting out the document right now.

Q. Not a problem.

A. Yes, sir.

Q. See the statement I just read in part that's on the second paragraph of point 4 of your memo that's Plaintiff's 105?

A. Yes, sir.

Q. Now, you're referring there to a decision made more than a year ago.

Now, take Plaintiff's 5-A back.

Looking at Plaintiff's 5-A, it refers you to, in the third paragraph, as we've just discussed, to a recent decision.

D. Dimick

Do you know whether the decision that you referred to in Plaintiff's 105, Where Suzanne pointed out, et cetera, is the decision that is also reflected in paragraph 3 of Plaintiff's 5-A?

A. I do not have evidence to show there's linking there.

Q. So you don't know if -- in both cases they use the word decision, but you don't know whether Suzanne was referring to the same decision that's referred to in the third paragraph of Plaintiff's 5-A?

A. I do not have specific knowledge to know they are one and the same.

Q. Let's take a look, if we can, at another document, which is Plaintiff's 38, which is a one-paragraph letter from Ms. Dupre to Mr. Ward dated May 8, 1989.

You have that in front of you?

A. Yes, sir.

Q. Before I ask you about this document, let me just take a half step back and

ask you about the practice that Geographic may or may not have followed in assigning back

copyrights to photographers.

Are you aware of any policy or practice that Geographic followed in or about 1989 in assigning or not assigning copyrights back to photographers?

A. No, sir, I'm sorry, I don't.

Q. Did a photographer ever ask you for an assignment back, whatever copyright he or she may have, given back to National Geographic?

A. No, sir, those, those issues were outside of my purview. I did not deal with those issues.

Q. But I'm not asking if you ever dealt with them.

Did a photographer ever ask you for a reassignment of a copyright?

A. If a request for reassignment of copyright were to occur, as they would have, as far as I know, that request that would have been

made to director of photography, not to an illustrations editor.

Q. O.K. Are you aware of whether the director of photography ever authorized a reassignment of copyright back to a photograph?

A. No, sir, I'm not, I'm sorry.

Q. Have you ever seen, other than in discussions with counsel, a letter like the letter in front of you whereby Ms. Dupre assigns to a photographer a copyright?

A. No, sir, I have not.

Q. Now, referring you to the document in front of you, which is Plaintiff's 38, it refers to a copyright in your article entitled: Jade.

Do you know what Ms. Dupre is referring to when she refers to your article?

MS. GRAY: Objection. Can you answer?

A. No; you'd have to ask her.

Q. You don't know whether she's

referring to the photographs or the text or to both when she refers to the article, do you?

A. No, sir.

Q. Do articles normally contain -- do the articles that Geographic publishes normally contain text?

A. Yes, sir.

Q. And do they normally contain

photographs?

A. Yes, sir.

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Q. Well, I understand, but I also would like to get your current state of knowledge.

You've had a considerable concern with processes that were going on at the time that you executed 105 and 109.

Generally, have those problems that you saw been taken care of in current contracts?

MS. GRAY: Objection to form.

You can answer, if you can.

A. The contracts that are being promulgated are not a concern that I deal with on a day-to-day basis; so I do not know the details.

Q. I'm understand. I'm talking generally regarding the concern that you had back in '97 when you participated in these meetings and you generated these memos.

You've had concerns. Correct?

A. I did have concerns, yes.

Q. Now, do you know if the contracts that are currently being utilized in obtaining contractual rights to photography, do they deal with those concerns in a different way?

MS. GRAY: Objection. Asked and answered.

You can answer again.

A. Once again, I cannot tell you the, cannot tell you regarding the contracts that are in effect for photographers who are on

D. Dimick

assignment. Contracts that have been created for the purchase of stock photography do indicate additional use payment.

Q. Mr. Dimick, do you have an anticipated retirement date with National Geographic?

A. I have not anticipated that far ahead.

Q. Do you intend to stay with National Geographic for the foreseeable future?

A. As far as I know, sir.

Q. I mean, that would be your desire to stay there as an illustrations editor or to move up the chain of command?

A. Yes, sir. I have no alternative program.

Q. And you'd like to stay there. Right?

A. It's a nice place to work.

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Q. O.K. Counsel, asked you if you had any immediate plans for retirement and the question is: At the time when you wrote those letters and those memos in 1997, what was your

salary?

A. Oh, I'm sorry, maybe -- I can't remember. Maybe $85,000.

Q. And subsequent to writing those, have you since gotten any promotion as far as your title or rank?

A. No, sir.

Q. Have you gotten any salary increases?

A. Yes, sir.

Q. What is your current salary?

A. One hundred and four thousand

dollars.

Q. And is that based on some standard salary increases that National Geographic has --

Did the increase that you received to 104,000, was that a standard or normal increase for the period of time or was there some bonus increment during this period?

A. There was no bonus increment, but I was told that amongst those who did receive

raises in my department, that my raises were amongst the largest percentage increase.

Q. At the time that you wrote those memos, referring to the ones, I think, 105 and 107, if I'm not mistaken, did you believe your company did not have the legal right to produce the CD 108?

MS. GRAY: Can you read the question back, please.

(Record read)

A. I was told by legal counsel that we have the right to do this.

My interest in producing those documents was to parse the various issues that we might be liable for in case it was deemed not

an archive.

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Q. Have you since learned that it was adjudged not an archive?

A. Actually, no, I have not.

Q. There's been no discussion of it in

D. Dimick

your place of business?

A. I am not aware of any decision by the Supreme Court of the United States that says it is or is not an archive.

Q. How about the decision of the Circuit Court of Appeals that heard the Greenberg case?

MS. GRAY: Objection. He's already testified what he knows about that, but if you want to waste our time --

MR. WEINGRAD: I have a few minutes. If you don't object, I'll finish.

MS. GRAY: You can answer it again.

A. I'm sorry. I was aware there was a decision, but I cannot tell you what specific issues were manifest in that decision that made Mr. Greenberg favorably looked upon.

Q. Have you read the Greenberg decision?

A. I'm sorry, I may have, but I have to tell you, I have forgotten.

Q. Can you tell us in your own words what your job function is today?

A. My job function today?

Q. Yes.

A. In addition to assisting in the administration of the illustrations division, I work as an illustrations editor commonly known to the outside world as a picture editor.

I originate and research stories focusing on the environment. I do original research, write story proposals, oversee the creation of magazine stories that come from those proposals, and get them published in the magazine while working with both photographers and writers.

Q. And prior to this current job title that you have as assistant director of illustrations division, before you had that title and that job function, did you deal with the contracts that are utilized by National Geographic for their special assignments?

A. I was not involved in the origination or the issuing of said contracts.

Q. Did you read them?

A. Yes, sir.

Q. So prior to 1995, you were familiar with the contracts that were being used?

D. Dimick

A. Well, sir, I was aware that they existed. For me to tell you what the details were, I'm sorry, I cannot.

Q. Other than the details, did you have an opinion when you read them, prior to 1995, as to whether National Geographic did or did not have the rights to use the images or text articles that they publish in the magazine in a product such as a CD 108?

MS. GRAY: Objection.

You're asking for a legal conclusion.

MR. WEINGRAD: No, I'm asking him for his opinion.

MS. GRAY: I will allow him to

answer to the best his ability.

A. I have no opinion. There was no specific insistence to electronic media as far as I know in contract to that date.

Q. At the time that you wrote the memo in the 105, did you anticipate that there would be suits for copyright infringement against National Geographic?

A. I was concerned there would be

subsequent action against the Society.

Q. What did you base that on, that concern?

A. That there was difference of opinion as to whether or not CD-ROM 108 was a residual editorial use or it was an archive.

Q. And at the time you wrote those memos, if National Geographic made a residual editorial use, were they obligated to compensate the photographers and text writers?

MS. GRAY: Objection. This has been asked and answered previously in the

deposition, and it also calls for a legal conclusion.

But I'll allow the witness to answer again.

A. In those mediums that existed at that time, to wit, books, for example, yes.

Q. Do you recall any specific discussions with any photographers complaining about the CD 108 usage?

A. I have no specific memory of specific conversations with photographers about that issue.

Q. What is your opinion today with respect to the continued use of the complete National Geographic in the CD-ROM medium?

MS. GRAY: Objection to form.

What do you mean what is his opinion?

Q. Well, do you have an opinion as to whether or not the National Geographic Society should continue today to utilize the complete

National Geographic images and text in the CD-ROM medium?

MS. GRAY: Objection. Calls for a legal conclusion.

But you can answer.

Q. Go ahead. You can answer.

A. Sir, I have no opinion on the issue.

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