

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 97-3924-CIV-SIMONTON

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

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

Defendants.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION IN LIMINE TO EXCLUDE EVIDENCE CONCERNING
OTHER INFRINGEMENTS ALLEGED TO HAVE BEEN COMMITTED**

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (together "Greenberg"), submit this memorandum in opposition to Defendants' Motion in Limine for an Order Precluding Plaintiffs from Presenting any Evidence Concerning the Geopack and Jason Poster and any Other Infringements Alleged to have been Committed by Defendants.

A defendant engages in willful infringement if he "knows his actions constitute an infringement; the actions need not have been malicious." Cable/Home Communication Corp. v. Network Productions, Inc., 902 F.2d 829, 851 (11th Cir. 1990). A reckless disregard for a plaintiff's rights also constitutes willfulness. CBS, Inc. v. Casino Record Distributors of Florida, Inc., 654 F. Supp. 677, 679 (S.D.Fla. 1987). As the Society's memorandum acknowledges,

courts have permitted evidence of other infringements in determining willfulness. The Society attempts to distinguish those cases by suggesting that they involved egregious facts, including a “notorious recidivist” infringer. Mem. at 4. But a prestigious institution like the Society, highly protective of its own copyrights, highly knowledgeable about the realm of copyright law, surrounded by sophisticated legal talent, and lavishly endowed with resources, should be held to a higher standard, and courts have acknowledged that, too. See, e.g., National Football League v. PrimeTime 24 Joint Venture, 131 F. Supp. 2d 458, 480 (S.D.N.Y. 2001).

Greenberg will produce evidence that on four occasions -- in 1975, 1994 (twice) and 1996 -- the Society wrongfully used his photographs (not the ones at issue in this case) without authorization. The jury has the right to determine whether that -- with numerous other kinds of evidence¹ -- amounts to a reckless disregard of Greenberg’s rights.

The Society’s memorandum describes at some length, albeit in an exculpatory tone, two separate unauthorized uses that were claims in this litigation. The Court entered summary judgment for Greenberg on those infringements. They are evidence of reckless disregard of his rights. Neither of these incidents, say the defendants, can be probative of the Society’s state of mind in publishing The Complete National Geographic on CD-ROM (“CNG”). Mem. at 5. Yet both incidents, and other evidence, speaks directly to a reckless disregard for Jerry Greenberg’s rights generally and over a period of time. It is a fair argument that the reckless disregard in terms of using 64 of his photographs in the CNG flowed naturally from a pattern of abuses.


The Society contends that the circumstances surrounding the publication of the CNG “differ dramatically” from other unauthorized uses because “[t]he Society sought and received legal advice prior to publishing” the CNG. Mem. at 4. That argument has no meaning, because

¹ That evidence is discussed in detail in Plaintiffs’ Memorandum in Opposition to Defendants’ Motion in Limine to Exclude Evidence as to Willfulness, at pages 13-14.

the advice was irrelevant or late. At considerable length, Greenberg has responded² to the advice-of-counsel defense to demonstrate that the advice was poorly solicited and was obtained after infringements already had taken place.

The motion should be denied.

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Attorneys for Plaintiffs

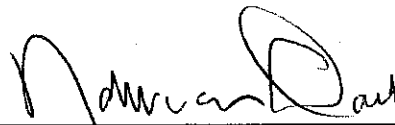


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² See Plaintiffs' Memorandum in Opposition to Defendants' Motion in Limine to Exclude Evidence as to Willfulness.

Certificate of Service

I hereby certify that a copy of the foregoing memorandum was served by mail on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131; and on Stephen N. Zack, Boies, Schiller & Flexner LLP, 2800 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131; and by facsimile and mail on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 10th day of January, 2003.



Norman Davis