NATIONAL GEOGRAPHIC UPDATE

July 8, 1997

Since our last newsletter the story on *The Complete NATIONAL GEOGRAPHIC: 108 Years of National Geographic Magazine on CD-ROM* has taken some interesting twists and turns.

Tom Stanton, Director CD-ROM Product Management has written to most photographers published in National Geographic and offered them $0.00 -- that's right, zero -- compensation for the use of their images in this 30-volume set of CD-ROM which Geographic will be selling for $199 each.

Stanton's argument for paying nothing goes as follows: "Because the CD-ROM archive consists of an exact image of every page as it was originally published, this reissuance (or reprint) is not a 'further editorial use' of material such as requires additional payment to the photographers whose contracts commit the Society to payment under those circumstances. The Society holds copyright in the magazine issues as collective works, and we believe that the continuing copyrights permit the Society to republish its magazine archive in this CD-ROM delivery mechanism. This is comparable to magazines being made available on microfiche."

Geographic has also made an offer through a company called Total Clearance to a few stock agencies that licensed one-time rights to certain stock images that were used. The fee they are offering for this use is $20 for a 20 year license.

THIS IS NOT A JOKE, FOLKS. This is the truth, unbelievable as it may seem.

The offer from Jill Alofs of Total Clearance reads as follows: "I have been commissioned to offer you a fee of $20.00 per photo, regardless of the size (used), 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, without alterations."

We know of no one who has accepted these offers. Many have written protesting. Unfortunately, many of the photographers who still do work for National Geographic are afraid to protest for fear of being black balled for life.

There are, however, hundreds of "former" Geographic photographers and writers who have no desire to ever do any work for National Geographic again, and who are seeking legal representation to force a reasonable settlement.

Geographic Strategy

It seems that Geographic has decided that rather than trying to make some sort of reasonable offer to their suppliers, it will be cheaper in the long run to take a position that costs the minimum up front, and pay off the few who are willing to sue. This could be a good strategy if very few sue, but based on the response of the more than 150 photographers I have been in contact with, Geographic may have made a severe mis-calculation as to how much this strategy will cost before it is finished.

One slight complication, and the one which National Geographic seems to be hanging most of its hopes on, is that most photographers who did assignments in the last 25 years, or so, signed contracts that gave away their copyright -- *under certain conditions.* The key language which has varied somewhat from contract to contract is

as follows:

"All photographs taken by you under this Agreement will be considered as specially commissioned for use by NGS and upon creation all rights, including the copyright and world publication rights, to these photographs will automatically, by virtue of this Agreement, be deemed transferred exclusively and indefinitely to NGS, subject to the following provisions:"

However, one of the provisions is: "if NGS makes further use (promotional, advertising, or other editorial use) of a photograph selected for publication, it will make additional appropriate payment to you but no such additional payment will be made if the use is as part of an NGS photographic exhibit or in an audio-visual presentation or lecture given by an NGS employee or under NGS auspices;"

Lawyers for the photographers believe that the photographers have a right to expect *appropriate payment* for this use. Geographic seems prepared to argue otherwise. The issue is likely to be fought out in court.

It is clear that photographers who have worked for Geographic have always been told that they would be paid for additional uses. Many have been paid for the additional use of pictures that first appeared in the magazine. Now, Geographic says they no longer have that obligation.

Those Who Lose The Most

It is also clear that people who stand to lose the most in this are the freelancers still doing work for National Geographic. They are the people Geographic will depend on to produce future stories for the magazine. It seems likely that they will be forced to take whatever is handed to them (nothing), even though they think it is patently unfair, because they must take this position if they expect to work for Geographic in the future.

Most organization would not consider this the best way to build loyalty among suppliers. Senior management at Geographic doesn't seem to be concerned. There are hints that some of those who will be charged with hiring photographers and writers in the future recognize the problem and are not at all happy with managements decision. However, they are powerless to change it.

It should also be clear to all suppliers that Geographic expects photographers to honor their side of any contracts they sign, but that Geographic will not honor its contracts unless they are taken to court and forced to do so.

What Might Be A Fair Settlement?

One of the big questions is, "what is a fair price for this use?" One of the problems with the way Geographic has structured the use is that we are not talking about one single use for a reasonably short period of time, but a whole range of uses, including possible web use, for 20 years.

Prices still vary quite a bit for single uses like this, but Forbes Magazine has been offering contracts to their suppliers that might be helpful. It should also be noted that Forbes does not have a reputation for being overly generous with suppliers. If anything, their reputation is one of being miserly. Nevertheless, in it's contracts with photographers who produce illustrations for existing stories Forbes agrees to a future payment of $100 per image for "The right to include Artwork in connection with the electronic reproduction of the article..."

Rules for supplying feedback

Input Feedback

DRK PHOTO is greatly disappointed that the actions of the National Geographic Ventures/Interactive division have forced us to this end. After enjoying a successful business relationship of several decades we hope this will be a temporary situation and that the powers-that-be at the National Geographic Society will move quickly to free our hands by resolving the matter without us having to resort to legal action.

We are sincerely sorry for what ever problems the moratorium may cause; now, or in the future. I encourage you to contact a Mr. Terrance Adamson, Esq., or a Mr. Angelo Grima at N.G.S. 202-857-7405 to make them aware of the ramifications as they affect you and your division/s. Perhaps if they hear from all involved parties at the National Geographic Society this matter can be settled immediately with as little disruption as possible.

Thank you for your time. Please feel free to contact me if you have any questions.

Sincerely,
Daniel R. Krasemann, President

RE: DRK PHOTO AGENCY

Background

Mr. Krasemann supplied the following background for his decision.

In May of 1997 - DRK PHOTO was offered a contract for the use of our images in the "108 Years" CD-ROM product for a fee of $20.00 per image; this was to be full payment for permissions for twenty (20) years, world-wide, all languages -- including CD-ROM, CD-I, DVD, and other versions, editions, adaptations, or sequels to the original title. After going back and forth to clarify wording in the contract we refused the $20.00 per picture offer and submitted what we felt to be a reasonable figure for such far reaching permissions. Upon receiving our fee suggestion, Mr. Tom Stanton (NGI) returned a letter referencing our "preposterously high" fee and went on to effectively say that after re-examining paperwork they felt they did not need our authorization to use our images in the CD-ROM.

On December 22, 1997, DRK PHOTO invoiced the National Geographic Society for use of images by our photographers in the "108 Years" CD-ROM. After roughly forty-five days had elapsed I called Mr. Stanton to inquire about the status of our invoice and was referred to legal counsel.

In speaking with both a Mr. Terrance Adamson, 202-857-7449, (the NGS V.P. of Business and Legal Affairs) and a Mr. Robert Sugarman, 212-310-8000, (the NGS legal counsel in New York) it became obvious that the NGS isn't about to settle our invoice until such time as current legal cases before "the courts" decide it must.

DRK PHOTO and many of the photographers it represents have licensed hundreds of images over the past several decades to the various divisions of the National Geographic Society; these include NG Magazine, NG Books, NG Traveler, NG Educational Media, NG World Magazine, NG Television, NG International Publications, etc. We feel the current position being taken of non-payment of our invoicing for the "108 Years" CD-ROM product is unacceptable if not illegal, is not in the spirit of the original licensing and agreements, and certainly is a breach of the immensely important trust we have established over the decades which we must now reconsider. To the best of my knowledge, the National Geographic Society is the only client of DRK PHOTO who has produced a CD-ROM product without first negotiating, obtaining, and paying for reproduction rights for use in such a product. In any case we cannot condone their position, nor allow the possibility of this happening again with other products of this nature by continuing to submit images to the National Geographic Society. Just recently we were contacted by an individual from NGI regarding yet another National Geographic project - "109 Years of National Geographic Maps". Where will it end? Do they intend to negotiate these uses? Or simply, "damn the torpedoes - full steam ahead".

DRK PHOTO has never been one to jump immediately to legal action, we have always been able to settle matters of dispute through mutual negotiations with our clients. We do, however, believe that in many cases there are alternative options to press a point, and that it was time for action to be taken.

Perhaps others who recognize the precedent setting implications of these NGS actions will support DRK PHOTO's position by sending a similar message to the National Geographic Society that they too may have to consider implementing a moratorium on [licensing] reproduction rights until such time as NGS deals with this situation.

It cannot be in the best interest of individual agencies, the best interest of the future of this industry, nor the best interest of our photographers to condone policies such as this one taken by the National Geographic Society.

I welcome comment and/or contact from anyone interested in discussing the position DRK PHOTO has taken.

Thank you for your time,

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Pickerell's Comments

I think every photographer and stock agency should applaud Dan Krasemann for the courageous stand he has taken for the long range welfare of our industry. I encourage you to send him a note to that effect.

I would encourage individual photographers to send notes to their agencies asking the agency not to allow any of the photographer's photos to be used by any National Geographic publication, until NGS and all its various publications establish an acceptable policy with regard to payment for future uses. Also encourage your agency to take the same stand that DRK took.

I would encourage all agencies to take a hard look at their books and determine how much of their total income comes from National Geographic Society publications. Then look at how much income they receive from other publications when they re-license rights to that publications for a picture the publication used previously. I believe that in the vast majorty of cases the re-licensing from all publications will be much higher than the earnings from NGS. This will make the economic stand the agency needs to take very simple. If Geographic gets away with all-future-use of an image for a low one-time-rights fee, and the right to ignore all contracts, every other publication in the U.S. will eventually do the same. Can you stay in business if this happens?

Agencies that don't want to mortgage their future need to take a stand NOW. The sad thing -- the almost incomprehensible thing -- is that agencies, and photographers, who make very few sales to NGS and therefore have almost nothing to lose, and everything to gain, by establishing industry precedents for the future have refused to take a stand on this issue.

I would encourage everyone to re-think their position and take a long range view of their careers, and how National Geographic can severely damage those careers if they are allowed to do so.

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