Greenberg v. National Geographic Society: The Eleventh Circuit Clarifies the Privileged Revision Doctrine of the Copyright Act

by
JOSEPH SIPRUT*

I. Background 522
II. *New York Times Co. v. Tasini* 524
III. *Greenberg* Remanded to the District Court 525
IV. *Faulkner v. National Geographic Soc'y* 526
V. Second Life for National Geographic 528
VI. Conclusion 532

The United States Court of Appeals for the Eleventh Circuit recently reversed an award in favor of a photographer against National Geographic. The long-running case implicates the contours of the United States Supreme Court's decision in *New York Times v. Tasini*,[1] a landmark decision on privileged revisions of published works under section 201(c) of the Copyright Act. The decision brings clarity and consistency to an area of law that was muddled by the Eleventh Circuit's first opinion in the case,[2] which it handed down only months prior to *Tasini*. The case also delivered a major, long-awaited victory to National Geographic after years of litigation and multiple trips to the Court of Appeals. The procedural history of the case is complex and dramatic, but substantively, the Eleventh Circuit's opinion is a victory for both National Geographic, specifically, and publishers, generally.

* Joseph Siprut is an attorney at the Chicago-based firm Schopf & Weiss LLP, where he focuses his practice on commercial litigation, including the prosecution and defense of copyright infringement claims.

1. 533 U.S. 484 (2001).

2. Greenberg v. Nat'l Geographic Soc'y, 244 F.3d 1267 (11th Cir. 2001) (hereinafter *Greenberg I*).

HeinOnline -- 30 Hastings Comm. & Ent. L.J. 521 2007-2008

I. Background

Jerry Greenberg is a freelance photographer whose photographs were published in the January 1962, February 1968, May 1971, and July 1990 issues of *National Geographic Magazine*.[3] The January 1962 photograph was also used on the cover of that issue. Each of these publications of Greenberg's photographs was authorized, and in each instance, Greenberg reacquired the rights to the photographs after publication.[4] For years, the National Geographic Society has reproduced back issues of the magazine in bound volumes, microfiche, and microfilm.[5] In 1997, National Geographic released "The Complete National Geographic" (the "CNG"), a thirty-disc CD-ROM set that consists of reproductions of each monthly issue of *National Geographic Magazine* from its first issue in 1888 through 1996.[6] Importantly, the CNG is an image-based reproduction of National Geographic—i.e., every page of every issue appears just as it did in the original published version.[7]

The CNG also contains a computer program which compresses and decompresses the images and allows the user to search an electronic index, as well as an "introductory sequence" that begins when the user inserts one of the CD-ROM discs into the computer drive.[8] That introductory sequence begins with an advertisement for Kodak, followed by a display of National Geographic's logo and theme song, and then a 25-second segment in which ten images of actual magazine covers from past issues of the magazine digitally fade into one another.[9] Greenberg's January 1962 cover photograph was included in this montage.[10]

Greenberg filed suit in December 1997, alleging, among other things, that the CNG infringed his copyrights in his individual photographs.[11] Before answering the complaint, National Geographic moved to dismiss the claims, and, in the alternative, for summary judgment.[12] The district court granted summary judgment on the copyright claims involving the

3. Greenberg v. Nat'l Geographic Soc'y, 488 F.3d 1331, 1335 (11th Cir. 2007) (hereinafter *Greenberg II*).

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* National Geographic registered its copyright of the CNG in 1998. On the registration form, the Society claimed that the work had not been registered before, but indicated that that it was a "compilation of pre-existing material primarily pictorial," and that a "brief introductory audiovisual montage" had been added. *Id.* (citing *Greenberg I*, 244 F.3d at 1270).

10. *Id.*

11. *Id.*

12. *Id.*

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CNG, relying on the district court opinion in *Tasini v. New York Times Co.*[13] The district court held that federal copyright law[14] grants the publisher of a collective work (like *National Geographic Magazine*) copyright in the collective work while the author of an individual contribution to the collective work (like Greenberg) holds copyright in his individual contribution.[15] Because the CNG reproduced the entire collective work as a whole, the district court held that the CNG was a privileged revision under section 201(c)[16] and that National Geographic did not infringe Greenberg's copyrights in the individual photographs.[17]

The Eleventh Circuit reversed the district court opinion.[18] The court held that section 201(c) did not apply to a "new" collective work, as opposed to a "revision" of the original collective work.[19] It further held that the CNG was a "new" collective work because it included additional copyrightable material: the computer program and the introductory sequence.[20] The court separately held that the use of the January 1962 photograph in the introductory sequence violated Greenberg's copyright in that particular photograph as well, and rejected National Geographic's defense that use of that photograph was fair use or *de minimus* use.[21]

The court's rationale transformed what might otherwise have been a privileged revision under section 201(c)—the image-based reproduction of each issue of *National Geographic Magazine*—into a new work because of the inclusion of "additional copyrightable material" (the introductory sequence and computer program). Taking that new material into account,

13. *Id.*; 972 F.Supp. 804 (S.D.N.Y. 1997).

14. 17 U.S.C. § 201(c).

15. *Greenberg II*, 488 F.3d at 1335. Of course, the author's rights to his contribution are subject to any contractual agreements and limitations that might otherwise be reached with the publisher. Here, Greenberg had reacquired the rights to each of his individual photographs after National Geographic published them. *Id.*

16. Subpart "c" of Section 201 of the Copyright Act, entitled "Ownership of Copyright," provides:

> (c) Contributions to Collective Works-Copyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution. In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

17 U.S.C. § 201(c).

17. *Greenberg II*, 488 F.3d at 1335.

18. *Greenberg I*, 244 F.3d at 1275-76.

19. *Id.* at 1272-73.

20. *Id.*

21. *Greenberg II*, 488 F.3d at 1336 (citing *Greenberg I*, 244 F.3d at 1272-75).

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the court then considered the entire work to be a new (and unprivileged) collective work, such that each use of Greenberg's four photographs in the CNG constituted copyright infringement. As noted above, the court also held that using Greenberg's January 1962 photograph in the introductory sequence was an additional copyright violation.[22]

The court remanded the case and ordered that the district court "should ascertain the amount of damages and attorneys fees that are due as well as any injunctive relief that may be appropriate."[23] National Geographic moved for a rehearing, arguing that the appellate court had no basis to direct the entry of judgment in Greenberg's favor on liability because none of National Geographic's defenses, other than its section 201(c) "privileged revision" defense, had been adjudicated.[24] Rather than grant the petition for rehearing, the appellate court *sua sponte* issued a corrected opinion deleting the sentence directing the district court to enter judgment on the copyright claims in Greenberg's favor.[25] It also amended the judgment's sentence on damages and attorneys fees to read: "[u]pon remand, the district court should ascertain the amount of damages and attorneys fees that are, *if any*, due as well as any injunctive relief that may be appropriate."[26] National Geographic then filed a petition for a writ of certiorari by the Supreme Court, which was denied.[27]

II. *New York Times Co. v. Tasini*

Shortly after the Eleventh Circuit decided *Greenberg I* and denied National Geographic's petition for rehearing, the United States Supreme Court decided *New York Times Co. v. Tasini*.[28] That case involved the use of individual freelance contributions in electronic databases (such as LEXIS/NEXIS) that removed the individual contributions from the context of the original collective work.[29] The *Tasini* court held that section 201(c) did not apply to such electronic databases *precisely because* the individual contributions were divorced from their original context.[30] Because the databases at issue presented the articles "clear of the context provided either by the original periodical editions or by any revision of those editions," the *Tasini* court concluded that that it could not "see how the

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* (quoting *Greenberg I*, 244 F.3d at 1275-76).
27. Nat'l Geographic Soc'y v. Greenberg, 534 U.S. 951 (2001).
28. 533 U.S. 483 (2001).
29. *Id.* at 487.
30. *Id.* at 499-502.

HeinOnline -- 30 Hastings Comm. & Ent. L.J. 524 2007-2008

[d]atabase perceptibly reproduces and distributes the article 'as part of' either the original edition or a 'revision' of that edition."[31]

In reaching this holding, the *Tasini* court distinguished the electronic databases at issue from microfilm and microfiche, which present an individual freelance contribution in the context of the original collective work.[32] The court thus implied (although did not directly state) that such collections are privileged revisions under section 201(c). It further observed that "the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on the Article, to the exclusion of surrounding material. Nonetheless, the user first encounters the article in context."[33] The court thus affirmed the concept of "media neutrality," which holds that the transfer of a work between different forms of media does not alter the character of the work for copyright purposes.[34]

III. *Greenberg* Remanded to the District Court

On remand, National Geographic answered the claims in Greenberg's complaint relating to the CNG within twenty days after the court's ruling in *Greenberg I*.[35] The answers set forth National Geographic's non-section 201(c) defenses to liability for copyright infringement relating to the CNG.[36] These included authorization by contract, laches, and estoppel.[37] Greenberg, however, moved to strike the answers as inconsistent with the Eleventh Circuit's mandate in *Greenberg I*.[38] According to Greenberg, *Greenberg I* held National Geographic liable for copyright infringement and that these non-section 201(c) defenses were barred.[39] The district court granted Greenberg's motion to strike and agreed that *Greenberg I* had ruled against National Geographic on liability and that this ruling was binding

31. *Id.* at 499-500.

32. *Id.* at 501-02.

33. *Id.* at 501.

34. *Id.* at 502 (quoting Brief of Petitioner-Appellant at 23).

35. *Greenberg II*, 488 F.3d at 1334. Because National Geographic had previously moved for dismissal and, in the alternative, summary judgment before answering, this was the first time National Geographic filed an Answer.

36. Brief of Petitioner-Appellant at 10, Greenberg v. Nat'l Geographic Soc'y, 488 F.3d 1331 (11th Cir. 2007).

37. *Id.*

38. *Id.* Much of the procedural history set forth in this Section and the subsequent Section relies on the parties' *Statement of the Case and the Facts* in their respective appellate briefs. Greenberg's brief adopted in large part the Statement set forth in National Geographic's brief. Brief of Respondent-Appellee at 4-5, Greenberg v. Nat'l Geographic Soc'y, 488 F.3d 1331 (11th Cir. 2007).

39. Brief of Petitioner-Appellant, *supra* note 36, at 10.

HeinOnline -- 30 Hastings Comm. & Ent. L.J. 525 2007-2008

notwithstanding the Supreme Court's intervening decision in *Tasini*.[40] National Geographic then unsuccessfully moved both for reconsideration and for leave to appeal that order.[41]

Because the district court—following what it believed to be the mandate of *Greenberg I*—determined that National Geographic was liable for copyright infringement as a matter of law, the case then proceeded to a jury trial on damages only.[42] Greenberg sought only statutory, not actual, damages, thus making the primary issue at trial whether the infringement was willful.[43] Greenberg argued that National Geographic's infringement was willful because, among other things, it did not withdraw the CNG after *Greenberg I*.[44] At the close of Greenberg's case, National Geographic moved for judgment as a matter of law on willfulness, but the trial court denied the motion.[45] National Geographic renewed the motion for judgment as a matter of law at the closing of all the evidence, but the trial court again denied the motion.[46]

The jury found that National Geographic's infringement had been willful, and awarded the maximum statutory damages of $100,000 for each of the four photographs at issue, making the total award $400,000.[47] In its post-trial motions, National Geographic argued that any infringement on its part was not willful as a matter of law, and thus, that the maximum statutory damages were $20,000 for each of the four works at issue, for a total award of $80,000.[48]

IV. *Faulkner v. National Geographic Soc'y*

In December 2003, while the post-trial motions in *Greenberg I* were still pending, the United States District Court for the Southern District of New York granted summary judgment in National Geographic's favor in another copyright infringement case involving the CNG.[49] In *Faulkner v. Nat'l Geographic Soc'y*, the court stated that in *Tasini* the Supreme Court "took a different approach" to section 201(c) than the Eleventh Circuit did in *Greenberg I*, and declined to follow the Eleventh Circuit's approach, even though the decision might otherwise have had collateral estoppel

40. *Id.*
41. *Id.*
42. *Id.* at 11.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 12.
48. *Id.*
49. Faulkner v. Nat'l Geographic Soc'y, 294 F. Supp. 2d 523 (S.D.N.Y. 2003).

HeinOnline -- 30 Hastings Comm. & Ent. L.J. 526 2007-2008

effect.[50] The court went on to hold that "the CNG is a revision of the individual print issues" of *National Geographic Magazine*, and that it "respectfully disagree[d] with so much of *Greenberg* as held otherwise."[51]

On appeal, and while the post-trial motions in *Greenberg II* were still pending, the Second Circuit affirmed the district court's ruling in National Geographic's favor in the *Faulkner* litigation.[52] The Second Circuit agreed with the New York District Court that that the CNG was a "revision" of the original collective works for purposes of section 201(c), and that *Greenberg I* was not entitled to collateral estoppel effect in this regard because it conflicted with the Supreme Court's subsequent ruling in *Tasini*.[53]

Although *Tasini* was decided on different facts than *Faulkner* and *Greenberg I*, the *Faulkner* court found it telling that the Supreme Court in *Tasini* had given "tacit approval to microfilm and microfiche as permissible Section 201(c) revisions, by contrasting that method of reproduction with the databases" at issue in *Tasini*, which allowed a user to retrieve an article in isolation, removed from its original context. [54] The *Faulkner* court explained that *Greenberg I* held that "if a subsequent work contains independently copyrightable elements not present in the original collective work, it cannot be a revision privileged by Section 201(c)."[55] It further explained that Supreme Court, in contrast, "held in *Tasini* that the critical analysis focused on whether the underlying works were presented by the particular database in the context of the original works . . . . [I]t also strongly implied, by contrasting the database to microfilm, that microfilm would constitute a privileged revision."[56] In sum, the *Faulkner* court held that "because the original context of the [m]agazines is omnipresent in the CNG and because it is a new version of the [m]agazine, the CNG is a privileged revision.[57] The court also specifically held that the introductory sequence was a revision that did not "substantially alter the original context," and, therefore, did not affect the CNG's status as a privileged revision.[58]

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50. Petitioner-Appellant's Brief, *supra* note 36, at 12. *See also Faulkner,* 294 F.Supp.2d 523.

51. *Faulkner*, 294 F. Supp. 2d at 543.

52. Faulkner v. Nat'l Geographic Soc'y, 409 F.3d 26, 43 (2d Cir. 2005).

53. *Id.* at 37-39. *See also* Brief of Petitioner-Appellant, *supra* note 36, at13.

54. *Faulkner*, 409 F.3d at 35.

55. *Id.* at 37.

56. *Id.*

57. *Id.* at 38.

58. *Id.* Again, there is a separate issue about whether the introductory sequence would itself constitute copyright infringement, because one of Greenberg's photographs was used in the sequence. *See supra* notes 9 and 21 and accompanying text.

HeinOnline -- 30 Hastings Comm. & Ent. L.J. 527 2007-2008

V. Second Life for National Geographic

In September 2005, after more than two years, the trial judge in *Greenberg I* finally denied National Geographic's post-trial motions.[59] In particular, the judge held that "construing the evidence in a light most favorable to the non moving party . . . a reasonable jury could find that Defendants were willful in their infringement of Plaintiff's copyright."[60] The court stated that "[t]his conclusion is not altered by the fact that the Second Circuit Court of Appeals has disagreed with the decision of the Eleventh Circuit Court of Appeals . . . . The Eleventh Circuit's decision is the law of this case, thus the [Second Circuit] decision is not persuasive."[61] After judgment was entered for Greenberg, National Geographic appealed to the Eleventh Circuit.[62]

National Geographic appealed on three separate grounds.[63] First, National Geographic argued that the Eleventh Circuit should reconsider *Greenberg I*'s holding that National Geographic is not entitled to the privilege of section 201(c).[64] National Geographic noted that *Greenberg I* established an analytic framework in which the key question in a section 201(c) claim is whether the disputed freelance contribution is presented in a "new" collective work that contains independently copyrightable elements.[65] National Geographic then argued that the Supreme Court's decision in *Tasini* superceded *Greenberg I's* analyitical framework by making clear that the integral question under section 201(c) is whether a freelance contribution remains in the *context* of the original collective work.[66] "[B]ecause the CNG is an exact, image-based reproduction of the paperbound *National Geographic* magazine," National Geographic argued, "it presents freelance contributions in precisely the same context as the original collective works" and is thus privileged under section 201(c) irrespective of whether the CNG might be a "new" collective work with "independently copyrightable" elements.[67]

Second, National Geographic argued that the Eleventh Circuit should reverse the judgment because the district court denied National Geographic the benefit of its other, non-section 201(c) defenses to copyright liability by

59. Brief of Petitioner-Appellant, *supra* note 36, at 13.

60. *Id.* (quoting Greenberg v. Nat'l Geographic Soc'y, No. 97-3924-CIV-LENARD/SIMONTON, slip op. at 5 (S.D.Fla. Oct. 3, 2005)).

61. *Id.*

62. *See generally id.*

63. *Id.* at 15.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

HeinOnline -- 30 Hastings Comm. & Ent. L.J. 528 2007-2008

striking its answer and affirmative defenses.[68] As National Geographic argued, *Greenberg I* never addressed the issue of whether National Geographic was liable for copyright infringement.[69] To the contrary, it addressed only the issue of whether National Geographic was entitled to summary judgment under section 201(c).[70] Thus, National Geographic argued that *Greenberg I*, by its own terms, never intended to foreclose National Geographic from presenting its non-section 201(c) defenses.[71]

Third, and finally, National Geographic argued that the Eleventh Circuit should at least reverse the trial judge's decision to allow the jury to award damages for willful copyright infringement.[72] In particular, National Geographic argued that it consulted experienced counsel before creating the CNG, and again after *Greenberg I* for advice on whether such digital archiving of past issues of *National Geographic Magazine* would violate the freelancers' copyrights under section 201(c), and was told it would not. Accordingly, National Geographic argued that the issue was not whether that advice was correct, but whether it was reasonable as a matter of law.[73]

The Eleventh Circuit began its analysis by noting that *Tasini* created a new, post-*Greenberg I* framework for analyzing the section 201(c) privilege, and that the prior panel precedent rule accordingly did not apply.[74] The court noted that the relevant question under the *Tasini* framework is whether the original context of the collective work has been preserved in the revision.[75] It held that the "replica" portion of the CNG—the image-based reproductions of the original magazines—clearly met this criterion.[76] It stated that the computer program is "transparent to the viewer and does not alter the original context of the magazine contents."[77] The two remaining issues the court addressed centered on the introductory sequence: "[f]irst, does the addition of the Sequence so alter the Replica that the CNG as a whole is no longer a privileged revision of the original magazines? And second, is the Sequence itself privileged under § 201(c)?"[78]

The Eleventh Circuit agreed with the *Faulkner* court that the addition of the introductory sequence did not extinguish the section 201(c) privilege

68. *Id.* at 16.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.* at 17.
73. *Id.*
74. *Greenberg II*, 488 F.3d at 1338.
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

HeinOnline -- 30 Hastings Comm. & Ent. L.J. 529 2007-2008

that attached to the replicated content.[79] In particular, the court noted that the addition of the sequence amounted to 25 seconds of "new" material that was appended to 1200 complete issues—indeed, over one hundred years—of the magazine.[80] For guidance in determining whether this added material destroyed the privilege, the court turned to the legislative history of section 201(c):

> [T]he last clause of the subsection, under which the privilege of republishing the contribution under certain limited circumstances would be presumed, is an essential counterpart of the basic presumption. Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not . . . revise the contribution itself or include it in a new anthology . . . or an entirely different magazine or other collective work.[81]

Thus, as the court noted, the question is "whether the new material so alters the collective work as to destroy its original context."[82] The court answered the question by analogy:

> Just as the addition of 400 pages of prose to a sonnet does not constitute a "revision" of the sonnet, the addition of a preface to a 400-page anthology would not transform the book into a different collective work. So it is here. The Sequence is nothing more than a brief visual introduction to the Replica, which acts as a virtual cover for the collection of magazines. Just as a new cover on an encyclopedia set would not change the context of the entries in the encyclopedia, the Sequence in no way alters the context in which the original photographs (as well as the articles and advertisements) were presented.[83]

Having determined that the addition of the introductory sequence did not "transform" the CNG into a new (non-privileged) work for purposes of section 201(c), the court then addressed the issue of whether the use of Greenberg's January 1962 photograph in the introductory sequence was privileged.[84]

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79. *Id.*

80. *Id.*

81. *Id.* (quoting H.R. Rep. No. 94-1476, at 122-123 (1976), *reprinted in* 1976 U.S.C.C.A.N 5659, 5738).

82. *Id.* at 1339.

83. *Id.*

84. *Id.*

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In *Greenberg I*, National Geographic argued that this use of the photograph in the introductory sequence was permissible under the fair use and/or *de minimis* doctrines, but the *Greenberg I* court rejected those arguments.[85] In particular, in analyzing the fair use defense, *Greenberg I* held that: (1) the use of the photograph "far transcended a mere reprinting or borrowing of the work," and that the use to which the photograph was put was "clearly a transformative use"; (2) the CNG integrates a visual presentation with an audio presentation consisting of copyrightable music; (3) the CNG is a product that may serve educational purposes, but is marketed through typical commercial channels; and (4) the inclusion of the photograph in the introductory sequence diminished, if not extinguished, the opportunity Greenberg might have had to license the photograph.[86]

Moreover, in response to National Geographic's invocation of the *de minimus* doctrine, *Greenberg I* held that, when measured against other works *in the sequence*, Greenberg's photograph constituted one-tenth of the entire sequence, and accordingly represented "a significant portion of the new work."[87] *Greenberg I* also noted that the user views the sequence without prompting each time one of the 30 discs is played.[88] The court thus found the use of the photograph to be both qualitatively and quantitatively significant, and rejected the *de minimus* defense.[89]

Thus, although *Greenberg II* rejected *Greenberg I*'s prior interpretation of section 201(c), nothing in *Tasini* addressed the distinct fair use and *de minimus* doctrines, so the *Greenberg II* court continued to follow *Greenberg I* on that score and held that the use of the January 1962 photograph in the introductory sequence was not privileged.[90] Yet, as the *Greenberg II* court noted, it does not necessarily follow that National Geographic is liable for infringement of the January 1962 photograph. That is because the district court had interpreted *Greenberg I*'s mandate to foreclose National Geographic from raising any other defenses to copyrightliability—and wrongly so, on the *Greenberg II* court's view.[91]

85. *Greenberg I*, 244 F.3d at 1274.

86. *Id.* at 1274-75.

87. *Id.* at 1275.

88. *Id.*

89. *Id.*

90. *Greenberg II*, 488 F.3d at 1335. Although *Greenberg II* followed *Greenberg I*'s prior ruling on this point based on the law of the case doctrine, it is not entirely clear that *Greenberg I* correctly decided the issue. *See, e.g.*, Joseph Siprut, *The Naked Newscaster, Girls Gone Wild, and Paris Hilton: True Tales of the Right of Privacy and the First Amendment*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 35, 42-45 (2005) (discussing cases in which publishers were permitted to advertise the content of their publications by incorporating copyrighted works if the underlying use of those works in the publications was privileged).

91. *Greenberg II*, 488 F.3d at 1335.

HeinOnline -- 30 Hastings Comm. & Ent. L.J. 531 2007-2008

Accordingly, in addition to finding that the replica and computer program portions of the CNG are privileged under section 201(c), the court vacated the verdict of willful infringement and accompanying damage award, and remanded to the district court for adjudication of the remaining claims and defenses.[92]

VI. Conclusion

Although a piece of this long-running case remains to be resolved, the larger issues relating to section 201(c) have now been put to rest. And having reached this point, the Eleventh Circuit has now repaired the fissure caused by the divergent analytic frameworks of *Greenberg I*, on the one hand, and the later emergence of *Tasini* and *Faulkner*, on the other hand. This collective body of law now provides clear guidance to publishers on the scope of privileged revisions under section 201(c).

92. *Id.* at 1341.

HeinOnline -- 30 Hastings Comm. & Ent. L.J. 532 2007-2008