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LAW

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INTELLECTUAL PROPERTY

Double exposure

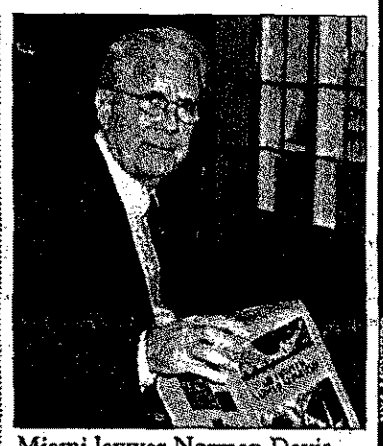
Miami jury sides with photographer in fight over reuse of work by National Geographic

by **Tony Doris**

In a case that has helped reshape copyright law for the computer age, a U.S. District Court jury in Miami found last month that the National Geographic Society willfully violated a free-lance photographer's copyright by republishing his work in a CD-ROM anthology.

Jerry Greenberg, a world-famous underwater photographer who lives in Pinecrest, filed suit against the Washington, D.C.-based nonprofit society in 1997 after it published a set of CD-ROMs called "The Complete National Geographic." The anthology, which reproduced 108 years of magazines, included Greenberg shots used in four articles pub-

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AIXA MONTERO

Miami lawyer Norman Davis represented the underwater photographer seeking compensation from National Geographic for reuse of his magazine work in a CD-ROM anthology.

ANTITRUST LAW

Microsoft settles

$200 million deal reached in suit on behalf of Florida purchasers

by **Matthew Haggman**

In one of the largest antitrust settlements in Florida history, software giant Microsoft has agreed to pay $200 million to resolve a class-action lawsuit brought on behalf of Florida consumers and businesses alleging that it violated the state's Deceptive and Unfair Trade Practices Act.

The suit, filed in 1999 in Miami-Dade Circuit Court on behalf of millions of Florida consumers, alleged that Redmond, Wash.-based Microsoft used its monopoly power in the operating system and software markets to choke off competition and charge customers inflated prices.

Under terms of the deal, Florida consumers who purchased Microsoft products between Nov. 16, 1995, and Dec. 31, 2002, will be able to recoup a portion of the money they spent. The settlement covers products such as the Windows operating system and the Office, Word and Excel software.

But the software giant will not have to pay cash. Instead, it will issue vouchers ranging from $5 to $12 for each Microsoft product purchased. The coupons may be used as a rebate to purchase computer equipment and software from any manufac-

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REDEVELOPMENT

Plans for Liberty City could displace longtime residents

by **Alina Matas**

Ruth Bonaby has made Liberty City her neighborhood for almost four decades, during which she raised a grandson and made a living as a housekeeper.

Her two-bedroom apartment at the James E. Scott/Carver Homes project on Northwest 75th Street has been home for as many years as she's been in the neighborhood. Retired nine years ago, she pays $107 a month in rent, or about 30 percent of her monthly Social Security income.

Inside an immaculate living room

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AIXA MONTERO

Ruth Bonaby has lived in Liberty City for four decades and may be displaced by the razing of the James E. Scott/Carver Homes project.

FEDERAL WATCH

Something to irk almost everyone

by **Jonathan Ringel**

The ideological fight over the federal judiciary spread to Florida, Alabama and Georgia last week when President Bush nominated Alabama Attorney General William H. Pryor Jr. to a seat on the 11th U.S. Circuit Court of Appeals. The court covers those three states.

Pryor's conservative legal and political positions on states' rights, abortion, church-state separation and a host of crime and punishment issues drew immediate criti-

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PHOTOS

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lished over a period of 30 years.

Greenberg claimed that because National Geographic had created a new anthology of work, it wasn't simply a reprint of existing work.

National Geographic argued that the reproduction was no different from bound volumes of the National Geographic or copies on microfilm and microfiche.

After a seven-day trial, the Miami jury awarded Greenberg the maximum allowable amount of $400,000 — $100,000 for each of four groups of photos that the society republished without his permission in the anthology.



Miami lawyer Stephen N. Zack represented National Geographic, which wants the federal court jury verdict set aside and a new trial held.

National Geographic issued a statement last month disagreeing with the jury verdict but saying that the entire 30-piece CD-ROM anthology containing Greenberg's photos was being taken off the market. "We believe that the public will be the loser, as this valuable educational archive will no longer be available to individuals, libraries and schools," said society spokeswoman Mary Jeanne Jacobsen.

Attorneys for National Geographic say they will appeal the verdict. They hope to bring into play a landmark 2001 U.S. Supreme Court.

In *New York Times Co. v. Tasini*, the high court held that that freelancers who sold articles to publications had not automatically granted the publishers the right to use articles in electronic databases. But, according to National Geographic attorneys, the justices also said that simply converting articles from print to microfilm or microfiche did not constitute republication. The attorneys argue that this reasoning would extend to converting photos published in print to CD-ROM.

But Greenberg's attorney, Norman Davis, a partner at Steel Hector & Davis in Miami, argues that the facts and issues raised in *Tasini* are irrelevant to National Geographic's copyright infringement.

The issue in the Greenberg case was whether the CD-ROM constituted a whole new product that was outside the privilege available in the Copyright Act, Davis said.

'New collective work'

After Greenberg filed his lawsuit in 1997, U.S. District Judge Joan Lenard in 1998 granted summary judgment in favor of National Geographic. Greenberg appealed to the 11th U.S. Circuit court of Appeals.

Several publishing giants, including Gannett Co., the New York Times Co., the Magazine Publishers of America and the Newspaper Association of America, filed amicus briefs supporting National Geographic's position.

In March 2001, the 11th Circuit reversed the trial court and said that the product did infringe. It found that the CD-ROM was not "merely a revision of the prior collective work, but instead constitutes a new collective work."

National Geographic's attorneys unsuccessfully asked the 11th Circuit to reconsider. In 2001, the U.S. Supreme Court denied a petition to hear the case. The 11th Circuit then sent the case back to federal court in Miami for a jury trial on damages. U.S. District Judge Andrea Simonton presided over the case.

Prior to the trial, Simonton ruled that the jury should make its decision based on National Geographic's reuse of four groups of Greenberg's photos, rather than the 64 individual shots in the four groups. That decision effectively reduced the maximum amount of damages from $6.4 million.

Since the 11th Circuit already had ruled in Greenberg's favor on the question of whether National Geographic infringed on his copyright, the key issue in the trial was whether the violation was "willful." That would determine how much the society would have to pay in damages.

Davis and Edwin Torres, also a partner at Steel Hector in Miami, represented Greenberg. National Geographic was represented in the damages trial by Stephen N. Zack, a partner at Boies Schiller & Flexner in Miami. Zack took over as lead defense counsel from Bob Sugarman, a partner at Weil Gotshal & Manges in New York, who handled the earlier stages of the case and remains involved.

Advice of counsel

The defense attorneys declined to comment on specifics of the case. According to Davis, the defense relied on two principal arguments in claiming that National Geographic did not willfully violate the copyrights.

The first claim was that the society relied on the advice of legal counsel, which gave the green light to publish the anthology. Second, the defense argued that it was also on the advice of legal counsel that National Geographic continued to market the CD-ROM after the 11th Circuit found that infringement took place.

The plaintiff attorneys countered that National Geographic already was committed to marketing the product before it obtained useful advice from counsel. They also argued that at the moment when the 11th Circuit ruling came down, National Geographic had no right to continue marketing the product with Greenberg's photos.

"The jury agreed with one or both of those theories," Davis said. "We'll never know which."

The plaintiffs also argued that by placing the photos on CD-ROM, National Geographic made it easy for them to be copied, e-mailed and altered. "Effectively, the product has destroyed the copyright value in those photos," Davis said.

Now a raft of post-trial motions are in the offing, including a potential appeal by Greenberg. The photographer hopes the decision that damages should be based only on reuse of four groups of photos, rather than on the 64 individual photos.

Contract permitted reuse?

Meanwhile, National Geographic is asking that the verdict be set aside and that a new trial be held. It's also seeking to reverse the 11th Circuit's 2001 ruling that prevented its attorneys from arguing that the society had a contractual right to reuse the photos. A hearing is set for today to schedule arguments on the various motions.

Zack said National Geographic will fight to uphold Judge Simonton's ruling to consider Greenberg's photos as four groups rather than 64 individual shots. At the same time, he said, the defense will seek to undo the court decision to block National Geographic from presenting evidence that its contract with Greenberg permitted the reuse of his photos.

The defense wants to present correspondence with Greenberg, who asked in 1985 that the copyrights for photos in three of the articles be transferred to him. In one letter, he assured National Geographic that the transfer would not prevent the society from reusing the photos.

The plaintiff attorneys have disputed the meaning of the correspondence, saying that National Geographic still was required to consult Greenberg on the re-use and price of the re-use.

"National Geographic did everything possible to respect the rights of Mr. Greenberg," Zack said. "We're looking forward to being able to argue the pending motions and ultimately present our complete defense based on the merits, including a contract agreement of Mr. Greenberg with National Geographic permitting them to reuse the images, and on the Tasini decision."

Davis said the case already has had an impact on how publishers reuse materials from free-lancers. "Publishers are preparing contracts of different kinds now, to more carefully spell out rights, particularly for continued use or reuse of materials and they're being more explicit than ever before in contracts." ◆

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