Lyle Rosbotham July 24, 1998

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CONDENSED TRANSCRIPT AND CONCORDANCE

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
----------X
JERRY GREENBERG, individually, :
and IDAZ GREENBERG, individually :
Plaintiffs, :
v. : Case No.
NATIONAL GEOGRAPHIC SOCIETY, a : 97-3924
District of Columbia corporation, : CIV-LENARD
NATIONAL GEOGRAPHIC ENTERPRISES, : Magistrate
INC., a corporation, and MINDSCAPE,: Judge Turnoff
INC., a California corporation, :
Defendants. :
----------X
Washington, D.C.
Friday, July 24, 1998
Deposition of LYLE ROSBOTHAM, a witness herein, called for examination by counsel for Plaintiff in the above-entitled matter, pursuant to notice, the witness being duly sworn by DONNA A. McCALLEY, a Notary Public in and for the District of Columbia, taken at the offices of Kirkland & Ellis, 655 15th Street, N.W., Washington, D.C. 20005, at 9:20 a.m., Friday, July 24, 1998, and the proceedings being taken

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down by Stenotype by DONNA A. McCALLEY, and transcribed under her direction.

APPEARANCES:

On behalf of the Plaintiffs:
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On behalf of the Defendants:
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ALSO PRESENT:
IDAZ GREENBERG

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PROCEEDINGS

Whereupon,
LYLE ROSBOTHAM,
business address at National Geographic Society, 1145 17th Street, N.W., Washington, D.C. 20036, was called as a witness by counsel for Plaintiffs, and having been duly sworn by the Notary Public, was examined and testified as follows:

EXAMINATION BY COUNSEL FOR PLAINTIFFS
BY MR. DAVIS:

Q. Would you state your name, please.
A. Lyle Rosbotham.
Q. And may we have your business address?
A. That's National Geographic Society, 1145 17th Street, Northwest, Washington, D.C. 20036.
Q. Could we have your home address?
A. It's 1001 Elm Avenue, Takoma Park, Maryland 20912.
Q. Where are you employed?
A. At the National Geographic Society.
Q. How long have you been employed there?
A. 13 years.
Q. And what position do you hold now?

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A. I'm called senior art director in the book division.
Q. Does that mean that there are other art directors in the book division?
A. Yes, other senior art directors, as well.
Q. How many art directors are there in fact in the book division?
A. Five.
Q. What does the book division do beyond what the name implies?
A. Well, in addition to books, we do calendars. We've done some games. That's about it.
Q. And have you been in the book division during the 13 years of your employment?
A. No, I've been in the book division about the last four or five years.
Q. What did you do prior to that?
A. Just prior to that, I spent a year and a half as the art director of National Geographic Traveler, their travel magazine, and all the time prior to that was spent as the art director of a scientific journal called National Geographic Research. It's no longer published.

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Q. To whom do you report?
A. My immediate supervisor is David Griffin. He's the design director of the book division.
Q. And when I say to whom do you report, what does reporting mean? On what kinds of things are you held accountable? In other words, what kinds of decisions can you make on your own and what kinds of decisions do you have to get approval on?
MS. GRAY: Objection to form.
THE WITNESS: I'm not sure what you're asking.
BY MR. DAVIS:
Q. Well, let me try it again. Can you tell me about your relationship with the design director.
A. Well, we all -- all the art directors work relatively independently on assigned projects. There's a review process that includes David Griffin and usually other people, as well.
Q. Can you tell me some more about the review process?
A. If it's a book, which it normally is, then the -- a style chapter is -- an art director

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creates a style chapter and puts it -- prints it out, puts it on a wall and then there's a review meeting with people involved with the project and they look at what's on the wall.
Q. As that particular project goes forward, does that review committee pass on what's happening?
A. There's a final review with the whole layout on the wall where the whole book is seen at one time and usually the same people will reconvene and look at it then.
Q. Does any one person have ultimate responsibility for making decisions about a project like that?
A. I'm not sure --
Q. Do you have ultimate --
A. No --
Q. -- responsibility?
A. I'm not sure what ultimate means in that situation.
Q. Okay, we'll --
A. It goes right on up.
Q. We'll come back to that a little bit later. What is your education after high school?

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A. I've got an undergraduate degree in psychology.
Q. And what year was that?
A. '71.
Q. Did you have any studies other than that?
A. No.
Q. Did you have any training or schooling of any kind in terms of art?
A. No.
Q. Art work?
A. I've taken short workshops from time to time.
Q. How did you become an art director?
A. Let's see, I started out doing paste-up jobs -- let's see. It's kind of a convoluted scenario. My wife actually learned graphic arts on the job as an intern, so then she began taking, accepting freelance jobs. I started sharing those jobs with her at home, learned the basics that way, and then myself started taking in freelance work. And it just evolved from there.
Q. This was before you were employed at The Geographic or --

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A. Yeah, quite a bit before.
Q. Is your wife employed there?
A. No.
Q. How often do you work with artists as freelance contractors?
A. Not very often.
Q. In a given year, would that be -- would you work with more than five?
A. No.
Q. Would you work with more than two?
A. No, in a given year, no.
Q. Would you work with at least one freelance artist in every year?
A. No, I couldn't even say that for sure. There might be a year in there where I did not.
Q. How many -- just approximately in a given year, how many different projects do you work on as an art director?
A. Maybe a dozen.
Q. Is it fair for me then to say that -- that on most, if not all, of those projects, you use staff artists as required, rather than freelance artists?
MS. GRAY: Objection.
MR. DAVIS: You can answer.

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THE WITNESS: I'll let you rephrase it.
MR. DAVIS: Would you read the question back.
THE REPORTER: "Question: Is it fair for me then to say that -- that on most, if not all, of those projects, you use staff artists as required, rather than freelance artists?"
THE WITNESS: Well, what are you asking here, what do you want to know?
BY MR. DAVIS:
Q. All right. We were talking a moment ago about -- about your involvement with freelance artists --
A. (Witness nods.)
Q. When you're working on projects that don't involve a freelance artist, do you work with artists of some other kind who are not freelance?
A. No.
Q. All right, then is it fair for me to say that the only time you work with artists is when you work with freelance artists?
A. Yes.
Q. Does The Geographic have staff

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artists?
A. They do, yeah.
Q. But in your particular activities, you don't work with those people?
A. No. That's right.
Q. You have said that you work in a typical year -- and I'm just using approximate numbers here, I'm not trying to be specific about this. In a given year, you'll work on perhaps a dozen projects any given year. But on only once or twice on those projects are you involved with freelance artists. What then do you do with those projects, those dozen or so projects? What is your role?
A. It varies greatly. When I say a dozen, my involvement can range from very slight to being the art director for the actual project.
Q. What would very slight involvement consist of?
A. It might be an hour spent fixing a problem file for someone else that can't -- that won't print for some reason.
Q. And at the other end you would be art director, is that right?
A. Right.

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Q. And what does that involve?
A. Actually designing the product from scratch.
Q. When you design a product from scratch, do you follow that product all the way through to some conclusion?
A. Yes.
MR. DAVIS: Would you please mark that as Rosbotham Exhibit 1.
(Rosbotham Exhibit No. 1 was marked for identification.)
MR. DAVIS: Would you like to look at that?
BY MR. DAVIS:
Q. Mr. Rosbotham, let me show you what has now been marked as Exhibit 1.
A. Uh-huh.
Q. Ask you if you've seen that before?
A. Yes.
Q. Did you have a role in the preparation of that item?
A. Yes.
Q. What was your role?
A. At some point in the middle of the process, I became the art director for this set

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of cards.
Q. Who was the art director -- or was there one prior to that?
A. There was. It was Beth Molloy.
Q. Is she employed at the Society?
A. Not now, if you're asking now.
Q. How did you happen to become the art director?
A. It was assigned to me.
Q. How far along was the project when it was assigned to you?
A. Let's see. As best I can recall, the -- the cards here that are non 3-D cards that are not printed on the clear plastic sheets were essentially designed, and the plastic -- the transparent cards were in a process that was partly designed.
Q. Okay. May I borrow that back?
A. Sure.
MR. DAVIS: I'm going to take an item out of this packet which is Exhibit 1 and ask the reporter to mark that as Exhibit 1A.
(Rosbotham Exhibit No. 1A was marked for identification.)
BY MR. DAVIS:

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Q. Now, if you would look at Exhibit 1 for me again, please.
A. Uh-huh.
Q. I want to try to get a description of what the exhibit consists of. Now I have just had taken out one of the components of Exhibit 1 and had it marked 1A. Can you tell me what that is?
A. This --
Q. First of all --
A. Yeah.
Q. Forgive me, let me start at the beginning. Can you tell me what the whole package is? Is there a way that you conveniently identify what Exhibit 1 is?
A. It's a set of Geosafari cards.
Q. All right. Do you know who they were prepared for?
A. For Educational Insights.
Q. Now, can you tell me then with reference to Exhibit 1A what that is?
A. This is what I was calling the transparent cards, it's actually three transparent pages on a -- bound to a cardboard back with a spiral binding.

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Q. And apart from Exhibit 1A, the other components in Exhibit 1 are cards only?
A. Right.
Q. Is that a way to put it?
A. Right.
Q. With reference to Exhibit 1A, would you now tell me at what stage in the development of 1A you became involved with that?
A. Okay, first of all, I should say that my memory on this is not real clear, things are pretty hazy. But to my best recollection, this was in what I'd call the early stages of design and also I think the early stages of conceptualizing what it would be physically.
Q. Had an artist been retained at the time you came on board on the project to work on item 1A or Exhibit 1A?
A. I honestly don't remember if an artist had already been hired or not.
Q. Did you play any role in hiring an artist?
A. No.
Q. Do you know who did?
A. No.
Q. Did you eventually become involved in

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some way with an artist?
A. Yes.
Q. And what was the artist's name?
A. Warren Cutler.
Q. And how did you first become involved with him?
A. I don't know how he first became involved in the sense that I don't know how the -- how the process began. I mean, what -- and what happened was I remember having meetings with Warren about these cards.
Q. When you became involved with the project, had Mr. Cutler submitted any kinds of materials to the Society for consideration or review?
A. No, I don't think so.
Q. The Society has identified a person named Megan Ullman as a researcher on this project. Do you know what her role was?
A. No, I'd even forgotten her name, forgotten that she was involved, in fact. So no, I can't say.
Q. Did you ever have any dealings with her yourself?
A. As regards this project? I don't know

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because I hadn't even remembered her.
Q. Did you work with a Barbara Brownell on this project?
A. Yes.
Q. What was her capacity or her role?
A. As best I remember, she was the editor.
Q. And what does -- an editor for the project or an editor in some other sense?
A. No -- well, she is an editor on our staff and she was the editor on this project as far as I remember.
Q. Did you report to her?
A. No, I can't say that.
Q. Do you know what role she played in the development of this project?
MS. GRAY: I object to the extent that it calls for speculation.
MR. DAVIS: I'm asking for his knowledge.
THE WITNESS: Well, say that again.
BY MR. DAVIS:
Q. Do you know what role she played on the project?
A. No, I really don't.

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Q. Did you ever discuss the project with her?
A. Oh, yes.
Q. What kinds of things did you discuss?
A. I honestly don't remember specifics. I mean, I remember, you know, her presence at meetings that we had, but it's too long ago to remember, you know, what we discussed.
Q. Did she ever direct you to do one thing or the other with respect to that project? Or anything at all, did she ever direct you to do anything with respect to that project?
A. I honestly don't remember.
Q. You've mentioned Warren Cutler. With reference to the entire Exhibit 1, the GeoPack, can you tell me what role he had with that entire package? In other words, did he work on all of the components in that package?
A. As far as I remember, he only worked on Exhibit 1A here, transparent overlays.
MR. DAVIS: Would you mark this, please, as Exhibit 2 to this deposition.
(Rosbotham Exhibit No. 2 was marked for identification.)
BY MR. DAVIS:

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Q. Would you take a moment, please, and look at what's now been marked as Exhibit 2.
A. Uh-huh.
Q. And then tell me if you've seen that before?
A. I don't have any memory of it, but I believe that this is my signature on here.
Q. There are at least three signatures on the bottom of the page, yours would be --
A. The art director signature.
Q. All right. Does that tell us that you would have negotiated this agreement?
A. I'm sure that I would have been the one to have Warren sign this. But as to actual negotiation of the price, I don't remember.
Q. At the top of the document, it is identified as book division artwork contract.
A. (Witness nods.)
Q. Was this a more or less standard form in use in the book division or were there some variations on this form?
A. There may have been variations. But as far as this -- this contract wasn't made up specifically for this.
Q. So in your experience with the book

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division, you have seen this contract used with other situations?
A. Yes.
Q. At least in this format?
A. Yes.
Q. Exhibit 2 makes reference to four pieces of artwork. Do you see the place I'm referring to?
A. Uh-huh, yes.
Q. Would those be the four pieces in Exhibit 1A?
A. Yes.
Q. And on the contract just below that is reference to tight pencil due date.
A. Uh-huh.
Q. What does tight pencil mean?
A. A tight pencil rendering. In other words, the -- sort of the artwork in outline.
Q. Would that be synonymous with the word sketch or is that not -- does that word not fit here?
A. No, that's -- that's fairly accurate.
Q. How many of these tight pencil renderings would you expect to receive from Mr. Cutler on a project like this?

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A. I don't think there's any way I could generalize.
Q. Do you know how many in fact you did receive?
A. No.
Q. Also in the contract, it says final paintings due and a date is shown.
A. Uh-huh.
Q. Final paintings would be what?
A. The final painted art.
Q. All right. Then is it correct for me to understand that there would first be a tight pencil sketching done, one or more --
A. Right.
Q. And then final paintings?
A. Right.
Q. Is a final painting translated into what we see there in Exhibit 1A? In other words, is anything done to the final painting between the time you receive a final painting from the artist and the time it appears in the product to change the content?
A. To change the content. Well --
Q. I understand there are a lot of technical and reproductive processes --

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A. Yeah.
Q. -- that go on.
A. Right.
Q. But in terms of the content of the work, is there anything done between the time you receive a final painting and the time we see it in the final product?
A. Well, the final painting itself isn't altered but the final painting does not include the type and other elements on this card.
Q. Okay. But except for those kinds of additions, is there any other change that's made in the final painting before it goes into the product?
A. No.
Q. By referring to Exhibit 2, does this document refresh your recollection at all in terms of where Mr. Cutler stood in producing or doing his work on this project at the time when you became involved?
MS. GRAY: Objection to form.
MR. DAVIS: Would you tell me what is the problem with it?
MS. GRAY: I think it's confusing the way it's worded. You can answer if you

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understand.
MR. DAVIS: Do you understand the question?
THE WITNESS: No, I was going to ask you anyway to explain.
BY MR. DAVIS:
Q. All right. You testified a few minutes ago that you didn't recall just how are far along Mr. Cutler was --
A. Yeah.
Q. -- in the project --
A. Right.
Q. -- when you came on board.
A. Right.
Q. And I'm asking whether Exhibit 2 refreshes your recollection as to just how far along Mr. Cutler was in working on the project at the time you became art director for the project.
A. I have to say no.
Q. In your experience, would an artist have begun work before a contract was executed?
MS. GRAY: Object to the extent that it calls for speculation.
THE WITNESS: In my experience, it has

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happened.
BY MR. DAVIS:
Q. Do you know whether it happened in this case?
A. No, I don't.
Q. When you became involved with the project as art director, did anyone other than yourself have contact with Mr. Cutler?
A. I don't have any specific memory of that, but I'm sure that they did. I would expect that they did.
Q. How would that -- if you expected they did, how would that work? I mean for what purpose would there be contact with persons other than yourself?
MS. GRAY: Object to the extent it calls for speculation. You can answer.
THE WITNESS: Ask me again.
MR. DAVIS: Sure. Would you please read the question back.
THE REPORTER: "Question: If you expected they did, how would that work? I mean for what purpose would there be contact with persons other than yourself?"
THE WITNESS: Okay. Again, I am

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speculating because I don't remember, but he would certainly --
MS. GRAY: Don't guess, if you're guessing. I mean you can answer the question but don't guess.
THE WITNESS: Okay.
BY MR. DAVIS:
Q. Well, let's back up now. You testified previously -- I'm not -- this is not a game of tricks here.
A. Right.
Q. You testified that you expected, you expect that others would have had contact with him.
A. (Witness nods.) Right.
Q. So based on your expectation --
A. Yeah.
Q. -- that others would have had contact with him, what kind or kinds of contact would that have been?
A. I'm thinking that it would have been contact with a researcher on the project, and you know, I remember that we had meetings with Warren, myself and at least Barbara Brownell. I don't remember all the people at the time, so --

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Q. What was the role of a researcher on this project?
A. Again, I don't remember specifically, you know, what -- what happened, but -- my problem is I don't -- I don't remember, I don't have any idea how these cards were conceptualized, so I don't know the roles people played in terms of, you know, deciding what was going to be researched. So I can't -- I don't have -- I can't tell you anything specific.
Q. Did the Society furnish Mr. Cutler with any materials to be used on the project?
A. I don't know.
Q. Do you know who would have knowledge of that?
A. Not with any certainty, no.
Q. Did you provide Mr. Cutler with any materials with which to work on this project?
A. I may have provided him with templates with the physical dimensions of the windows of these cards, and that's -- I'm not sure of that, but that would be -- that's all that I could think of.
MR. DAVIS: Please mark this as Exhibit 3 for the deposition.

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(Rosbotham Exhibit No. 3 was marked for identification.)
BY MR. DAVIS:
Q. Mr. Rosbotham, would you look at what's now been marked as Exhibit 3 --
A. Uh-huh.
Q. Tell me if you've seen that before.
A. No.
Q. Until today, you've never seen that book?
A. Right.
Q. Would you look with me at Exhibit 2 for a moment, which is the contract with Mr. Cutler. In the second paragraph, it says: NGS book division will furnish whatever research aid is necessary.
Do you have any knowledge as to whether the book division furnished Mr. Cutler with research aid?
A. No, I don't.
Q. The sentence I just read goes on to say: It becomes the artist's responsibility to notify the art director should the research material not be adequate.
Did Mr. Cutler ever notify you in that

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respect?
A. No.
Q. Referring again to Exhibit 2 in that same paragraph in the middle of the paragraph, it says: It should be understood that the artist will be required to make corrections or rework finished art at his/her own expense if the errors are made by the artist by choosing inaccurate research materials.
Did Mr. Cutler make any errors during the time when you were involved with the project in choosing research materials?
A. Not that I know of.
Q. Did you take any steps in the course of your role in the project to determine whether or not he had chosen inaccurate research materials?
A. Did I take any steps to --
Q. Take a look at Exhibit 2.
A. Yeah.
Q. I'm reading from --
A. Yeah.
Q. -- the middle of that same paragraph.
A. Yeah.
Q. And I'm paraphrasing on the language in there in the middle, which refers to errors made

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by the artist in choosing inaccurate research materials.
A. Okay.
Q. Did you ever become aware that Mr. Cutler had chosen inaccurate research materials?
A. No.
Q. Did you take any steps to discern whether or not he had used inaccurate research materials?
A. No.
Q. To your knowledge, did anyone else at the Society take that step?
A. To my knowledge, no.
Q. Then is it the case that Mr. Cutler was free to do whatever he wanted to do in terms of the materials that he put into this -- these sketches and the final artwork?
A. I can't say that. I don't know. You see, I'm not the only one he dealt with, so I -- you know, I can't tell you that, I don't know.
Q. But you don't know who else he dealt with, is that right?
A. I didn't remember until I saw this that Megan Ullman was involved in this project. I

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remember Megan, and she's on Exhibit 2 here as the researcher. So my best guess -- and that's all it is, would be that Megan Ullman also had, you know, worked with Warren.
Q. Did you ever ask anyone at the Society to review the accuracy of what Mr. Cutler had done?
A. No.
Q. Do you have knowledge that Mr. Cutler used research materials of his own in preparing the sketches and the final artwork?
A. No.
Q. Did Mr. Cutler ever discuss with you at all materials he was using in the preparation of those items?
A. Not that I remember.
MR. DAVIS: Please mark this as Exhibit 4, Composite Exhibit 4.
(Rosbotham Composite Exhibit No. 4 was marked for identification.)
BY MR. DAVIS:
Q. When you have a moment, would you look at Composite Exhibit 4 and tell me if you've seen that before.
A. I saw one or both of these at a meeting

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with Naomi Gray, was it Tuesday?
Q. Had you seen either of those pages prior to last Tuesday?
A. I don't have any specific memory, but I expect that I did at the time that Warren was drawing them.
Q. Would you look with me at Exhibit 1A for a moment.
A. Uh-huh.
Q. There are four pages that comprise Exhibit 1A. We have been furnished with sketches for only -- that appear to deal with only two of those pages.
A. Uh-huh.
Q. Were sketches prepared for the other two pages?
A. I'm sure that they were.
Q. Do you know if they exist today?
A. No, I don't know.
Q. The contract with Mr. Cutler, which is Exhibit -- a copy of which is Exhibit 2, makes reference to tight pencil. Is that what these documents that comprise Exhibit 4 consist of? Are these tight pencil sketches?
A. Xeroxes of them.

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Q. Yes?
A. Yes, as far as I can tell.
Q. This is what would have been contemplated on this contract when it refers to tight pencil, is that right?
A. Yes. There may have been -- this may have been a loose early one, there may have been a tighter later one, but I don't remember. But I would say looking at these that that would be -- that's -- this is what's meant by tight pencil.
Q. On other unrelated projects involving artwork, do you also anticipate receiving tight pencil sketches for use in the development of such products?
A. Not in all cases. It would depend on the nature of the -- the art being developed.
Q. So that I'm clear in terms of what your testimony was a moment ago, are you saying that you had not seen these sketches before or you don't recall having seen them before?
A. I don't remember seeing them specifically but I'm sure that I did, that I would have, you know, in the process.
Q. There is writing on these sketches. Do you know who put that writing there?

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A. No, I don't. I don't see anything here that is my handwriting.
Q. Do you know whether Mr. Cutler put that writing on there?
A. No, I don't know.
Q. If you look at the first page of Composite Exhibit 4, at the handwriting across the top of the page, it says: Cover realms of the sea. Do you see the place I'm referring to?
A. Yes.
Q. Do you have any idea what that means or refers to?
A. No.
Q. Alongside it, it says: Page 223, Audubon Nature Guide. Do you know what that would refer to?
A. Well, I'm assuming --
MS. GRAY: Don't --
THE WITNESS: There's a book by that title. Well, I don't know what it refers to.
BY MR. DAVIS:
Q. Just to the right of that is writing which says: Living Reef, page 33. Do you have any idea what that refers to?
A. Well, I have an idea now sitting here,

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yes.
Q. And what is that idea?
A. That it refers to the book that's exhibit whatever.
Q. Exhibit 3. Do you know whether the book that is Exhibit 3 was used in the creation of this pencil sketch?
A. I don't know.
Q. Do you have knowledge that it was not used in the creation of this pencil sketch?
A. No, I don't have that knowledge.
Q. Would you look at Composite Exhibit 4 at the second page.
A. Uh-huh.
Q. In the upper left-hand corner, there's a date. Below it, it says: Warren's art and annotations.
A. (Witness nods.)
Q. Do you see that?
A. Yes.
Q. Is that your writing?
A. No.
Q. Do you know who put that there?
A. No.
Q. Do you have any idea what that means?

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A. No.
Q. As an art director, does that indicate that Warren provided annotations for these sketches?
MS. GRAY: Objection to the extent that it calls for speculation.
THE WITNESS: I don't know.
BY MR. DAVIS:
Q. In sketches that you've worked with, with other artists on other projects, did the artist provide annotations to the sketches they provided you?
A. No, I can't recall a project where I got annotated pencil sketches.
Q. Were the sketches that are shown in Composite Exhibit 4 translated into the final product that is marked as Exhibit 1A?
A. Yes.
Q. Were any changes made in the sketches before that happened?
A. Yes.
Q. Can you tell me what changes were made?
A. Well, actually -- the changes that I remember being made -- let's see. I remember

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having Warren make changes in the final art work in two places here to improve the readability of the type that appeared above the art. And one of those changes was in the anemone, which is in -- what's that, 4A, the top, top page, the one that says realms of the sea on the left.
Q. Yes.
A. The anemone in the lower center of the -- what I'm telling you is that in -- in the final artwork, I had Warren lighten up some of that anemone in order that the type above it on the page above it in these transparent overlays could be read more clearly. The other change that I remember again having Warren make in the final art actually shows up on the other Xerox of Exhibit 4, and that is sort of the -- the lower right center. I don't know what that growth is there, but I had him lighten up an area there, again so that that type would show up.
Those are the changes that I recall.
Q. When you say you had him make it lighter --
A. Uh-huh.
Q. Help me as an nonartist understand what that means.

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A. You mean the -- how he did it or --
Q. Well, it was simply too dark and you wanted him to -- what would you ask him to do to make it lighter?
A. Basically lighten it up, yeah. There were parts that were too dark and I just wanted him to go in -- I don't know how he did it, to tell you the truth, but lighten the color in that area so that black type would show, would be readable on top of it.
Q. And those are the only changes that you recall having him accomplish, is that right?
A. No. I remember a change that doesn't appear in these overlays on Exhibit 4 that there was a change that involved altering the two divers so that they would be more -- look more like adolescents rather than adults.
Q. Had he submitted a sketch that showed them looking like adults?
A. Yes, he would have.
MR. DAVIS: Can you go off the record just a moment?
(Discussion off the record.)
BY MR. DAVIS:
Q. Would you look again at Exhibit 1A.

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A. Uh-huh.
Q. And turn to the panel that shows the divers that you were referring to.
A. Okay.
Q. Did you send the preliminary sketch back to Mr. Cutler to have him change those divers, is that what you've just said?
A. No, that's not what I said. I don't remember anything in that specific detail. I remember that that change was made. I'm not sure why that change was called for. I think it was at the request of Educational Insights but I can't say that for sure. And as far as I remember, all the changes that we asked Warren to make were done when we sat down together and looked at his sketches.
Q. Did he make the change as you sat there with him or did he go back home and do that?
A. No, he went home and did what needed to be changed.
Q. Did he thereafter submit a different sketch that would show the changes?
A. I think -- I don't remember with the divers whether he submitted another sketch or whether he made the change and went directly to

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the final art. The other changes I'm talking about were changes I asked him to make after we had already received the final art. So I would have given him back his -- his art and had him correct it and bring it back to me.
Q. In what form did you receive final art, as you put it?
A. I don't remember specifically, but I'm assuming that it was on some kind of an art board, heavy board.
Q. Was it done with oil or water colors or -- I mean, I'm asking these things out of ignorance.
A. I think -- I think he painted these with acrylic and in some cases used air brush on top of it.
Q. So is it -- is it relatively easy to make changes on artwork of that kind where necessary? Or does one have to go back and do the whole artwork again?
A. Oh. No, whatever -- the changes that I've described that we're talking about -- well, these, these two changes of lightning up areas, he would have been able to do that and I'm sure he did, on the original artwork. The divers, as

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I recall, were changed from a sketch. So he didn't repaint those, you know.
Q. Would you look at Exhibit 1A, please.
A. Uh-huh.
Q. And on the first panel in the top center is a fish.
A. Uh-huh.
Q. It does not have a number alongside of it. Do you see the one I'm referring to?
A. Yes.
Q. It seems to be from where I'm sitting to be primarily of a yellow or gold color. That fish, would you look at Composite Exhibit 4 and tell me if that fish appears on that Exhibit?
A. No. I don't see it.
Q. Do you know who called for that to be added?
A. No.
Q. In other words, you were not involved with that change or that addition?
MS. GRAY: Objection to form.
THE WITNESS: I don't remember.
BY MR. DAVIS:
Q. I'm sorry?
A. I don't remember.

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Q. I'm still puzzled at what your role was, and I say this with complete sincerity. I'm curious as to what an art director's role is on a project like this. In other words, if -- if you didn't -- weren't involved with making that change, who else would make such decisions?
MS. GRAY: Objection to form.
BY MR. DAVIS:
Q. Maybe you can sort of tell me how the process works a little bit more fully.
MS. GRAY: Objection to form.
THE WITNESS: I think what I want to tell you in general is that I'm not trying to hide anything from you at all. I don't remember very much of this process at all, and all I can tell you is I was not responsible for figuring out what elements went onto these cards. So you know, I just -- I don't have the knowledge or the memory to answer a lot of what you're asking.
BY MR. DAVIS:
Q. Fair enough. And I gather from your testimony so far that in terms of your role, you also had nothing to do with any reference materials the artist would have used in preparing the product, is that right?

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A. That's true.
MR. DAVIS: Why don't we take a short rest break at this point.
(Recess.)
BY MR. DAVIS:
Q. With respect to Exhibit 1A, when Mr. Cutler -- did Mr. Cutler give his final artwork to you?
A. I'm -- I don't specifically remember it but I'm sure that he did.
Q. Did you approve it?
A. Yeah, we accepted it, yes. Yes --
Q. When you say we, does that mean someone other than you or in addition to you?
A. It would have been the group of us that was involved with the project looking at it together.
Q. Was the decision to accept it a group decision or was there someone in the group who had more authority on that score than others?
MS. GRAY: Objection to form. You can answer.
BY MR. DAVIS:
Q. Was a vote taken in this group?
A. No, there was no vote. It's basically

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it's usually consensus. If everyone's happy with it --
Q. So therefore, there was a consensus at the Society that the artwork that he submitted in its final form was acceptable, is that right?
MS. GRAY: Objection to form.
MR. DAVIS: Would you tell me what the objection is?
MS. GRAY: You're characterizing the witness's testimony.
MR. DAVIS: I just asked him if that's correct.
THE WITNESS: So let's hear the again?
MR. DAVIS: Yes, would you --
THE REPORTER: "Question: So therefore, there was a consensus at the Society that the artwork that he submitted in its final form was acceptable, is that right?"
THE WITNESS: What I'm saying is there was a consensus among the folks who worked on this project that we accept the artwork.
BY MR. DAVIS:
Q. To your knowledge, did anyone at the Society inquire into whether any inappropriate copying by the artist had been done?

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A. To my knowledge, no.
Q. In your experience at the Society in dealing with freelance artists, has the Society ever concerned itself with that question in terms of product produced by freelance artists?
A. I'm not sure what you're asking.
MR. DAVIS: Would you please read it back.
THE REPORTER: "Question: In your experience at the Society in dealing with freelance artists, has the Society ever concerned itself with that question in terms of product produced by freelance artists?"
MS. GRAY: I'm going to object to the question.
THE WITNESS: Yeah, I still -- I'm not clear what you're asking anyway.
BY MR. DAVIS:
Q. My previous question had to do with inappropriate copying of materials by a freelance artist.
A. Uh-huh.
Q. In your experience at the Society in dealing with freelance artists over the years, has the Society ever inquired or concerned itself

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with whether a freelance artist was inappropriately copying material?
MS. GRAY: Objection.
THE WITNESS: I don't know how to answer, I guess because I'm not -- I don't know what constitutes the Society concerning itself with.
BY MR. DAVIS:
Q. We're here on a copyright case.
A. Yeah.
Q. Our clients have alleged infringement of their copyrights. At your level and in your role as an art director, do you have concern for the sanctity of copyrights when you assign work to freelance -- or supervise work by freelance artists?
A. Yes.
Q. And how, if at all, do you act on that concern? Is there anything you do to safeguard against the inappropriate use of copyrighted material?
MS. GRAY: Objection to form.
THE WITNESS: What to say. If -- if in the course of me art directing an outside artist I thought there was any reason to be concerned

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about that, then I would, you know, I would act on my concern. It's something that I'm conscious of and definitely, you know, aware of copyright issues.
BY MR. DAVIS:
Q. What kinds of steps would you take in dealing with a freelance artist to assure yourself that no improper use of copyrighted materials was taking place?
MS. GRAY: Objection to the extent it calls for speculation.
THE WITNESS: I don't know how to answer it. I mean that's real speculative.
BY MR. DAVIS:
Q. All right, that's your answer. Did you ask Mr. Cutler to show you the reference materials, if any, that he was using in preparing this product?
A. No.
MR. DAVIS: Would you please mark this as Exhibit 5, I think it is. C5, I guess that's a composite exhibit, it's several pages.
(Rosbotham Composite Exhibit No. 5 was marked for identification.)
BY MR. DAVIS:

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Q. When you've had a chance to look through Composite Exhibit 5, would you tell me if you have seen the original from which this copy was made?
A. No, I haven't.
Q. These pages, which were numbered by the Society from 261 through 265 were produced to us by the Society. The first page in composite Exhibit 5 appears to be the cover of a book which I showed you previously and that was marked as Exhibit 3, The Living Reef.
A. (Witness nods.)
Q. Do you know of your own knowledge that the Society possesses a copy of The Living Reef in its archives?
MS. GRAY: Objection.
THE WITNESS: I don't know.
MR. DAVIS: What is it, I'll try and fix it?
MS. GRAY: I was objecting because he's testified that he has never seen the book which is marked as Exhibit 3, nor has he ever seen the copy which is marked as Exhibit 5, and so it seems to call for information beyond his knowledge.

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BY MR. DAVIS:
Q. The pages that comprise Composite Exhibit 5 came to you or were produced to us in this form. They were clipped or stapled together. You've testified that you have not seen the book The Living Reef previously. Have you seen any collection of the specific pages that comprise Composite Exhibit 5?
A. No.
MR. DAVIS: Would you please mark this as Composite Exhibit 6.
(Rosbotham Composite Exhibit No. 6 was marked for identification.)
BY MR. DAVIS:
Q. Have you had a chance to inspect Composite Exhibit 6?
A. Uh-huh.
Q. Have you seen any of the component pages of that exhibit before?
A. I haven't seen them in this form, but I've seen -- I mean, these are representations of the cards of the set we're talking about.
Q. So that we're clear on what you're talking about, tell us the number --
THE WITNESS: Yeah.

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MS. GRAY: The identifying number.
MR. DAVIS: In the lower right-hand corner of that page.
THE WITNESS: 81 and 82, those pages are representations of Exhibit -- cards in Exhibit 1. I'm just saying I haven't seen them, you know, duplicated like this.
BY MR. DAVIS:
Q. Take a look at page -- at the page marked NGS 83.
A. Uh-huh.
Q. Have you seen that page before and page 84?
A. Right. I don't have any specific recollection, but I expect that I did, would have seen it.
Q. Do you know whether page in this format would have been used for?
A. Again, I'm just -- from looking at it, it's the -- we call them the clues on the cards, or the questions on the -- on the cards in --
Q. In the product.
A. Yeah, in the product, and the answers. And again, I'm assuming, only assuming that they -- it's also showing the source from which

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the question came, question and answer came.
Q. And when you say the source, are you referring to what portions of pages 83 and 84?
A. The underlined items which as far as I can tell --
Q. In the right-hand corner?
A. In the right, yeah, that look to be book titles, page numbers.
Q. Would you look at page 86 of that exhibit, please.
A. Uh-huh.
Q. On page 86, there is some handwritten notations. Do you know whose handwriting that is?
A. No.
Q. They appear to have been added after the typewritten portion of the page was prepared. Do you have any knowledge as to why it would be added later?
A. No.
MR. DAVIS: Would you mark this, please, as Exhibit 7.
(Rosbotham Exhibit No. 7 was marked for identification.)
BY MR. DAVIS:

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Q. When you've had a chance to inspect Exhibit 7, would you tell me if you have seen that before today?
A. I don't have any memory of this one but I may have seen it at the time.
Q. Toward the middle of the page, along side item number ten, there's some handwriting that says artwork from photos. Do you see what I'm referring to?
A. Uh-huh, yes.
Q. Do you know whose handwriting that is?
A. No.
Q. Do you have any idea what that notation refers to?
MS. GRAY: Objection to the extent it calls for speculation.
THE WITNESS: In any event, I don't know what it refers to.
BY MR. DAVIS:
Q. In your experience as an art director, are photos used ever in the preparation of art work for the Society?
A. I'm sure that they are in general. I can't -- I have to -- I don't know if I can remember specific jobs I've done. I don't have

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any specific recollection of --
Q. Do you know whether photos were used by the artist in preparing the product that's marked Exhibit 1A?
A. I don't have any direct knowledge of what Warren used to paint these cards.
Q. So you cannot say, I gather, that he did not use photographs in the preparation of his artwork, is that correct?
A. It's true that I can't say that he did not use photos.
MR. DAVIS: Would you please mark this as Exhibit 8.
(Rosbotham Exhibit No. 8 was marked for identification.)
BY MR. DAVIS:
Q. When you've had a chance to review Exhibit 8, would you please tell me if you've seen that previously?
A. I don't have any recollection of ever seeing this.
Q. Across the top of the document, it says: Received by Lyle Rosbotham.
A. Uh-huh.
Q. Does that help your recollection at

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all?
A. No.
Q. Across the very top of the page, it says: Preliminary recording sheet for use with art only. Does that have any meaning to you as an art director, that kind of title or label?
A. Yeah. This, as far as I remember, this sheet or this form would have been completed by Karen Edwards. And this is just -- I don't have any -- you know, I don't remember that, but I'm assuming since her name is on here as record to that she would have filled out this form. And it's basically a logging in of artwork we've received.
Q. Received from where?
A. From the artist. In this case, according to this form, the submitter is Warren Cutler. So -- I'm, you know -- what this form represents is, you know, a record that six pieces came from Warren Cutler as are described on the form.
Q. Toward the middle of the page is the word comments: Artwork at the engraver. Artwork will be returned.
Does that mean that the engraver will

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return the artwork or does that mean --
MS. GRAY: Objection.
MR. DAVIS: -- something else?
MS. GRAY: Objection.
MR. DAVIS: Which is?
MS. GRAY: Both to form and to the extent it calls for speculation.
MR. DAVIS: What is the form?
MS. GRAY: It's compound and it's confusing.
BY MR. DAVIS:
Q. All right. What does artwork at the engraver mean to you?
A. To me, that means that these pieces of art were sent to an engraver, an outside contractor that makes separations from the artwork.
Q. And those separations would have been used to make the product --
A. Right.
Q. -- which is Exhibit 1A?
A. Right.
Q. With reference to Exhibit 8 again, the phrase, artwork will be returned, what does that mean to you?

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A. That's a little -- I'm unsure what that means. One of two things: It will be returned from the engraver or it will be returned to the artist.
Q. Do you know whether the artwork was indeed returned to the artist?
A. No. I don't know.
Q. In your experience in dealing with freelance artists over a period of time, is original artwork retained by the Society as a rule or returned to the artist as a rule?
A. As a rule -- actually the rules are changing. At -- at this -- back in 1994, as a rule, the art was returned to the artist a year after publication.
Q. But I gather you don't know whether that in fact was done in this case.
A. That's right, I don't know.
Q. On Exhibit 8 in that same line we've been discussing is the statement: Dupes in illustration library.
What does that mean?
A. That would mean that the artwork was duped, meaning that we made sheet film transparencies of it. Could have been 4 by 5, 4

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by 7 or 8 by 10, but large-format color transparencies. That's what a dupe is in our lingo.
And at this time, that was normal procedure, was to make dupes of all artwork before it was sent out. Didn't always happen, but that was the standard procedure. And the illustration library is the division in The Geographic that holds original transparencies and also these dupes of artwork and other stuff.
So they -- the idea is that the dupes would be on file permanently even though the artwork was returned to the artist.
Q. Why would such a file be maintained?
A. Again, the rules are -- things -- the rules are changing as far as usage rights and so forth, the contracts that we make with people. But at this time, most -- I believe the contracts that we were using in '94 allowed us to reuse, reproduce in other ways original artwork that we commissioned. And if the original art were returned to the artist, we would still have the dupe from which to work.
Q. And when you say a dupe from which to work, what does that mean?

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A. Meaning that we have that -- that large format transparency that we could send to the engraver in place of the original art for separations to use in another project at a later date.
Q. You may have indicated this a minute ago, and if you did, it went by me because I'm not a expert in your field. But tell me how the dupes are made.
A. Well, literally just put them up on a copy stand with lights and -- and take a picture of them with a large-format camera and transparency film.
Q. So they aren't made electronically, I gather?
A. No.
MR. DAVIS: Let's take a little break here.
MS. GRAY: Sure.
MR. DAVIS: We may be close to a conclusion.
(Recess.)
BY MR. DAVIS:
Q. Mr. Rosbotham, before we took a short break, you were explaining to me the dupes that

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were prepared for the illustration library.
A. Uh-huh.
Q. When those dupes are made for those purposes, are they positives or negatives?
A. Positives.
MR. DAVIS: Were we produced copies of those dupes? To my knowledge, we were not.
MS. GRAY: If you're telling me you were not, then I mean --
MR. DAVIS: I mean, I don't know whether some of the material, you would indicate to me that some of the materials that were produced were in fact copies of those dupes. But to my knowledge, they weren't, so I guess I'm asking, and asking if you would look into that for me and let me know.
MS. GRAY: What exactly is your question, I'm sorry?
MR. DAVIS: Were copies of those dupes that were in the illustration library --
MS. GRAY: Illustration library produced.
MR. DAVIS: Yes.
MS. GRAY: I can check into that for you. I'll take it under advisement.

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BY MR. DAVIS:
Q. You said a few moments ago that at least sometimes film artwork is returned to the artist. Have you done that yourself with artists?
A. Yes.
Q. These being freelance artists?
A. Yes.
Q. As you understood it, was the artist then free to use that artwork for anything the artist wanted to do?
A. No, the contract terms were that they were allowed to resell the original art but they were not allowed to allow its reproduction without prior permission from The Geographic.
Q. As I come to the end of this deposition, I'm still not clear on what you do.
A. Uh-huh.
Q. With reference to Exhibit 1A, would you mind telling me again, because I don't understand, what you did with respect to that project, to that part of the product.
A. Uh-huh. My recollection, you know, what I remember from '94 is -- well, let me give you the -- my overall work on this project was to

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get to a complete electronic files that could be then, you know, printed.
So I dealt with the placement of type on here. I dealt with the header, this band that runs across the top of the cards, what it looked like, you know, the type faces, the sizes. I dealt with positioning of all the type on here that, you know, the names of the fish, the numbers and the labels, their placement. I recall in our -- the meetings I had with Warren dealing with issues of the transparency of how to make these multiple layers work, you know, so that you could see through the top layer to the next layer, to the layer below that, you know, how to make that work in an appealing way.
That was -- sort of the art direction process of it was working out with Warren, really giving him guidance, because he's the one who really worked out most of it, this layering system. But explaining to him, you know, how we wanted it to work, you know, giving him direction, and then he worked out these -- the sketches that we've looked at for how these layers would work.
Then I did all of the electronic

P.58 dupes

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production end of it that I was describing where I would basically do low resolution scans of his artwork, and I probably did them of his sketches to begin with, and placed them in the electronic documents so that I would know how they would fit, how the type would fit down the sides here. That's what I remember doing on this project, on these particular cards.
Q. Does the word composition fit in there somewhere? Is that what art --
MS. GRAY: Objection.
BY MR. DAVIS:
Q. -- directors do?
MS. GRAY: Objection to form.
THE WITNESS: I don't know.
BY MR. DAVIS:
Q. I don't know either. I just think about art directors being concerned about composition of a product.
A. I mean composing --
MS. GRAY: Objection. Objection to form. Go ahead, you can answer.
THE WITNESS: Okay.
MS. GRAY: I mean --
MR. DAVIS: Yes, answer.

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THE WITNESS: You mean composing the --
BY MR. DAVIS:
Q. What does the word composition mean to you as an art director?
A. It's got a couple of separate meanings. Composition's an old term for typesetting and also arranging elements in a piece of art.
Q. Were those two things part of your role in helping to prepare this product?
A. Yes.
Q. You mentioned electronic scanning and electronic files.
A. Yes.
Q. Can you tell me what that means?
A. Well, let's see. The files from which these things were printed, both the transparent ones and the opaque cards here, were layouts created in Work Express, is the software program for doing layout. And those files can be output as film, separated film, to print from. And those files would have been complete in the sense that they would have had all the type in them and a scan of the artwork in them. All the colors would have been specified within that file.

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Q. Were the colors applied electronically?
A. Not -- not in the artwork, no. I'm talking about the -- in this case we're talking about the colors on the header here.
Q. Okay.
A. And the white, for instance, in these circles, that's all.
Q. Then was the artwork itself altered in any way electronically?
A. Not to my knowledge.
Q. Were colors on the artwork altered in any way electronically?
A. Not to my knowledge. In the normal process of things, there is a stage called -- that's called color correction where you're generally just trying to get the -- a proof of what's going to print to match the colors of the original art or transparency, whatever.
Q. Now, you helped me with your description --
A. Okay.
Q. Of what that role was. Among the team as you call it that worked on this project, who selected the fish to be used in this product?
A. I don't know.

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Q. Who would know that?
A. I would think that Megan Ullman might know it, assuming she was the researcher which I saw on one of your exhibits. I hadn't remembered her involvement. That was on Exhibit 2. She -- she might know, might very well might know. Patty Frakes also might know. I remember her being involved in this project.
Q. What kind of position did she have?
A. I was thinking that she was the researcher. That must be faulty memory on my part. But I think that she was involved in it, so --
Q. You told us Beth Molloy had been the art director on this project before you were.
A. Yes.
Q. Does the discussion we've had today refresh your recollection at all as to whether these sketches in Composite Exhibit 4 were prepared before you became art director or after?
A. None. I'm just not sure.
Q. You've told us a little while ago about some changes that you required to be made.
A. Uh-huh.

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Q. Or requested be made --
A. Uh-huh, yeah.
Q. -- on these sketches.
A. Yeah.
Q. In terms of -- strike that. Would you look at Exhibit 1A, please.
A. Uh-huh.
Q. On the first panel.
A. Uh-huh.
Q. We discussed earlier this morning that fish in the top center.
A. Uh-huh.
Q. There appears to be no name or number for that fish.
A. (Witness nods.)
Q. The naming and numbering of the fish in this particular part of the product, would that be part of your responsibility?
A. I placed these names and numbers, is that --
Q. Is there some reason why that fish that we're discussing now has neither a name nor a number?
A. I don't know why it doesn't have a name and a number, but I believe the reason it's there

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in that specific place on this page is to hide the -- the name moon jelly fish number nine that's on the layer beneath it.
And that -- I don't remember specifically but that would have been something that I would have been making sure of, you know, making -- I know I spent a lot of time on these things hiding type on lower layers with elements on the upper layers and moving things around, so --
Q. All right, if you saw a need in doing what you've just said, a need to cover the type on the underlying page, how would you have gone about accomplishing that? Who would you talk to, the artist?
A. Yeah.
Q. What would you -- you said just give me a fish, Mr. Cutler, or Warren, that I can put in here? How would you have done that?
A. I don't remember the specifics. I mean, I would have been -- I would have told Warren that -- that -- well, no, I can't even -- I don't remember that I -- that that's the way it worked, that I asked for anything to be placed there for it to hide that type. I don't remember

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any more about how that came about.
Q. I'm a little unclear now --
A. Yeah.
Q. -- as to your recollection and that's all I want is your recollection.
A. Yeah.
Q. Do I understand your testimony to be that you don't know why the fish was put there?
A. No, what I'm -- what I'm trying to tell you is that -- that the fish is there hiding the type and number underneath it.
Now, what I can't remember is whether I asked Warren to put a fish there because that was a problem we needed to solve or move that fish over from somewhere else to help me with the type underneath. That, the process, I don't remember. So --
Q. But in any event, it was your decision to add something in that space to cover the type, is that right?
A. No, I'm not --
MS. GRAY: Objection.
THE WITNESS: Even sure it was a matter of adding. It may have been a matter of moving.
BY MR. DAVIS:

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Q. Either way, whether it was added or moved, that would have been -- do I understand it correctly that that would have been your decision to make to say I need to have a fish added or a fish moved to cover this type?
A. Yes.
Q. Do you have that right?
A. Uh-huh.
Q. Okay. And do I also understand correctly that in accomplishing that, you would have dealt directly with the artist about that?
A. Yes.
Q. Before today's deposition, you met with your attorneys?
A. (Witness nods.) Yes.
Q. With whom did you meet?
A. With Naomi Gray and Bob Sugarman.
Q. And where was the meeting?
A. The offices of Weil, Gotshal.
Q. Was it in Washington?
A. Yeah, yes.
Q. Was anyone else from The Geographic present at that meeting?
A. No.
Q. Did you have more than one meeting?

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A. No.
MR. DAVIS: I have no further questions. Thank you.
(Whereupon, at 11:25 a.m. the taking of the instant deposition ceased.)

_____
Signature of the Witness
SUBSCRIBED AND SWORN to before me this _____ day of _____, 19____.

_____
Notary Public
My Commission Expires: _____

Concordance Report
Unique Words: 962
Total Occurrences: 3,471
Total Words In File: 10,553
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