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## GREENBERG WINS AGAINST NATIONAL GEOGRAPHIC

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The U.S. District Court of Appeals in Atlanta has ruled that National Geographic Society (NGS) made unauthorized use of photographer Jerry Greenberg's copyrighted photographs in their "108 Years of National Geographic on CD-ROM" (108 Years), and that such copyright infringement "is not excused by the privilege afforded the Society under 201(c)" of the copyright law.

NGS had claimed that their copyright in the original issues of the Magazine in which the photographs appeared gave them the right to use the pictures in (108 Years) without additional compensation to the creators. The Federal District Court of the Southern District of Florida had granted NGS's motion for summary judgment and held that the "allegedly infringing work was a revision of a prior collective work and fell within the defendants' privilege under 201(c)." The appeals court reversed the lower court finding that (108 Years) was a new collective work, not a revision, and that this new work fell beyond the scope of 201(c).

The appellate ruling "establishes brand new law that had not existed before," Norman Davis, Greenberg's attorney, said. "It'll apply to any author who owns the copyright in his work."

NGS executive vice president Terrence Adamson said he was "surprised and disappointed" by the court's action. "This is an important decision that has a lot of implications for a lot of things quite apart from National Geographic." Adamson said NGS is considering appeal options including asking the 11th Circuit to reconsider the case and going to the Supreme Court.

"The Society contended all along that the only thing it had done is just reprint a bunch of old magazines," Davis commented. "If that's all they would have done, they would have prevailed. The 11th Circuit said it was much more than that."

Section 201(c) is entitled "Contributions to Collective Works". It provides: 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.

In rejecting NGS's arguments that the CD\_ROM's were revisions, Judge Stanley F. Birch, Jr., writing for the appeals panel, said, "(I)n layman's terms, the instant product is in no sense a 'revision'".

The panel referred to the legislative commentary which said, "The basic presumption of section 201(c) is fully consistent with present law and practice, and represents a fair balancing of equities. At the same time, the 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."

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Also the creation of the introductory sequence using one of Greenberg's images clearly violated these exclusive rights under 106(2). "Manifestly, this Sequence, an animated, transforming selection and arrangement of preexisting copyrighted photographs constitutes at once a compilation, collective work, and, with reference to the Greenberg photograph, a derivative work."

The court found that "In the context of this case, Greenberg is 'the author of the contribution' (here each photograph in a contribution) and the Society is 'the owner of copyright in the collective work' (here the Magazine). Note that the statute grants to the Society 'only [a] privilege,' not a right. Thus the statute's language contrasts the contributor's 'copyright' and 'any rights under it' with the publisher's 'privilege.' This is an important distinction that militates in favor of narrowly construing the publisher's privilege when balancing it against the constitutionally-secured rights of the author/contributor."

The appeals court ordered U.S. District Judge Joan Lenard in Miami to enter a judgment on the copyright claims in favor of Greenberg and to provide injunctive relief. In addition, it found Greenberg the prevailing party was entitled to attorneys' fees under the Copyright Act. The panel urged Judge Lenard "to consider alternatives, such as mandatory license fees, in lieu of foreclosing the public's computer-aided access to this educational and entertaining work."

It is important to note that in this case Greenberg had very clear letters of assignment and had his copyrights registered prior to the infringement. Thus, the case has major differences from the "Tasini" decision which deals with authors rights when there were no written agreements and no registration of the copyrights prior to infringement.

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