WEIL, GOTSHAL & MANGES LLP
767 FIFTH AVENUE · NEW YORK, NY 10153-0119
(212) 310-8000
FAX: (212) 310-8007

DALLAS
HOUSTON
MENLO PARK
(SILICON VALLEY)
MIAMI
WASHINGTON, D.C.

BRUSSELS
BUDAPEST
LONDON
PRAGUE
WARSAW

WRITER'S DIRECT LINE
310-8078
naomi.gray@weil.com

October 17, 2000

BY FEDERAL EXPRESS

United States Court of Appeals
For the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Attention: Jennifer Alexander

Re: Greenberg v. National Geographic Society, et. al.,
Docket No. 00-10510-C

Dear Ms. Alexander:

We represent the Appellees in the above-referenced action. On October 11, 2000, we filed Appellees' Motion to File Additional Letter Submission, from which an exhibit was inadvertently omitted. Enclosed are copies of the Motion with attached exhibits.

Very truly yours,

Naomi Jane Gray

Enclosures

cc: Norman Davis, Esq.

DOCKET NO. 00-10510-C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG,
Plaintiffs/Appellants

vs.

NATIONAL GEOGRAPHIC SOCIETY, a District of Columbia corporation,
NATIONAL GEOGRAPHIC ENTERPRISES, INC., a corporation, and
MINDSCAPE, INC., a California corporation,
Defendants/Appellees.

APPELLEES' MOTION TO FILE ADDITIONAL LETTER SUBMISSION

Robert G. Sugarman, Esq.
Naomi Jane Gray, Esq.
Joanne McLaren (not admitted in
the Eleventh Circuit)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

- and -

Edward Soto, Esq. (265144)
Valerie Itkoff, Esq. (26514)
WEIL, GOTSHAL & MANGES LLP
701 Brickell Avenue
Suite 2100
Miami, FL 33131
(305) 577-3100

Attorneys for the Appellants

Terrence B. Adamson, Esq.
Executive Vice President
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036-4688

Of Counsel

DOCKET NO. 00-10510-C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG,
Plaintiffs/Appellants

vs.

NATIONAL GEOGRAPHIC SOCIETY, a District of Columbia corporation,
NATIONAL GEOGRAPHIC ENTERPRISES, INC., a corporation, and
MINDSCAPE, INC., a California corporation,
Defendants/Appellees.

CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT

Appellees National Geographic Society, National Geographic Enterprises, Inc. (now named National Geographic Holdings) and Mindscape, Inc. submit this Certificate of Interested Persons and Corporate Disclosure Statement.

Educational Insights

Gray, Naomi Jane

Itkoff, Valerie

Lenard, Joan, U.S. District Judge

Mattel, Inc.

McLaren, Joanne

Mindscape, Inc.

National Geographic Society

National Geographic Holdings

Soto, Edward

Sugarman, Robert

Weil, Gotshal & Manges LLP

Robert G. Sugarman, Esq.
Naomi Jane Gray, Esq.
Joanne M. McLaren (not admitted in the Eleventh Circuit)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Edward Soto, Esq. (265144
Valerie Itkoff, Esq. (26514)
WEIL, GOTSHAL & MANGES LLP
701 Brickell Avenue, Suite 2100
Miami, Florida 33131
(305) 577-3100

Attorneys for Appellants

-and-

Terrence B. Adamson, Esq.
Executive Vice President
National Geographic Society
1145 17th Street, N.W. 20036-4688

Of Counsel

By: Robert G. Sugarman (TSG for RGS)
Robert G. Sugarman

DOCKET NO. 00-10510-C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG,
Plaintiffs/Appellants

vs.

NATIONAL GEOGRAPHIC SOCIETY, a District of Columbia corporation,
NATIONAL GEOGRAPHIC ENTERPRISES, INC., a corporation, and
MINDSCAPE, INC., a California corporation,
Defendants/Appellees.

APPELLEES' MOTION TO FILE ADDITIONAL LETTER SUBMISSION

Appellees National Geographic Society, National Geographic Enterprises, Inc. and Mindscape, Inc. respectfully submit this Motion to file the letter submission attached as Exhibit A.

ARGUMENT

This Court heard oral argument in the instant case on October 3, 2000. Despite the amount of time devoted to the argument, several important questions posed by the Court remained unanswered. In order to more fully respond to the Court's inquiries, Appellees respectfully move for permission to file the accompanying letter submission, carefully limited to the issues raised, but not resolved, at oral argument. There has been no prior application for the relief requested herein.

Dated: October 11, 2000

Robert G. Sugarman, Esq.
Naomi Jane Gray, Esq.
Joanne M. McLaren (not admitted in
the Eleventh Circuit)
WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue

New York, New York 10153
(212) 310-8000

- and -

Edward Soto, Esq. (265144)
Valerie Itkoff, Esq. (26514)
WEIL, GOTSHAL & MANGES LLP
701 Brickell Avenue
Suite 2100
Miami, FL 33131
(305) 577-3100

Attorneys for Appellees

- and -

Terrence B. Adamson, Esq.
Executive Vice President
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036-4688

Of Counsel

By: Robert G. Sugarman (NTL for RGS)
Robert G. Sugarman

RECYCLED PAPER

WEIL, GOTSHAL & MANGES LLP
767 FIFTH AVENUE · NEW YORK, NY 10153-0119
(212) 310-8000
FAX: (212) 310-8007

DALLAS
HOUSTON
MENLO PARK
(SILICON VALLEY)
MIAMI
WASHINGTON, D.C.

BRUSSELS
BUDAPEST
LONDON
PRAGUE
WARSAW

ROBERT G. SUGARMAN
DIRECT LINE (212) 310-8184
E-MAIL: robert.sugarman@weil.com

October 11, 2000

BY FEDERAL EXPRESS

Honorable Lanier Anderson
Honorable Gerald Tjoflat
Honorable Stanley Birch
United States Court of Appeals
Eleventh Judicial Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: Greenberg v. National Geographic Society, et al.,
00-10510

To The Court:

We very much appreciate the significant time that the panel devoted to this case at oral argument and the meaningful and penetrating questions that were asked. We believe that, despite the amount of time spent, some of the Court's questions were not answered. We respectfully request that the Court consider this letter[1] as a means to accomplish that. Our comments will be limited to issues raised at oral argument.

I. CD-ROM 108 is not a derivative work. However, even if it is, it is, at most, a revision which is permissible under § 201(c).

A. CD-ROM 108 lacks sufficient originality to constitute a derivative work.

We respectfully submit that the District Court was correct in holding that CD-ROM 108 differs from issues of the Magazine only in trivial respects. CD-ROM 108 consists of 108 years' worth of issues of the Magazine, slavishly copied, page by page,

[1] We put these comments in letter form in light of the Court's request for letter submission prior to argument and the reference to the potential requests for letter submissions at the argument.

A.
EVEN THE MOST HUMBLE CREATION CAN BE DERIVATIVE & WORTHY OF ©

1.
IF DERIVATIVE THEN NOT COVERED BY 201-C

into electronic format, and stored in chronological order on 30 CD-ROM disks. But for the technological mechanics of reproduction, the process employed and the result of compiling the Magazine in its entirety on 30 CD-ROMs are identical to the compilations contained in the approximately 195 bound volumes, the 171 microfilm rolls and the microfiche collections of the Magazine that have long been published.

The additional elements present in CD-ROM 108 – less than one minute total of prefatory material consisting of the Moving Cover Sequence and a Kodak promotional message -- viewed in the context of the entire work of over 1,200 complete issues of the Magazine, do not provide sufficient originality to "recast, transform or adapt" the pre-existing issues of the Magazine into a derivative work,[2] see 17 U.S.C. § 103(a), even if the individual additions are original enough, in and of themselves, to qualify for copyright. Tellingly, while the Copyright Act provides that "editorial revisions" to pre-existing works will create a derivative work, the record is crystal clear that the Society made absolutely no changes, editorial or otherwise, to the pre-existing issues of the Magazine. See 17 U.S.C. § 103(a).

In certain of the bound volumes that the Society has published for years, there is included in the front of the work a mosaic depicting the covers of the Magazines contained in that bound volume. (Exh. A). Just as that mosaic does not transform the bound volume into a derivative work, the Moving Cover Sequence does not transform CD-ROM 108 into a derivative work.[3]

B. Even if CD-ROM 108 is a derivative work, it is a revision permitted by § 201(c).

[2] See Paramount Pictures v. Video Broadcasting Sys., 724 F. Supp. 808 (D. Kan. 1989) (mere addition of commercials at the beginning of videocassettes containing plaintiff's motion pictures did not recast, transform, or adapt the motion picture into an original work of authorship). Although the court found that "defendants' advertisement is an original work, the court does not recognize the addition of it to a videocassette in any way recasting, transforming or adapting the motion picture." Paramount, 724 F. Supp. at 821.

[3] The circumstances here are different from those involved in the filming of a play, an example given during oral argument. Such a film would be a derivative work due to the originality associated with camera angle, lighting, sound and other subjective elements involved in transforming the play into a film. Because the technology involved here permits the pictorial scanning of the paper Magazine into digital format without changing any of the original elements in the Magazine, CD-ROM 108 is not a derivative work.

NOT one minute – also repeated on each disc

NOT A REPRINT W/ MOVING COVERS... SEE THEIR VA FORM

3. THE TEXT IS NOT SHARP OR EDGY TO READ TO REDUCE TO MAXIMIZE PRESS SPEED UP PROCESS

THEN WHY THE NEW VA FORM?

The legislative history makes clear that derivative works are permissible revisions under § 201(c). If the later edition of an encyclopedia and later issue of a publication, which are derivative works, are permitted revisions, certainly CD-ROM 108 is a permitted revision. Indeed, if CD-ROM 108 does not qualify as a revision under § 201(c), nothing would, and that privilege, clearly given to the owner of the collective work, would be read out of the statute.

C. A mere change in medium does not create a derivative work.

The fact that CD-ROM 108 is published in CD-ROM format, rather than on paper, does not make it a derivative work. When the Society changed the medium from paper to microfilm – which it continued to do even after it assigned copyright in Mr. Greenberg's photographs to him in 1985 – no one, including Mr. Greenberg, claimed that it violated the rights of the photographers. The "slavish copying" of a work into a different medium "cannot, by itself, constitute the originality required for copyright protection." The Bridgeman Art Library, Ltd. v. Corel Corp., 36 F. Supp.2d 191 (S.D.N.Y. 1999). In Bridgeman, the defendant "labored to create 'slavish copies' of public domain art" in preparing transparencies and CD-ROMs. Bridgeman, 36 F. Supp.2d at 191. The court found that "[w]hile it may be assumed that [the creation of the transparencies and CD-ROM] required both skill and effort, there was no spark of originality – indeed, the point of the exercise was to reproduce the underlying works with absolute fidelity. Copyright is not available in these circumstances." Id.; see also L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486 (2d Cir. 1976) (differences between plastic "Uncle Sam" coin bank and cast iron original in public domain were trivial, thus plastic bank was insufficiently original to support copyright).

As in Bridgeman, the Society created slavish copies of the original issues of the Magazines in CD-ROM 108. This mechanical process lacked the "spark of originality" required to render the CD-ROM collection of Magazines a new work.[4]

[4] Cohen v. Paramount Pictures Corp., 845 F.2d 851 (9th Cir. 1988), discussed during oral argument, does not affect the medium neutrality of the 1976 Act. H.R. Rep. No. 94-1476, 94th Cong., 2d Sess., at 52 (1976), reprinted in 1976 U.S.C.C.A.N. 5659, 5665 ("it makes no difference what the form, manner, or medium [in which a work is fixed]...whether embodied in a physical object in written, printed...magnetic, or any other stable form, and whether it is capable of perception directly or by means of any machine or device 'now known or later developed'"). Cohen was a contract interpretation case that addressed the limited circumstances, not present here, where a licensor grants rights to exploit a work in certain specified media and expressly retains all rights not set forth in the license. The Cohen court did not address § 201(c). In contrast to Cohen, Greenberg has not demonstrated that the Society's right to reproduce the photographs at issue was ever expressly restricted to certain media. Indeed, at the time the Society assigned

PUBLIC DOMAIN WORK OK!

A PORTION OF 108 YEARS FROM PUBLIC DOMAIN MATERIAL

THE BALANCE FROM EXISTING COPYRIGHTED MATERIAL

II. Section 201(c) does not condition the publisher's privilege on economic factors.

Section 201(c) is silent as to economics. It does not condition the publisher's exercise of its privileges on economic factors. Therefore, the potential of publishers to realize economic gain from the exercise of the privileges is irrelevant to an analysis of § 201(c). Such arguments are appropriately directed at Congress, not the Courts. See Tasini v. New York Times, 981 F. Supp. 841, 848, (S.D.N.Y. 1997) rev'd on other grounds, 192 F.3d 356 (2d Cir. 1999), petition for cert. filed, (U.S. Aug 04, 2000) (No. 00-201).

In this case, moreover, an emphasis on economics is particularly misplaced. The Society is a nonprofit scientific and educational organization. (R1-20-Exh. A). Its mission is to increase and diffuse geographic knowledge in its broadest sense. (R1-20-1). All revenues generated by the Society, including its wholly-owned taxable subsidiaries and including those from CD-ROM 108, are used to further this mission. There are no individual economic stakeholders or shareholders to benefit economically. Therefore, the beneficiary of any economic gain attributable to CD-ROM 108 is the public at large, which benefits from the Society's educational programs, scientific research and exploration initiatives, and commissioning and underwriting of the articles and photographs that appear in the monthly Magazine.

work by photog done for non-profit org then handed over to a for-profit division & an other un-related for profit MINDSCAPE

MINDSCAPE & OTHER RETAIL OUTLETS NOT FOR PROFIT?

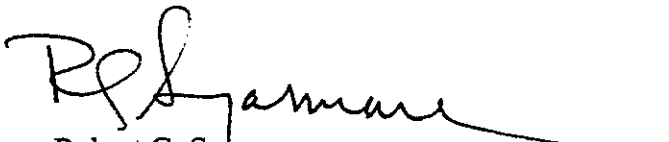
MICRO FILM & MICROFICHE WERE NOT SOLD TO THE GENERAL PUBLIC, OR SOLD FOR PROFIT

Greenberg copyright in his photographs, it was publishing, and continued to publish, the magazines in different media – microfilm and microfiche.

The Cohen court's analysis does not apply where a publisher pictorially reproduces its collective work, or a revision thereof, in a medium that may not have existed at the time the collective work was initially published, and the pictorial reproduction is a faithful reproduction of the collective work in the same word and pictorial format as the original publication in a new medium. The 1976 Act does not restrict the publisher to reproducing its collective work in a single medium; indeed, the legislative history is clear that medium neutrality in this context was specifically contemplated. Hearing on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835 Before the House Committee on the Judiciary, Copyright Law Revision, 89th Cong. at 57 (U.S. Gov't Prtg. Office 1966) (exchange between Messrs. Kastenmeier and Cary).

We thus respectfully submit that the constitutional underpinnings of the copyright law are furthered by the reproduction of this rich, historical archive of Magazines, and the Society's official journal, in an accessible and easily-used form for the benefit of individuals, families, schools, libraries and researchers as a revised collective work under § 201(c).

Respectfully submitted,



Robert G. Sugarman
Naomi Jane Gray

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Terrence B. Adamson
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036-4688

Counsel for Appellees

cc: Norman Davis
Steel, Hector & Davis LLP
200 South Biscayne Blvd.
Miami, FL 33131

Joseph M. Beck, Esq.
Kilpatrick & Cody LLP
1100 Peachtree Street
Suite 2800
Atlanta, GA 30309-4530

Patricia A. Felch, Esq.
Banner & Witcoff, Ltd.
Ten So. Wacker Drive
Suite 3000
Chicago, IL 60606-7407

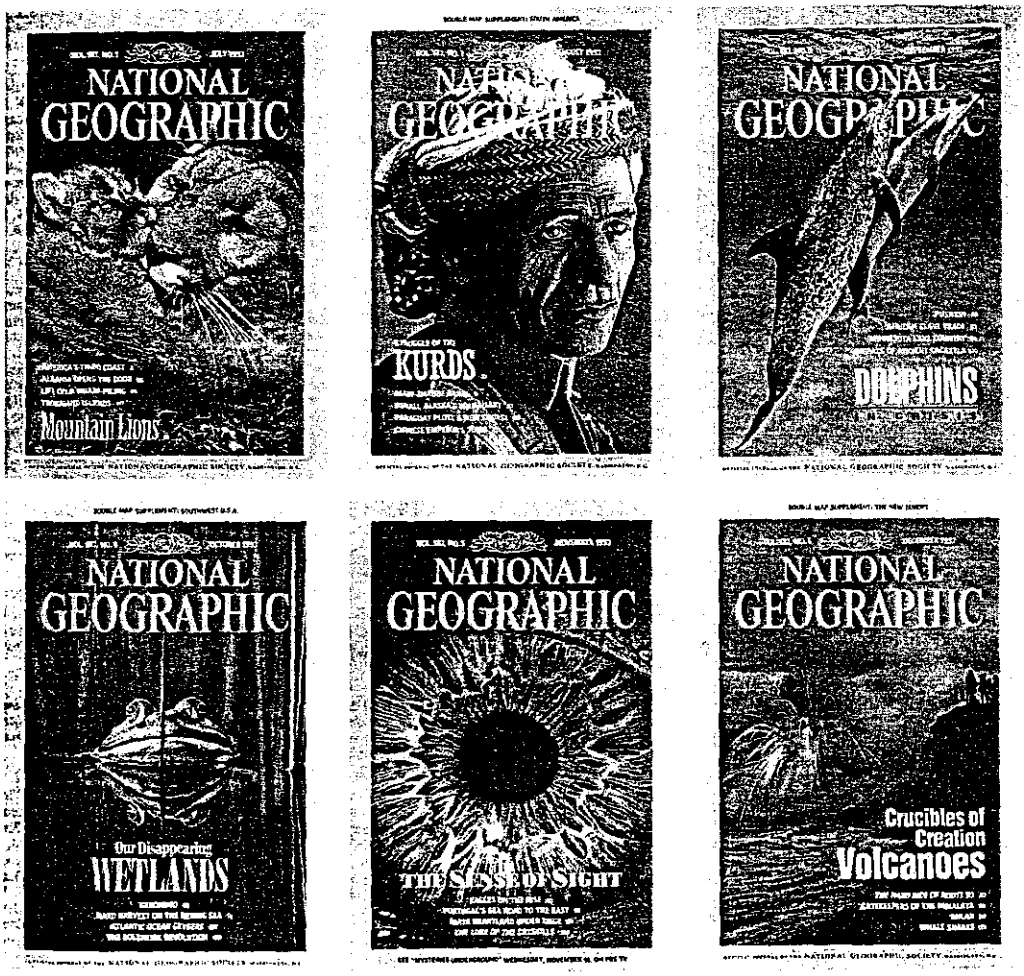
RECYCLED PAPER

VOLUME 182

NATIONAL GEOGRAPHIC

INDEX

JULY-DECEMBER 1992



OFFICIAL JOURNAL OF THE NATIONAL GEOGRAPHIC SOCIETY WASHINGTON, D.C.

For Your Information . . .

STEEL HECTOR & DAVIS
REGISTERED LIMITED LIABILITY PARTNERSHIP

Norman Davis
305.577.2988
ndavis@steelhector.com

Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, Florida 33131-2398
Fax 305.577.7001
www.steelhector.com

Miami West Palm Beach Tallahassee Key West London Caracas São Paulo Rio de Janeiro Santo Domingo

STEEL HECTOR & DAVIS

Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, Florida 33131-2398
305.577.7000
Fax 305.577.7001

MIAMI WEST PALM BEACH TALLAHASSEE KEY WEST CARACAS LONDON