EXPERT REPORT OF JANE S. KINNE

The National Geographic Society ("NGS") has retained me in this case to opine on the amount of the license fees which would have been negotiated for the use of images created by Plaintiffs in the various "Complete National Geographic" CD-ROMs and DVDs ("CNG") published by Mindscape under agreement with NGS.

BACKGROUND AND EXPERIENCE

I have worked in the photographic industry for some 55 years. From 1947 to 1993, that principally involved being an agent for freelance photographers. As such, I was negotiating or supervising the grant of licenses and the accompanying fees for all types of uses, both editorial and commercial, on a daily basis. At times, this activity exceeded 100 different transactions in a single day.

Part of my background included acting as editor or packager on single books or series of titles. All of these publications relied heavily on the image content but also included supporting text.

Throughout my long career, I have been active in the various professional organizations whose membership includes the creators, the users and the agents and vendors of the entire photographic and publishing communities. From the late 1960's to the present day, my involvement in the American Society of Media Photographers (ASMP); the American Society of Pictures Professionals (ASPP); the Picture Agency Council of America (PACA); and the North American Nature Photography Association

(NANPA) has centered on the development of ethical business practices, the creation of standard paperwork, conditions and terms and the education of creators and users on the elements that create value in arriving at fair and reasonable pricing. Toward these ends I was involved in the writing and editing of ASMP's Guide to Business Practice Editions 1 through 5, and the Stock Photographers Handbook Editions 1 and 2. I also served as a consultant and editor for Pricing Photography by Michael Heron and David MacTavish.

In the past four years I have testified, either at deposition or at trial, as an expert in the following cases:

2001: B&B Photo Studio v. New York Post, New York State Supreme Court
Levy v. Levy, New York State Supreme Court
Sinkovec v. Rick Johnson & Co., Inc., New Mexico State Court
Greenberg v. Lens Crafters, U.S. District Court, Southern District of Florida
George Howard v. City of Tucson, Arizona State Court
John Warner v. St. Labre Indian School Education Ass'n, U.S. District Court, District of Montana, Billings Division

2000: Edith Shaw Marcus and Meta Shaw Stevens as Temporary Administrators of the Estate of Sam Shaw v. Martin Bressler, Larry Shaw, Susan Shaw, Bressler & Bressler, Valerie Goodman, 1912 Productions, Inc., Marc Weinstein, Individually and d/b/a Color Group, New York State Supreme Court

1999: Edward Pardee v. Orange Micro, U.S. District Court, Northern District of California
Guthy-Renker v. Gary Bernstein, U.S. District Court, Southern District of California

1998: Jack Leigh v. Warner Bros., U.S. District Court, Southern District of Georgia, Savannah Division
Kim Taylor Reece v. DFS (Duty Free Shops), U.S. District Court, District of Hawaii
Greg Mancuso v. University of California, L.A., California State Court
Focus on Sports v. Ernest Lawrence Group, New York State Supreme Court

Boris Raishevich v. Charles Foster, an Officer of the NY State Police
U.S. District Court, Southern District of New York

I am being compensated for my time and expertise at the rate of $200 per hour. A copy of my curriculum vitae is attached as Exhibit A.

INFORMATION REVIEWED

a) Certain issues of the magazine in which the images that are the subject of this complaint originally appeared;

b) The various CD-ROM and DVD products in which these same images appear;

c) Financial information on the sales figures for the various CD-ROM and DVD products;

d) Letter dated 6 May 1997 from James Pickerell addressed to Former and Present National Geographic shooters;

e) The expert report of Plaintiffs' expert Henri Dauman;

f) The expert report of Plaintiffs' expert Kerry Ruoff;

g) The expert report of Plaintiffs' expert Barbara Zimmerman;

h) The expert report of Plaintiff's expert Jonathan Wells;

i) Industry pricing guides often used in determining price structures, including:

1) Negotiating Stock Photo Prices, by Jim and Cheryl Pickerell, 1993, 1997, 2001 editions;

2) Pricing Photography, by Michael Heron and David MacTavish, 1993, 1997, 2002 editions;

3) The computer software program Foto Quote;

4) ASMP Professional Business Practices in Photography, 6th Edition.

j) Contracts between Plaintiffs and NGS concerning the publication of images and/or texts in National Geographic Magazine;

k) Documents showing amounts paid by NGS for the use of images in CD-ROM products other than "The Complete National Geographic;"

l) Documents showing amounts paid by NGS to stock photographic agencies for the use of images in "The Complete National Geographic;"

m) Minutes of a meeting of the Board of Trustees of the National Geographic Society on June 12, 1997.

Most importantly, I relied on my 55 years of experience in the real world of negotiating licenses and fees and in determining suitable budgets for heavily illustrated products.

ANALYSIS

I have a fundamental difference of opinion with all of Plaintiffs' experts as to the nature of "The Complete National Geographic." By long-standing industry accepted definition, this is an editorial product intended to convey facts and information, as opposed to a commercial product which is intended to promote or advertise goods or services. To use any commercial fee structure, therefore, is simply wrong.

Moreover, I disagree with the basic approach taken by Plaintiffs' experts, whereby they set a base fee for the use and then apply multipliers due to a variety of factors. As an initial matter, I understand based on comments by John Fahey to the NGS

Board of Trustees that NGS expected "The Complete National Geographic" to do no better financially than break even. The parties thus would never have anticipated or accounted for in their negotiations the success that the products actually realized. For this reason, the royalty model that I outline below is a better approach because it accounts for the events that actually occurred. Additionally, because my approach provides for royalties payable on all sales, it takes into account all of the varied factors that caused Plaintiffs to apply multipliers, such as the print run, worldwide distribution, and the like.

Plaintiffs' approach is also flawed because certain of the multipliers are simply inappropriate. For example, Plaintiffs use a multiplier of 100% for the right to publish in all languages, when in fact I understand that the product was only published in the English language. Furthermore, two of the multipliers – for "lack of copyright credit" and for "unauthorized use" – have no place in an analysis that attempts, as Mr. Dauman states, "to determine the prices each party would have agreed to had they been reasonably and voluntarily trying to reach an agreement" before publication of the products at issue. These multipliers are only applicable if the negotiation took place after publication. Finally, even when multiples are used, they are rarely 100%, the amount suggested by Mr. Dauman and Ms. Zimmerman in some instances.

As a result of Plaintiffs' fundamentally flawed approach, the proposed license fees put forth by Plaintiffs' experts are astronomical. In no negotiation of which I am aware did a photographer or writer request or receive such a high fee. The unreasonableness of Plaintiffs' experts' proposed license fees is underscored by comparing them to amounts actually paid by National Geographic Society to third parties

for the use of images in various CD-ROM products. On average, NGS paid $137 per image in CD-ROM products other than "The Complete National Geographic." With respect to "The Complete National Geographic," NGS paid an average $161 per-image fee to stock photo agencies.

In trying to determine a fee that might have been the result of an arm's-length negotiation prior to the publication of CNG, the first fact established would have been the classic editorial nature of this reference set, even though it is an electronic product rather than a traditional print set and is widely sold in retail locations, not just in bookstores. With that in mind, it is my opinion that a "budgeting approach" would have been used as a framework for negotiating fees to be paid to photographers and writers. Such an approach would have been analogous to the model long used in the publishing world for heavily illustrated books, popularly called "coffee table" books, wherein the appeal to the consumer emanates from the images displayed more than from the written text.

The model often used by publishers for these "coffee table" books is to set aside a sum equal to a percentage of the "sticker price," or retail price, to pay for all content, both images and text. The percentage can range from 10% to 15%. Historically, the visual content or images commanded two-thirds of this sum, and one-third was reserved for the texts. To be conservative, I have chosen 15%, with 10% going to photographs and 5% going to texts.

These percentages should be applied to revenues received as a result of sales of the product to end users. Therefore, the figure to which the percentages should

be applied is the revenue received by Mindscape, less its sales to NGS, plus NGS' sales to end users. I am informed that this figure is $53,724,449. Use of this amount is also conservative because it uses actual sales figures, not the projections which were made before the product was released. I have reviewed John Fahey's statements to the Board of Trustees of National Geographic Society prior to publication of "The Complete National Geographic" that the product was expected to do no better than break even. I have also reviewed certain documents reflecting revenues that the defendants received from the sale of "The Complete National Geographic," as well as the reports of Plaintiffs' financial experts. Based on these documents, I understand that the projections were much lower than the actual sales for "The Complete National Geographic."

Applying the budgeting model, $8,058,667 (15% of $53,724,449) would have been set aside to pay photographers and writers. Two-thirds, or $5,367,072, would have been available to pay photographers. One-third, or $2,683,536, would have been available to pay writers.

This exact model is suggested in the 6 May 1997 letter from James H. Pickerell addressed to "Former and Present National Geographic Shooters," wherein he states:

> 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 large numbers 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, let's

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

The next step would be to divide these totals for images and text between the creators of the content proportionately according to each individual's contribution.

The images that were potentially protected by copyright in 1997, and thus would have been considered eligible to be included in the content percentage, are those that appeared from 1923 through 1997. I am informed that approximately 123,075 images appeared during those years. This figure was determined by having a NGS staff member count the number of images appearing in one year's worth of magazines every five years after 1978 and every ten years before 1978. These counts were used to calculate the average number of images that appear in National Geographic Magazine during the course of a year, and that average number was multiplied by 75 (the number of years elapsed between January 1, 1923 and December 31, 1997) to arrive at the 123,075 figure.

Dividing the $5,367,072 photographer royalty pool by 123,075 photographs establishes that each individual image would carry a value of $43.60 (nearly 9 times the value of James Pickerell's 1997 example). The per-image figure of $43.60 then only needs to be multiplied by the number of images each creator provided to arrive at his/her share. Thus, in the case of Fred Ward, who I have been told is the creator of 532 images, his share would be 532 times $43.60, or a total of $23,195.20.

The same principle applies to the authors of text pieces. They would share 5%, or $2,683,536, proportionally according to their contribution. I am informed that, based on a counting exercise done in the same way as that conducted for photographs, approximately 5,775 stories have appeared in the Magazine since 1923. Each individual story therefore would carry a value of $464.68. The per-story figure would then be multiplied by the number of stories each creator provided to arrive at his/her share. Mr. Ward, who, I am told, wrote nine stories, would have received $4,182.12.

This report reflects my expert opinion at this time based on all the facts made available to me. Should additional facts become available, I reserve the right to amend my opinion at that time.

Dated: January 28, 2002

Jane S. Kinne

Exhibit A

JANE S. KINNE
Vice President
RUSS KINNE INC.
email: KINNEPIX@earthlink.net

316 N. Wilton Rd.
New Canaan CT 06840
(203) 966-4900
(203) 966-7292 Fax

B. A. History '47
College of William & Mary, Williamsburg VA

M. A. Audio Visual Education '50
Columbia University, New York City

Post-Graduate Courses:

Film & Photography, New York University
Layout & Design, Photographics, University of Bridgeport New Canaan CT
Photography and the Law, New York University
Basics of Media Law, Padgett-Thompson, American Management Association
Your Picture on the Wall; How to Build a Career in Fine Art Photography; VISCOM '96
How to Edit for Electronic Publication - Photo Plus '01
Fund Raising for Personal Projects - Photo Plus '01

Professional Career History:

1947-1950	Audio Visual Librarian Colonial Williamsburg Williamsburg, VA
1950-1957	Head of Photo & Film Department National Audubon Society 700 Broadway New York, New York 10003
1958-1986	Head of Natural History Department Secretary of Corporation President Photo Researchers Inc. 60 East 56th St. New York, New York 10022
1986-1993	Vice President Comstock, Inc. 30 Irving Place New York, New York 10003

1993-present Vice President
Russ Kinne Inc.
New Canaan CT 06840

Professional Affiliations:

Picture Agency Council of America (P. A. C. A.)
President, 1978-1982
Chairman of the Executive Committee, 1982-1987
Member, Committee to write By-Laws, 1988
Chairman of the Legal Committee, 1985-present
Training sessions; Experts in Evaluation, 1996 to present
Speaker, International Meeting-Copyright&Trademark Protection,1999,2000,2001
Speaker, NANPA - PACA Seminar - Copyright & Trademark Protection, Loss, Damage 2001

American Society of Picture Professionals (ASPP)
Chairman - Legal Committee, 1990 to present
President - National Organization, 1988-1992
Speaker - Panels - Picture Rights & Permissions, Copyright, Trademark 1990-2000
Member - Committee to Revise Code of Ethics
Lifetime Member and Honorary Trustee - National Organization, 1999

American Society of Media Photographers (ASMP)
Sustaining Member
Participant of Drafting Committee, Guide to Business Practices
1973, 1978, 1982, 1986
Consultant in the drafting and production of the Stock Photography Handbook 1984, 1990
Speaker to various ASMP Chapters on the business of stock photography, at least annually 1980 to present

North American Nature Photography Association (NANPA)
Founding member '93
Member, Organization Board '94
Member of Board '95-'98
President-Elect '95-'96
President '96-'97
Past President '98-'99
Moderator - Forum on Nature Photography '93,'95,'96
Speaker - ABC's of the Photography Business '96
" - ABC's of Visual Copyright '98
" - Nature Imagery Turns to $ & ¢ '99
" - Loss, Damage, Unauthorized Use, How to Handle the Really Tough Problems 2001
Summit Advisory Chair '99 -'01 -'02
Infinity Foundation President '99 -'01 -'02

Photographic Administrators Inc.
Invited Member - 1981 to present

Digital Preserve
Board of Directors 1998, 1999, 2000, 2001, 2002

Panelist and Speaker

Photo Expos — Photo '83'84'85'86'87'88'89'91
Photo West '89,'90
Photo Midwest '90,'92

Multi Media Business Report — Publishers' Opportunities in Multi Media '93

Roger Tory Peterson Institute - Nature Photography: A Focus on the Issues
Member - 1992 to present
Program Chairman '93

The Association of the Bar of the City of New York
Appropriation Art and Copyright '94

Maine Photographic Workshop

Speaker and Panelist on Stock Photography for International Photographic Congress and Stock Photo Weekend '87, '88, '89, '90, '92, '93, '94, '95

United States Copyright Office

Member of Working Committee on Fair Use & the New Technologies
1995, 1996, 1997, 1998

PUBLICATIONS IN WHICH JANE S. KINNE HAS PARTICIPATED AS AUTHOR/EDITOR/PACKAGER

BOOKS

Business Practices in Photography, 1973 - First edition --
American Society of Magazine Photographers

Professional Business Practices in Photography, 1979, 2nd Edition --
American Society of Magazine Photographers

Professional Business Practices in Photography, 1982, 3rd Edition --
American Society of Magazine Photographers

Professional Business Practices in Photography, 1986, 4th Edition --
American Society of Magazine Photographers

Stock Photography Handbook, 1984 First Edition --
American Society of Magazine Photographers

Stock Photography Handbook, 1990 2nd Edition --
American Society of Magazine Photographers

Pricing Photography - the Complete Guide to Assignment and Stock Prices --
Heron & MacTavish - Allworth Press

ARTICLES/AS AUTHOR

Copyright Issues and Digital Photography 1992 --
Journal of National Desktop Color Alliance

BOOKS - AS PACKAGER/EDITOR

60 Titles in Audubon Nature Series - Doubleday & Co.

Dream Collector - Arthur Tress - Westover

Second Chance to Live - Alpert/Leogrande - DeCapo Press

Motorcycle Book - Radnor

Secretariat - Ray Wolfe - Viking Press

The Penguin Book - Roger Tory Peterson - Houghton-Mifflin

Awards

American Society of Picture Professionals
April 1993 - Lifetime Achievement Award and
Honorary Lifetime Membership

Picture Agency Council of America
May 1993 - Lifetime Service Award
and Honorary Emeritus Membership

North American Nature Photography Association
February 1996- Outstanding Service to the Nature Photo Industry Award

Consultant

National Geographic Society - Image Sales Division
1993 to present

Monkmeyer Photos	1997-98
Pacific Stock	1998-2001
Everett Collection	1999-2000
Mountain Stock Photography & Film Inc	1999 - 2001
Aristock	1999, 2000
George Kalinsky	1999 - present
George Leavens	1998 - present
Photo Assist	2000, 2001
Photo Resource Hawaii	2001
Look South	2001- present
Sharon Kurlansky	2001

Nominating Committee

LIFE Magazine: Alfred E. Eisenstadt Annual Photographic Awards 1997-2001

Photo District News - Most Important Innovations in Photography in the last 20 years

Mediator - Between photographers & publishers

Expert Witness

Consulted in over 500 cases pending before the American Arbitration Association and the State and Federal Courts throughout the United States concerning copyright issues, value of photographic images, reproduction rights and fees. Appeared in 115 cases throughout the world as an expert.

Appraiser

For estates of photographers, establishing value for tax purposes and/or donations to institutions. Also for establishing value following destruction of images by fire or flood. Appraisals of photographic businesses for the purposes of sale. Appraisals have been accepted by Southeby's, the Internal Revenue Service of the United States, Wesleyan University, the Cousteau Society and the courts of New York, CT and New Jersey.

LIST OF COURT CASES IN WHICH JANE S. KINNE HAS GIVEN DEPOSITION OR TESTIFIED DURING THE LAST FIVE YEARS:

2001

B & B Photo Studio v New York Post (New York Supreme Court, Kings County)
Damages due to damage to images

Levy v Levy (New York Supreme Court)
Value of photo collection as asset in divorce action

Sinkovec v Rick Johnson & Co, Inc - (New Mexico State Court)
Damages due to loss of images

Greenberg v Lens Crafters - (Federal District Southern Florida)
Copyright infringement - Damages

George Howard v City of Tucson - (Arizona State Court)
Destruction of images

John Warner v St. Labre Indian School Education Association - (US District Court for the District of Montana, Billings Division)
Destruction of images

2000

Edith Shaw Marcus and Meta Shaw Stevens as Temporary Administrators of the Estate of Sam Shaw v Martin Bressler, Larry Shaw, Susan Shaw, Bressler & Bressler, Valerie Goodman, 1912 Productions, Inc, Marc Weinstein, individually and d/b/a Color Group - (New York Supreme Court) Ownership of copyrights, value of portfolios and limited edition prints

Charles Mason v Image Bank - (New York Supreme Court) Loss of images

Wayne Perry v Sonic Graphics - (Federal Court, Eastern District of PA)
Copyright infringement - Damages

1999

Edward Pardee v Orange Micro (Federal Court,Northern District California)
Copyright Infringement - Damages

Guthy-Renker v Gary Bernstein (Federal Court,Southern District California)
Copyright Infringement - Damages

1998

Jack Leigh v Warner Brothers (Federal Court, GA)
Copyright Infringement - Damages

Kim Taylor Reece v DFS (Duty Free Shops) (Federal Court, Hawaii)
Copyright Infringement - Damages

Gregg Mancuso v University of California. L.A. (California State Court)
Value of lost original images

Focus on Sports v Ernest Lawrence Group (NY Supreme Court)
Value of lost original images

Boris Raishevich v Charles Foster, an Officer of the NY State Police. (Federal Court, NY)
Value of lost original images

1997 David Hundley v Net Assets Inc. (Washington State Court)
Value of lost original images

Peter B. Kaplan v City of New York et al (NY Civil Court)
Damages due to photographer unable to work due to personal injury

Schneider v Kavanaugh (Missouri State Court)
Damages owed to photographer due to damage done to original images and use beyond scope of the license

Thompson v Cole, Henderson, Drake (California State Court)
Damages due to loss of original images

Robert E. Meyer Photography v Montgomery Ward (Illinois State Court)
Damages due to loss of original images

Darryl Jones v Preferred Janitorial Service (Indiana State Court)
Damages due to loss of original images

David Phillips v Kidsoft (Federal Court, Baltimore)
Copyright infringement - Damage

Clients For Whom Appraisals Have Been Completed

Beatrice Berg: The collection of Paul Berg

Harry Benson: The collection and value of the business

Bill Binzen - The collection of Bill Binzen

June Cahn: The collections of Jules Cahn - 1996
Value of images being donated - 2000

Walter Chandoah: Value of collection and the photographic business

Sandra Chase - Collection of Rob Chase

Jerry Cooke - Lifetime Collection, Value for establishing Trust

The Cousteau Society of the United States

J. Leon Dishman - Collection Being Donated

The Everett Collection - Value of collection and of the business

Ed Goldfarb: Collection entitled "Reflections"

Richard Halberstein and the Estate of Declan Haun: The collection of Declan Haun

Image Works: Value of the business

Photo Resource Hawaii - Value of the business

Photographic Estate of Art Kane

Laughing Stock: Value of the business

Herman Leonard/Leonard Studio: Jazz Collection

Leila Levy - Collection of Yoav Levy

Stephen Maka: Value of collection and the business

The Estate of Tom McHugh: The collection of Tom McHugh

Monkmeyer: Value of the business

Homer Page: Value of the Guggenheim Year Collection

The Estate of Roger Tory Peterson: The collection of Roger Tory Peterson
Value for Donation - 1999, 2000

The Estate of Virginia M. Peterson: The collection of Roger Tory Peterson

David Shaw: The collection of Mark Shaw

Estate of Sam Shaw: Value of collection and damages due to improper storage

Sotheby's Photo Files

Wayne Source - Twenty Year Body of Work

Wesleyan University - Philip Trager, Value of donation

Rita Wynne - The collection of Dan Wynne