3 June 1997

Tom Stanton
Director
CD-ROM Product Management
National Geographic Interactive
1145 17th Street, NW
Washington, DC 20036-4688

Dear Mr. Stanton:

I have received your letter of May 21, 1997 concerning "National Geographic on CD-ROM." Frankly, I am surprised that you have decided to take such a confrontational approach.

By offering the photographers nothing you are begging those who own the copyright to their images to sue National Geographic in Federal Court.

I am in touch with over 150 photographers who have had one or more images in the magazine. So far not a single one has come to me and indicated that they think your position on this issue is fair, or that they support it.

You may have contractual rights to a good portion of the images, but by no means all. Some of the rights you think you have may not hold up in court.

The Society's arrogance in demanding everything and being willing to give up nothing drives these photographers and writers up the wall and makes them want to sue.

You also seem to have failed to recognize that there are two broad categories of photographers who have produced images for the magazine in the last 20 or 30 years.

You can easily intimidate those who have worked for National Geographic recently, and who hope to do other stories for the magazine in the future.

But, then there is the other big category of published photographers. They have no desire to ever work for National Geographic again. Many control the copyright to the work published in the magazine. They present a major problem.

They worked for NG for low rates expecting additional compensation through additional uses. Now they see their asset being whittled away. They are ready to fight for a principle and you have no leverage over them.

The way you have set it up, it is these people who will get all the money. Your current producers for the magazine, who will likely be a resource for the future, get nothing.

Instead, they get to stand by and watch as National Geographic spends big dollars on lawyers and in large settlements to a few, many of whom were never large contributors to the magazine. Those resources could have been shared among all contributors, but current contributors get nothing, even though they may be entitled to quite a bit. The current contributors dare not raise the issue of their legitimate claims because they can't risk retaliation by the magazine. This might cut them off from their principle source of income.

Just because they are not complaining publicly doesn't mean they are happy or satisfied. You have managed to create a number of bitter photographers. Actually, they have been bitter for a number of other reasons and this just increases the bitterness. This bitterness will not be directed at the photographers and writers who are able to win suits, but at the magazine that set up the situation that has encouraged so many to sue.

In fact, while being bitter, they are also likely to quietly cheer on their brother and sisters who bring the suits. This is the only way they can get back at the Society for treating them so unfairly.

The amazing thing is that most of these problems could have been avoided if the Society were not so greedy. Photographers and writers would listen if the Society were willing to communicate honestly, rather than trying to dictate the harshest of terms and exploit its suppliers whenever possible.

In fact, it is still not too late to turn this around.

A royalty system that treats everyone equitably based on their proportional share of the whole is something photographers and writers would consider, and embrace if presented in the right way. Nobody would get rich, but everyone would have the knowledge that they were being treated equitably. Maybe it will be impossible to convince 100% of the contributors to accept this idea, but National Geographic would end up with a lot fewer lawsuits than you are going to get with the course you have chosen.

Given what has already been done, your best chance of getting such an idea accepted is to open a dialogue with an individual or small group that the photographers trust to represent their interests.

The amount you pay out to contributors needs to be a fixed percentage of gross sales whether you sell one set of discs of 50,000. If the product is a weak seller, as you seem to expect, then it costs National Geographic almost nothing. The contributors of content share the risk with the Society.

The administration and distribution of the royalties costs you nothing. That can be handled by The Authors Registry and they will charge you nothing to set up the account.

On top of the cost savings National Geographic will reap the benefits of positive publicity throughout the creative community for embracing a royalty solution. The alternative is to suffer the

bad publicity and bad feeling that will result from your current position.

In would also be helpful if you would stop insulting the intelligence of the photographers and writers who have worked for the magazine by claiming that, "the Society does not expect to do more than break even on these products." That may well be true for all the other products other than "The Complete National Geographic on CD-ROM." Clearly it is the flagship product. It is our understanding that it is the only product in which Mindscape is really interested at this time.

We know there are 20,059 public secondary schools, 6,500 private secondary schools, 8,929 public libraries, and 3,632 college and university libraries in the U.S. Clearly this product has great usefulness as a reference tool for all of them. And this is just in the U.S. And you've got 20 years to sell them -- including regular updates. And when it goes on-line it will bring in even more revenue.

Some sources have speculated that the management of the Society has decided it is better to incur some bad publicity and a few photographer's lawsuits than to trigger a breach of contract suit from Mindscape and Pearsons, which can probably do National Geographic much more damage.

Frankly, I don't see that the above is an either/or situation. Certainly a breach of contract suit needs to be avoided at all cost, but if the creatives are paid a percentage of what National Geographic receives based on a lesser percentage of gross sales how can that possibly trigger breach of contract. You are never asked to pay more than a small percentage of what you are taking in.

Presented properly, the people who supply creative content for the magazine will buy into this approach. What they will not accept is the master-slave mentality and misrepresentations of the facts.

Sincerely,

Jim Pickerell

6 May 1997

Dear Former and Present National Geographic shooter:

As you have probably heard, National Geographic is planning to put all the content of their magazines on a set or 30 CD-ROM discs which they hope to begin marketing this fall.

As yet they have not made an official statement about what they intend to do in terms of compensating freelance and contract photographers for this usage. There are rumors that they intend to claim that this is for educational purposes and thus they are not required to make any additional payment.

I talked to Bob Madden who is in charge of production of the project. He said that as far as he knows freelancers, or photographers who did work on contract for Geographic, will be paid something, but he has no idea how much.

Angelo Grima is responsible for making the decision as to what Geographic will do and he is not talking to the press.

It seems to me that this is an important battle to fight, not so much for the compensation that any of us might get for this particular use, but for the precedent it will set for the future as more and more ways are developed to make electronic use of images previously published. Any arrangement Geographic is able to establish with this disc project is likely to be the precedent for future disc and on-line uses.

Obviously, staff photographers would have no rights to additional compensation and there may be some question as to who owns the copyright to the stories shot before 1976. But after '76 it should be clear that the rights the photographers were licensing was for the initial use in the magazine and nothing else. Freelance photographers can easily prove this understanding, absence any written agreement, because many have been paid for additional uses made by Geographic between '76 and the present.

In addition, several photographers have documents from Geographic where the magazine has formally reassigned back to the photographer the copyright for the pictures and stories produced. It would seem

that there is no way Geographic could argue that these photographer don't own the copyright to their images.

Granted that before the product is released and there is some idea of how well it will sell, it may be very difficult to calculate a fair fee for this usage. In fact, it may be a monumental task just to try to determine what rights were actually purchased at the time of the shoot, and what remained with a given photographer or writer. Nevertheless, the fact that there are difficulties does not justify Geographic's claiming that they own the rights when they don't.

Their are rather simple solutions to their problems. A reasonable compromise would be for Geographic to set aside a certain percentage of the gross sales of the product which would be shared by the copyright holders based on their proportional share of the total content on the disc set.

Considering the number of images involved the payment per image is likely to be very low, but for photographers who have done a number of stories over the years the gross still may be significant.

For example, lets say that there are 20,000 pictures that were produced by freelancers entitled to royalties. If, as a result of sales, $100,000 goes into the pot to pay the copyright holders each holder would get $5 per picture.

If Geographic thinks such a system is too complex to administer there is an organization The Authors Registry that would be happy to handle the distribution for Geographic and its photographers. TAR was founded a couple years ago by a consortium of writers trade associations and currently has about 50,000 writers as members. Several publications, with more signing up all the time, have agreed to make royalty payments to writers for electronic re-use of material that originally appeared in their publications. The important thing to recognize here is that there are practical solutions to the problem, if Geographic will only consider them.

I think the goal of the photographers should be to find some solution that will not just work for this project, but that can be a model for future re-use of images on-line and in other electronic media. Clearly, if they are successful in this appropriation there will be a lot more down the road.

If Geographic takes a hard line and refuses to provide reasonable compensation for this project, there is the possibility of seeking an injunction to stop the distribution of the discs until the courts can decide if the copyright holders are entitled to compensation. We believe there is no question the courts would decide in favor of the copyright holders.

It is hard to tell what pursuing such an action might cost, but we can begin to get organized for little or no expense. At the point where we need to make a large commitment to a copyright lawyer we

can assess the situation and decide what to do.

There may be other incentives for Geographic to "do the right thing." There are photographers already involved in copyright infringement actions against National Geographic. If Geographic decides to make this additional use of their material while the current cases are in progress it might demonstrate blatant disregard for photographer's rights and be detrimental to Geographic's case.

In addition Corbis now owns the rights to Roger Ressmeyer's photos. Any royalty payments from the use of his work will go directly to Corbis. It would seem that Corbis has a strong interest in protecting the copyright of Roger's work and in not letting Geographic use the images without compensation. If Geographic can make electronic use of all the pictures previously published without having to pay the copyright holders while Corbis has to pay the copyright holders to use their work it might put Corbis at a competitive disadvantage.

Corbis has invested, not only in Roger's work, but in the work of many other Geographic photographers and it is hard to imagine them accepting without a fight, a National Geographic claim that they don't have to compensate the photographers.

Corbis has paid $4.50 per images (plus a lot of scanning costs) for the electronic rights to images of many of the same situations that were published in Geographic. They will not want the ground cut out from under their future market. Corbis has staff lawyers and could easily bring an action against Geographic. The big thing the rest of us need to be concerned about is that Geographic isn't able to do some special deal with Corbis that doesn't apply to other Geographic photographers.

We have a strong legal position, but it will do us little good if we don't formally press the issue. I believe we need to take the following steps:

1st

Organize photographers who have done freelance or contract work for Geographic so that a unified presentation might be made to Geographic. Choose members of the Geographic CD-ROM Disc Committee to represent the group in negotiations with Geographic. [At present there is no such committee, but there needs to be two or three individuals designated to handle negotiations for the entire group. No individual would be bound by these negotiations. The purpose is to open some lines of communication and to try to develop a plan that might be acceptable to the majority of photographers. If you would like to be one of the negotiators, or have strong feelings about who should handle these negotiations please indicate that on the response form below.]

2nd

Make a formal presentation to Geographic pointing out that we

expect to be compensated for every use of our work according to previous agreements. Emphasize that any policy must work for everyone, not just one or two people. Get Geographic to disclose their position. Report back to the photographers.

3rd

If Geographic will not make a reasonable offer, consider an injunction to stop distribution of the discs.

If for some reason you are not interested in joining the group, I urge you to stand up for your rights as an individual. Contact your editor or Angelo Grima and tell them that you expect to be compensated for use of your work on this disc project and any other future electronic use of your work.

I you are interested in being part of this group please sign below and fax this page back to Jim Pickerell at 301-309-0941.

Sincerely,

Jim Pickerell

Photographer Survey

I expect to receive some compensation for the re-publication on a CD-ROM disc set of the stories and/or photographs of mine that were previously published in National Geographic. I authorize Jim Pickerell, or representatives of his choice, to explore compensation options with National Geographic and to use my name in conjunction with these efforts.

_____ _____

signature print name

I would like to serve on the Geographic CD-ROM Disc Committee.

_____ _____

signature print name

Please fax to 301-309-0941 or mail to: Jim Pickerell, Taking Stock, 110 Frederick Avenue, Suite A, Rockville, MD 20850.

Some have suggested that it is better to wait until the disc is out and then we will have them in an actual infringement. I believe it is better to move now. The problem with waiting is

Jim Brandenburg, Minden Pictures -- Chris Carey 408-685-1913

people who have worked for Geographic ought to be very interested in getting some compensation, even if it is relatively small, so a precedent is set, rather than just letting Geographic claim this additional right as something they paid for in the first place.

It also seems to me that the best time to negotiate is now, before they have released the first disc, rather than wait until the product is out. If they decide to be hard nose, it seems to me that it is entirely possible for the photographers to get an injunction to keep them from releasing the product until the courts examine the issue and determine whether Geographic has a legal right to make the claim that they don't have to pay any additional compensation to copyright holders.

On the downside, I am very concerned about the precedent this will set for other publishers if Geographic can distribute all this material without paying additional compensation.

While I hear grumbling from Geographic photographers, I am not aware of any concerted effort to take action. I think Geographic copyright holders need to get themselves organized and someone needs to be talking to management on their behalf.

I can fully understand why the people who are presently shooting for Geographic might not want to get involved in such an action because it might jeopardize their chance for future assignments. On the other hand, there are a number of photographers who have produced work for Geographic in the past -- yourself and Fred Ward -- to name a couple, and who probably never have the opportunity to do any more work for Geographic in the future.

It is my thinking that if a group of former Geographic shooters were to take some joint action it might help everyone.

I'm writing you, first of all to get your opinion, and secondly to see if you could help me identify some of these "former" shooters and how to contact them.

While I can see why you might not want to become actively involved in this effort considering your present position it would seem to me that it would be entirely appropriate for you to say, "I expect to be compensated for my work."

In addition to Geographic, World Book has just purchased from their content providers for a one-time fee the unrestricted right to use the images that have previously appeared in World Book in all future multimedia and on-line encyclopedias, forever, including all subsequent updates. They also bought the right to let user copy these images and paste them into their documents in ways that constitute "fair use."

The way I read this, school children can go to their World Book Encyclopedia and use any photograph in the encyclopedia for one of their reports. If the encyclopedia was accessed on-line it is not clear whether World Book would be charging for each use, but if they do charge they get to keep 100% of what they collect.

We lost out on the "Face of Life" deal because after a lot of yelling and screaming, no one sued them. By comparison the Geographic deal is much more dangerous and more all encompassing than the Life magazine deal was. In addition, I think the Geographic deal has a much better chance of producing some profits for the magazine.

If somebody doesn't stop these deals pretty soon they could take away a lot of the educational market Corbis seems to be aiming at. We will probably never have a better chance of forcing our position than we do with Geographic.

I think we should be asking Geographic to set aside a certain percentage of gross sales (probably 5% to 10%) to be shared as a royalty payment among all the providers entitled to such royalties. That probably won't mean much for anyone on this disc project, but it could set a valuable precedent for on-line use down the road.

Let me know what you think. Jim Pickerell jim@chd.com

The following is the third letter I have sent to Geographic photographers in the last couple of weeks. Send me your mailing address and I will mail you copies of everything I have sent. I now have about 140 photographers on my list and it is growing.

20 May 1997

GEOGRAPHIC MAKES AN OFFER

There is good news and bad news.
Geographic has made an offer. It is not nearly good enough.

Some have received the following letter from Total Clearance:

"As you may know, my client, National Geographic Society is developing a digital archive of National Geographic Magazine from 1888 through 1996, entitled The Complete National Geographic on CD-ROM. It is intended to contain a digital image of every page of the magazine, including advertisements, without any changes or modifications. The CD-ROM will contain a search engine based on National Geographic Society proprietary indexing scheme; the product does not allow users to cut and paste photographs or text, and while photographs or text; can be printed, the quality is inferior to a photocopy of the magazine itself.

"This product has been designed as a low-cost reference tool for educators, libraries, students and families. Producing a CD-ROM of this size is an expensive proposition; however, the 30 volume set has been priced at $199 to make it more affordable for educational institutions and families. The Society does not expect to do more than break even on this project.

"Certain images for which restricted publication rights were obtained from have appeared in National Geographic Magazine, and I have been commissioned to offer you a fee of $20.00 per photo, regardless of the size, for the licensing rights to include these images in this CD-ROM archive, as well as on versions in CD-I, DVD, and other versions, editions, adaptations, or sequels to the original title. The term and territories sought for this product is twenty years worldwide, in all languages. All photos will be used as they originally appear in the magazine, without alterations. Promotional rights for these images are not included.

"I will contact you shortly to discuss this further."

This is signed by Jill Alofs, President of Total Clearance. Their address is: P.O. Box 836, Mill Valley, CA 94942, Phone: 415-389-1531, Fax: 415-380-9542.

Reviewing The Offer

One of the major positives is that Geographic has acknowledged that they have an obligation to pay for this usage. It may be fairly safe to assume that any freelancer who has produced work after 1976 will eventually receive one of these offers. It is not clear what Geographic will claim for work done prior to that time.

The question facing each of us is whether or not to accept the offer.

I personally think the offer is very inadequate. Lets begin by looking at some numbers.

At $200 per set they only have to sell 5,000 sets to produce $1,000,000 in gross revenue. What's the likelihood of that happening? Here are some approximate figures of the potential buyers:

Public Secondary Schools	20,059	
Private Secondary Schools	6,500	(approximately)
Public Libraries	8,929	
College & University Libraries	3,632	
	39,120	

These are just the institutions in the United States. It would seem to me that every one of them will need at least one copy of this disc set. That would mean almost $8,000,000 in gross sales without counting a single copy being sold to a private individual. Maybe all these schools won't all buy within the first year, but can you imagine any of them not owning a set within five years. In addition there are over 60,000 elementary schools and in the next few years most of the libraries in these facilities will be wanting disc sets also.

If Geographic were to set aside 10% of gross sales of this product to pay royalties to the copyright holders they would have a fund of $700,000.

Of course we are talking about a lot of images. I have no idea how many, but it may be helpful to make some guesses. I have counted the number of pictures in a few issues of Geographic and have a low of 105 and a high of 140 per issue. Thus, I am going to assume a rough average of 125 per issue. If we look at 50 years of issues that would be 600 times 125 or 75,000 images.

My guess is that much of the earlier work was done by staffers, not freelancers. And, of the work in the last 50 years, I suspect that at least 2/3rds of that was done by staffers who don't qualify to share royalties.

Consequently, my guess is that their might be as many as 25,000 images that are entitled to royalties. It may be a lot smaller number, but I doubt that it is much higher. 25,000 times $20 each is $500,000.

Thus, Geographic hasn't even allocated 10% of the gross sales to compensate the photographers.

Other Issues

1 - We are not just talking about sales in the U.S., we are talking about sales worldwide.

2 - The contract is for 20 years. In 20 years they can sell a huge number of disc sets. To agree to any single fee for a 20 year right is a major hazard. There is no predicting what will be possible in 20 years. More and more publishers are pushing for long term agreements and this has to be stopped.

3 - The contract covers "other versions, editions, adaptations, or sequels to the original title." It doesn't say on-line, but anyone right out of law school could interpret "adaptations" and "sequels" as allowing on-line distribution of this material. If on-line is not specifically prohibited in the contract they are going to ask you to sign, you can be sure that this material will appear on-line in the very near future. If you sign this agreement there will be no additional compensation for this on-line use.

4 - They want the right to publish "in all languages," but they say they are just scanning the page as it originally appeared in the magazine. The magazine is in English. How are they going to supply this information in other languages? Of course they have 20 years to work that out. Where will technology be then?

If they are not going to supply the information in other languages why do they need that right?

5 - They want the right to produce "other versions." They are not prohibited from re-scanning to a better resolution for those other versions. Any segment (individual story or collection of stories) could be considered another version.

6 - What about the text that some of you have written? What are they going to offer for that?

7 - What are they going to do with CD-I? Are they going to have people reading the stories in other languages and show the pages as a multi-media show?

Your Options

1 - You can say no. At least one photographer has already done that. It they use his images it will be a copyright infringement unless they can negotiate a better deal with him. What they will probably do is publish the full set and blank out the few images this photographer has produced.

2 - At the very least you can delay signing any agreement until the many undefined issues are clarified.

3 - You can negotiate a higher one time fee. Some may be able to hold out for $40 or $100 per image. This may work for those of us who have no desire to work for Geographic in the future, but anyone who wants to continue to work with them probably needs to be prepared to accept their first offer or face retaliation.

4 - I would like to see us ban together and hold out for a "percentage of gross."

The percentage of gross can have important benefits for every freelance contributor to Geographic.

Everyone would get the same deal. Individuals who currently work for Geographic would not have to risk reprisal by taking a position because they would be automatically covered by any royalty arrangement negotiated.

Any royalty agreement that can be negotiated is likely to have long term benefits for every professional editorial photographer. It will set a precedent not only at Geographic, but that other major publishers will not be able to easily ignore.

It should be made clear that any percentage agreed to is for this one project only. The percentage itself will not necessarily be applicable to any future projects. The percentage for each new project will always be negotiable. The process of paying a percentage of gross as a royalty rather than a fixed fee would be the precedent setting aspect of the agreement.

A percentage of gross can solve all the "what if" problems of the future. If Geographic develops other versions, or adaptations or sequels at least we will get fair compensation relative to what they earn.

The ideal is to build into the agreement a provision for a re-negotiation of the percentage for each new version.

If you decide to hold out for a royalty it is entirely possible that you won't earn $20 per image. But, it is also very possible that over the life of the contract - 20 years - you will earn a lot more than $20 per image.

Maybe Geographic really needs most of the $199 per disc set to cover their overhead. If that is the case, I would suggest that in order to pay a 10% royalty they simply raise the price to $222 then they can pay the content creators 10% and still end up with more than they would have otherwise. They have no risk. If the discs don't sell well they haven't spent a lot of money in up front payments for rights to content. I can't imagine that the higher price is going to cause them to lose many sales. If someone is willing to pay $199 for this product, I can't imagine they are going to balk at paying $222.

Sincerely,

Jim Pickerell

Who Likes The Royalty Idea?

While it would be easier if all copyright holders were to agree to one system of pay outs, it may be possible for one group to accept the $20 as a one-time payment and another group to negotiate a royalty arrangement. For this reason, I would like to know how many would prefer a royalty instead of the $20. I also need to know the number of your images which were published and were produced on a freelance or contract basis, even if you don't want your name used. That way I can say to Geographic that X number of photographers with a total of X images in the magazine would prefer to receive a royalty rather than a one time $20 fee. I assure everyone who signs this particular agreement that your name will not be made public. You will simply be counted as one of a number of photographers supporting this position.

I urge you to respond quickly. We need to be talking to someone at Geographic, not at Total Clearance. Arms length negotiations are not satisfactory and will not solve our problem.

I would prefer to receive a royalty for the use of my images in The Complete National Geographic on CD-ROM instead of the $20.00 per image fee that is to be offered.

_____ print name

_____ total images in magazine to which you own the copyright

_____ signature

THE ABOVE ENDS THE LETTER I HAVE SENT SO FAR.

Here's my strategy. Assume Geographic has to license rights to a total of 25,000 images. I already have support for the royalty idea from photographers who probably represent at least 1,500 of those images, and I think that number is likely to grow pretty substantially. I have a list of about 140 photographers to whom I have sent letters and that list will grow.

We say to Geographic that the people on our side are going to hold out, fight to the degree they can, and if Geographic decides to use their images without permission some of these photographers are very likely to sue for copyright infringement. We think we can win those suits, but for Geographic, at the very least, it is going to be a bruising, costly, time consuming battle.

The alternative is for Geographic to offer photographers two options. The first is the $20 per image offer that is on the table. The second is a continuing royalty share of sales. Each photographer can choose the option they want.

We calculate the royalty as follows. We assume that if all 25,000 images were to choose royalty 10% of the gross receipts would be allocated for this purpose. Let's say that Geographic gets 15,000 images to accept the $20 fee. 10,000 images want royalties. In that case the percentage of gross receipts allocated to pay the royalty holders would drop to 4% of gross receipts. This way, on a per image basis, the photographers are still receiving the same proportional share of gross receipts that they would get if royalties were being paid to all copyright holders.

If, after the whole thing is calculated, some additional royalty holders appear that were not identified previously they get to share in the royalties and the percentage that Geographic pays into the fund is raised proportionally. Let's say another 250 images show up. In that case the percentage Geographic would pay is 4.1% of gross receipts.

The big negotiating point will be what that figure for the total number of royalty images should be. Geographic is going to want it to be a lot lower than 10%. I think based on book publishing deals that the 10% for content is reasonable. Geographic is going to want to claim that if its 10% it should be for all content including all images produced by their staffers which would likely cut it down to 3.5% or 4% for the work of copyright holders.

At this point we haven't dealt at all with payment for the text which I would hope would be another add on percentage, not a cut of the 10%.

I need help and suggestions as to any arguments I can make as to why a higher percentage than 10% for all content is reasonable. Clearly some huge production and marketing expenses will be necessary in order to sell this product and nobody makes any money if it doesn't sell.

I also need have a better understanding as to what percentage of this payout would go to The Authors Registry for administration if that arrangement could be set up.

Let me know what you think.

Jim Pickerell
jim@chd.com

Please return this form to: Jim Pickerell, Taking Stock,
110 Frederick Avenue, Suite A, Rockville, MD 20850