

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

**SERVICE COPY**

JERRY GREENBERG, individually,  
and IDAZ GREENBERG, individually,

Plaintiffs,

CASE NO. 97-3924  
CIV-LENARD

v.

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

**ORAL ARGUMENT IS  
REQUESTED**

Defendants.

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**Memorandum of Law in Opposition to  
Plaintiffs' Motion for Summary Judgment on Liability  
for Count I and Count II Amended Complaint**

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**Memorandum of Law in Opposition to  
Plaintiffs' Motion for Summary Judgment on Liability  
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Defendant National Geographic Society (the "Society")<sup>1</sup> submits this Memorandum of Law in opposition to Plaintiffs' Motion for Summary Judgment on Liability for Count I and Count II of Amended Complaint and in support of the Society's request that the Court exercise its discretion and grant summary judgment to the Society dismissing Counts I and II of the Amended Complaint.<sup>2</sup>

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1. Counts I and II of Plaintiffs' Amended Complaint, which are the subject of Plaintiffs' motion for summary judgment, do not apply to Defendant National Geographic Enterprises or to Defendant Mindscape, Inc.

2. See Gencor Indus., Inc. v. Wassau Underwriters Ins. Co., 857 F. Supp. 1560, 1567 (M.D. Fla. 1994) (district court may grant summary judgment to non-moving party); Marshall v. Sunshine & Leisure, Inc., 496 F. Supp. 354, 359 (M.D. Fla. 1980) (same).

### Preliminary Statement

Lest there be any mistake or misunderstanding, the Society, as its former Director of Photography points out in his affidavit submitted in support of Plaintiffs' motion, see Affidavit of Robert E. Gilka, views each photograph it publishes as an original and protectable work and highly values the talent and creativity of its photographers. Plaintiffs do not, however, seek here to protect a photograph which, as they themselves point out, combines "innumerable variables," including the location of the subject, the lens and film used, the position of the photographer relative to the subject, the lighting, and the subject's posture and attitude. Pl. Mem. at pp. 6-7. Instead, they seek to claim copyright protection for one unprotectable piece of a photograph -- the depiction of a creature in nature (here, a fish) and thereby, in effect, assert a monopoly over the ability to depict that creature. That is not what the copyright law contemplates or permits, for, as the Supreme Court has emphasized time and time again, "The primary objective of copyright is not to reward the labor of authors, but 'to promote the Progress of Science and useful Arts.'"<sup>3</sup> Nor does it serve the public good, which requires that publishers be able freely to disseminate, depict and describe fish, animals, plants and other living beings just as they are able to disseminate, depict and describe facts.

### Statement of Facts

#### The "GeoPack"

In 1995, the Society and Educational Insights, Inc., published a children's educational game called the "3D GeoPack" (hereinafter the "GeoPack") (Pl. Mem. Exh. C). The GeoPack includes depictions and descriptions of many different types of sea flora and fauna. Declaration of Lyle Rosbotham at ¶ 2 (hereinafter "Rosbotham Decl."); Pl. Mem. Exh. C.

In order accurately to depict the fish which would be described in GeoPack, the Society hired Warren Cutler, a scientific illustrator with over thirty years' experience, to prepare drawings of those fish. Rosbotham Decl. at ¶ 3; Deposition of Warren Cutler at

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3. Fogerty v. Fantasy, Inc., 510 U.S. 517, 527 (1994); Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349-50 (1991).



12:20-13:23; 18:10-21:6; 53:23-54:8 (hereinafter "Cutler Dep."). Mr. Cutler's practice is to collect a variety of research materials depicting examples of his subjects, and to prepare his illustrations with those reference materials collectively gathered in front of him. Cutler Dep. at 45:16-25; 51:7-12. Following this practice, Mr. Cutler drew, as accurately as he could, pictures of several fish which were creatively depicted on multiple layers of transparencies to create the GeoPack's three-dimensional effect. Accuracy was essential in order for the GeoPack to fulfill its educational mission -- to teach children about undersea life.

Rosbotham Decl. at ¶ 3. Thus, Mr. Cutler was expected, and strove, to draw the images of the fish as accurately as possible. Id.; Cutler Dep. at 53:23-54:8.

Among the materials on which Mr. Cutler relied for reference in preparing his drawings was a book entitled "The Living Reef," containing photographs taken by Jerry Greenberg. Cutler Dep. at 50:4-51:12; 62:9-16. Although the Society provided Mr. Cutler with some reference materials to assist him in his work on the GeoPack, it did not give him a copy of "The Living Reef." Cutler Dep. at 27:7-28:20. Rather, Mr. Cutler owned a copy of the book in his personal library, along with "over a hundred" other books -- including roughly twenty on the subject of fishes. Id. at 23:19-24:4. Mr. Cutler referred to numerous other sources in addition to "The Living Reef" in preparing his drawings for the GeoPack. Cutler Dep. at 45:16-25; 50:4-10; 51:7-12; 62:9-66:8.

#### The "Jason Project"

The Society participates in numerous public service activities, including the Jason Project, an educational program designed to excite and engage students in science and technology and to provide professional development for their teachers. Wheeler Decl. at ¶ 3. The Jason Project was founded by explorer Dr. Robert Ballard and is sponsored by the Society, along with a consortium of private industry, scientific research facilities, museums, government and educational organizations. Id. As a member of this worldwide network, the Society hosts an electronic theater with giant video screens and an interactive communications center that permits students to experience the thrill of exploration and research remotely, via telepresence -- live broadcasts incorporating technologies from

robotics to satellite communications. Id. In 1996, the Society invited teachers, students in grades 3-9, and parents to participate in the Jason Project free of charge. Id.<sup>4</sup>

On the April 1996 Jason voyage, "Adapting to a Changing Sea," a U.S. Navy nuclear submarine descended 600 feet below the ocean surface to study an ancient coral reef previously untouched by humans. Id. at ¶ 4. At the Society's electronic theater in Washington, D.C., students interacted live with scientists aboard the submarine to learn invaluable lessons in reef ecology, climate change, marine biology and a host of additional subjects. Id. Moreover, prior to the voyage itself, participating teachers attended professional development workshops rich in hands-on lessons in science, technology and geography which formed an integral part of the students' overall scientific curriculum. Id.

The Society produced a poster (the "Poster") in order to inform area educators of the April 1996 Jason voyage (attached as Exhibit 7 to the Affidavit of Jerry Greenberg (hereinafter "Greenberg Aff.")). The Poster, measuring 24 inches by 11 inches, contains text describing the voyage and several photographs depicting various aspects of marine life, as well as the U.S. Navy submarine and the Society's electronic theater. Wheeler Decl. at ¶ 5; Greenberg Aff. Exh. 7. A portion of a photograph of a sea fan (the "Sea Fan"), taken by Jerry Greenberg and originally published in the July 1990 issue of National Geographic Magazine (Wheeler Decl. at ¶ 5 and Exh. A thereto), appears in the upper right-hand corner of the Poster. Greenberg Aff. Exh. 7. The Sea Fan is surrounded by a school of fish and occupies a space measuring approximately 3 1/2 inches by 3 inches. Id.; Wheeler Decl at ¶ 5. A caption beneath the Sea Fan reads: "This colorful sea fan, a coral species, grows on healthy reefs off the Florida Keys. Jerry Greenburg." Wheeler Decl. at ¶ 5; Greenberg Aff. Exh. 7.

The Society printed approximately 7,000 copies of the Poster. Wheeler Decl. at ¶ 6. Roughly 5,000 copies were mailed at no charge to teachers who had already expressed interest in the Jason Project, along with registration packets. Id. The remainder

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4. Today, the Society charges a nominal registration fee for the Jason Project. Wheeler Decl. n.1. However, the Jason Project remains a non-profit, public service endeavor by the Society. Id.

of the copies were given away for free in Explorers' Hall at the Society's corporate headquarters in Washington, D.C. Id.

Through inadvertence, the Society did not obtain the right to use the Sea Fan from Greenberg before printing the Poster. Id. at ¶ 7. When the Society discovered this oversight, Rock Wheeler, a Society employee with responsibility for rights clearance with respect to the Poster, promptly wrote to Greenberg advising him of the use and offering him compensation. Id. At that time, it was the Society's practice to pay \$50 for the type of use involved in the Poster. Id. Because the Society had inadvertently used Greenberg's photograph without obtaining advance permission, however, it offered him compensation in the amount of \$500. Id. When Greenberg subsequently contacted Mr. Wheeler, he acknowledged that it was "to the Society's credit" that it had taken affirmative steps to inform him of the use and offer him compensation. Id.

#### Plaintiffs' Complaint And Motion

Plaintiffs sued the Society alleging infringement of their copyright in the images of three fish and two scuba divers in the GeoPack. They have now moved for summary judgment, claiming that the accurate depiction of one unprotectable element of a photograph -- a fish or a scuba diver -- is an infringement of their copyright in the entire photograph. As demonstrated below, the copyright law does not protect the depiction of a creature in nature, just as it does not protect an idea or facts. Moreover, the GeoPack drawings are not substantially similar to Plaintiffs' photographs and, in any event, the Society's use of them was fair. Finally, to the extent that the depiction of the Sea Fan is protectable, its use by the Society as a poster about the Jason Project was fair. Plaintiffs' motion should, therefore, be denied and the Court should exercise its discretion and grant summary judgment to the Society.

#### Argument

#### I. PLAINTIFFS' COPYRIGHTS IN PHOTOGRAPHS OF VARIOUS SPECIES OF FISH DO NOT GRANT PLAINTIFFS A MONOPOLY OVER ALL DEPICTIONS OF THOSE SPECIES OF FISH.

In order to succeed on their claims for copyright infringement, Plaintiffs must not only establish that there is substantial similarity between their copyrighted photographs

and the allegedly infringing GeoPack images, but that the elements of the photographs they seek to protect are, indeed, protectable. And, while there is no dispute that their photographs, as a whole, are protectable, the portions of those photographs at issue here -- depictions of the physical features of fish -- are not, since the Copyright Act only protects expression and not general facts, themes and ideas. See Sharpshooters, Inc. v. Retirement Living Publ'g Co., Inc., 932 F. Supp. 286, 288 (S.D. Fla. 1996); Designer's View, Inc., v. Publix Super Markets, Inc., 764 F. Supp. 1473, 1478 (S.D. Fla. 1991), aff'd 961 F.2d 223 (11th Cir. 1992); Jungle Rags Inc. v. Rainbow Graphics Inc., 29 U.S.P.Q.2d 1704, 1708 (M.D. Fla. 1993). Here, any similarity between the portions of Plaintiffs' copyrighted photographs showing various fish and the depiction of those same fish in the GeoPack results from the fact that both works depict the same subject matter. Such similarity does not give rise to a cause of action under the Copyright Act. See Designer's View, 764 F. Supp. at 1479 (noting that where the subject matter of two works is essentially similar, that aspect of an artistic work is not protected by the Copyright Act); Durham Indus. Inc. v. Tomy Corp., 630 F.2d 905, 913 (2d Cir. 1980) ("[W]here the protected work and the accused work express the same idea, the similarity that inevitably stems solely from the commonality of the subject matter is not proof of unlawful copying.").

This distinction is particularly important when dealing with depictions of creatures in nature. A redband parrotfish is a redband parrotfish. It has a shape, a set of colors, fins, gills and a tail. Any accurate depiction of a redband parrotfish must, of necessity, be very similar, indeed virtually identical, to any other. Thus, as the Designer's View court noted regarding the alleged infringement of a creature of nature: "There is a strong possibility that the idea and the expression of that idea will coincide because the expression provides nothing new or additional over the idea." Designer's View, 764 F. Supp. at 1478.

It is uncontroverted that Plaintiffs' copyright extends to the whole of their photographs of a redband parrotfish, a stoplight parrotfish and a moray eel in their natural environments. However, that copyright does not give them the ability to prevent others from depicting the elements of those photographs which portray the physical features of those same fish. Protecting the expression would improperly confer on them a monopoly of the

subject matter of the protected work. See Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F.2d 738, 742 (9th Cir. 1971) (exclusion of other jewelers from producing jeweled bee pins would in effect grant plaintiff a monopoly over all jeweled bee pins); Leigh v. Warner Bros., 10 F. Supp. 2d 1371, 1376 (S.D. Ga. 1998) ("In cases involving photographs, a plaintiff cannot copyright the subject matter of the photo.").

II. THERE IS NO ACTIONABLE INFRINGEMENT SINCE THE SOCIETY'S FISH DEPICTIONS ARE NOT SUBSTANTIALLY SIMILAR TO THE FISH DEPICTED IN PLAINTIFFS' PHOTOGRAPHS.

As a matter of law, Plaintiffs must prove substantial similarity between the two works to succeed on their copyright infringement claims. Original Appalachian Artworks Inc. v. Toy Loft, Inc. 684 F.2d 821, 829 (11th Cir. 1982). Because Plaintiffs' claim deals with creatures in nature, in order to establish substantial similarity, they must prove near identity between the works. Designers View, 764 F. Supp. at 1478 (where the alleged subject matter of the copying is of an item in nature, in determining whether substantial similarity exists the "requirement of near identity [between the works] is especially applicable."); see also Jungle Rags, 29 U.S.P.Q.2d at 1708 ("When the idea and its expression are not completely inseparable, there . . . may be only a limited number of ways of expressing the idea. In such a case, the burden is heavy on the plaintiff, who may have to show 'near identity' between the works at issue") (quoting Concrete Mach. Co. v. Classic Lawn Ornaments, Inc., 843 F.2d 1031 (1st Cir. 1988)).

A comparison of the fish as depicted in the GeoPack with the same fish as pictured in Plaintiffs' photographs reveals that the works are not nearly identical and therefore not substantially similar. Indeed, a comparison of the two works shows that they are not substantially similar even if the near identity standard is not applied.

A. The Redband Parrotfish

There are many differences between the depictions of the redband parrotfish in Plaintiffs' photograph and the GeoPack. Most obviously, the two fish are colored very differently. Generally, the colors in the Cutler drawings are much brighter. In particular, the fins, mouth and eye of the GeoPack fish are red, whereas these same body parts are

orange on the Greenberg fish. Additionally, the various colors of the redband parrotfish in the Greenberg photograph tend to blend into each other, whereas the colors of the parrotfish depicted in the GeoPack are in much sharper contrast to each other. The gill shown on the GeoPack fish is well-defined as compared to the gill in the Greenberg photograph. The fish in the Greenberg photograph has a much more defined skin texture -- similar to chicken wire -- as compared to the impressionistic rendition of scales in the GeoPack fish. These are just some of the differences between the two fish that preclude a finding of near identity or substantial similarity.

B. The Stoplight Parrotfish

Similarly, the GeoPack stoplight parrotfish is much more vivid and colorful than the stoplight parrotfish pictured in the Greenberg photograph. The fins of the GeoPack fish are much wider and more colorful than those of the Greenberg fish. The purple bands behind the eye and mouth of the GeoPack fish are much thicker than the bands behind the eye and mouth of the fish photographed by the Greenbergs. These differences, among others, preclude a finding of near identity or substantial similarity.

C. The Moray Eel

As to the moray eels, the most obvious difference is that the moray eel depicted in the GeoPack is a golden brown, speckled color whereas the moray eel photographed by Greenberg is green. Additionally, the GeoPack moray eel has prominent teeth which are hardly, if at all, visible in the moray eel photographed by Plaintiffs. There is also a substantial difference in the fins of the two works, as the fin of the moray eel pictured in the Greenberg photograph has more curves than that of the moray eel depicted in the GeoPack. Additionally, the GeoPack moray eel is buried in sand while the moray eel photographed by the Greenbergs is not buried to any appreciable degree. These differences also preclude a finding of near identity or substantial similarity.

III. THE SCUBA DIVERS THAT APPEAR IN BOTH WORKS ARE NOT SUBSTANTIALLY SIMILAR

Plaintiffs also contend that the scuba divers that appear in the GeoPack infringe their copyrights in photographs of scuba divers that appear in their book, "The

Living Reef." However, a comparison of the scuba divers depicted in the GeoPack and the allegedly infringed photographs located on pages 17 and 74 of "The Living Reef" reveals that they are not substantially similar.

The test for determining whether two works are substantially similar is whether "an average lay observer would recognize the alleged copy as having been appropriated from the copyrighted work." Original Appalachian Artworks Inc. v. Toy Loft, Inc. 684 F.2d 821, 829 (11th Cir. 1982) (quoting Novelty Textile Mills, Inc. v. Joan Fabrics Corp., 558 F.2d 1090, 1092-93 (2d Cir. 1977)). In comparing the copyrighted work with the work at issue, the "important criteria is whether an ordinary observer regards the overall aesthetic appeal of the copyrighted work and the allegedly infringing work as the same." Designer's View, 764 F. Supp. at 1478.

There are many differences between the two works that would lead the ordinary lay observer to regard the aesthetic appeal of the two works to be different. As an initial matter, both of the divers in Greenbergs' photographs are male, see Greenberg Aff. at ¶¶ 17-18, while Mr. Cutler drew a boy and a girl diver in the GeoPack. Both of Mr. Cutler's divers are children, while one of the Greenberg divers is an adult. Mr. Cutler's divers are wearing red swim suits with bright yellow air tanks; the Greenberg divers appear to be wearing blue wet suits with dull-colored air tanks. The air tanks in the two works are shown at different angles. The bubbles flowing from the air tanks in the GeoPack flow in a narrower but longer path than the bubbles flowing from the divers in the Greenberg photographs. The legs of the GeoPack divers are spread further apart than the legs of the divers in the Greenberg photographs. The fins of Mr. Cutler's girl diver "have more curve to them, flow, more action" than the fins of Greenberg's boy diver. Cutler Dep. at 67:10-68:8. The location of the divers in their respective pictures is also substantially different. Both divers in the Greenberg photographs are in larger perspective and in the foreground of the photographs, while both GeoPack divers are in smaller perspective and in the background of the GeoPack overlay. These differences preclude a finding of substantial similarity with respect to the scuba divers.

#### IV. THE USE OF PLAINTIFFS' PHOTOGRAPHS IN THE GEOPACK IS FAIR.

The 1976 Copyright Act codifies the judicial doctrine of fair use, an "equitable rule of reason" which "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster."

Stewart v. Abend, 495 U.S. 207, 236 (1990) (citations omitted). Section 107 permits:

the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching. . . scholarship, or research. . . . In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C.A. § 107.

A. The Geopack Is An Educational Game For Children And Does Not Seek To Exploit Plaintiffs' Photographs For Commercial Gain.

I. The Geopack Is An Educational Game For Children.

The preamble of §107 lists six examples of the type of use which may give rise to a successful fair use defense: criticism, comment, news reporting, teaching, scholarship and research. 17 U.S.C.A. §107. The list is nonexclusive and is meant to provide "general guidance about the sorts of copying that courts and Congress most commonly had found to be fair uses." Campbell, 510 U.S. 569, 577 (1994) (parody); see also Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539, 560 (1985) (news reporting); New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152, 155 (2d Cir. 1990) (critical biography); Salinger v. Random House, Inc., 811 F.2d 90, 96 (2d Cir. 1987) (biography).

Generally, fair uses are those which contribute in some way to the public welfare. Pacific and Southern Co., Inc. v. Duncan, 744 F.2d 1490 (11th Cir. 1984). Such uses give rise to a strong presumption of fair use. Arica Institute v. Palmer, 970 F.2d 1067, 1077 (2d Cir. 1992) (psychologist's book on "intuition training" fell within preamble to



§107); Wright v. Warner Books, Inc., 953 F.2d 731, 736 (2d Cir. 1991) (scholarly biography fit within categories of uses that Congress indicated may be fair).

The GeoPack is an educational game designed to teach children about various aspects of undersea life. Rosbotham Decl. at ¶¶ 2-3. This core didactic purpose defined the scope of Mr. Cutler's assignment on the GeoPack. Mr. Cutler, an experienced scientific illustrator, was hired to prepare realistic, scientifically accurate drawings of marine life. Rosbotham Decl. at ¶ 3; Cutler Dep. at 12:20-13:23; 18:10-21:6; 53:23-54:8. Indeed, accuracy was essential in order for the GeoPack to fulfill its educational mission -- to teach children about undersea life. Rosbotham Decl. at ¶ 3. Thus, the GeoPack is not a commercially oriented venture of the Society, but serves to further its mission for the increase and diffusion of geographic knowledge in its broadest sense. This weighs in the Society's favor.

2. The Geopack Makes "Transformative" Use Of Plaintiffs' Photographs, Which Weighs In Favor Of A Finding Of Fair Use.

The Supreme Court's most recent pronouncement on fair use emphasizes that the "central purpose" of the first fair use factor is to determine whether the new work merely replaces the original, or whether it makes "transformative" use of the original by adding further creative expression or meaning to it. Campbell, 510 U.S. at 579 (citations omitted); see also Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539, 562 (1985) (no fair use of verbatim excerpts of former President Ford's memoirs); Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc., 109 F.3d 1394, 1400 (9th Cir. 1997) (nontransformative use of elements of Dr. Seuss character cut against fair use); Pacific & Southern Co., Inc. v. Duncan, 744 F.2d 1490, 1496 (11th Cir. 1984) (no fair use where television news service copied and sold entire news feature); Jartech, Inc. v. Clancy, 666 F.2d 403 (9th Cir. 1982) (upholding jury finding of fair use because use was not the "same intrinsic use [from] which the copyright holders expected protection").

A transformative use builds upon elements of the original work in creating an entirely new work which conveys a different message and serves a different function than that of the original. Campbell, 510 U.S. at 580. A finding of transformative use will diminish the significance of other considerations, such as commerciality, which might

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otherwise weigh against the defendant. Id. at 579. This is consistent with the Copyright Act's goal of encouraging creative endeavors in science and the arts. Id.

The GeoPack's use of Plaintiffs' photographs is clearly transformative. Not only are there numerous differences between the GeoPack depictions and Plaintiffs' images, see pp. 7-9 supra, but the nature and purpose of the GeoPack are entirely different from that of Plaintiffs' book, "The Living Reef." "The Living Reef" targets a very different audience than that of the GeoPack, as is apparent from its subtitle, "With Special Fishwatcher's Supplement." It is a photographic catalogue which assists nature lovers in identifying the flora and fauna they are likely to encounter underwater. Moreover, it is a purely commercial endeavor of Plaintiffs -- a professional photographer and a professional illustrator who publish their works through a business known as Seahawk Press. Greenberg Aff. at ¶¶ 3, 6; Deposition of Jerry Greenberg at 6:5-9:1; Deposition of Idaz Greenberg at 5:25-6:19.

In contrast, the GeoPack is an educational game designed to teach children about marine life. Rosbotham Decl. at ¶ 2. In preparing his scuba diver drawings, Mr. Cutler deliberately consulted a reference book containing photographs of children in the water, and he was specifically instructed to make his divers look like children. Cutler Dep. at 63:16-66:15; Rosbotham Dep. at 37:11-38:16. Thus, the GeoPack builds upon elements of "The Living Reef" and other reference materials to create a distinct product with a unique look, design and purpose. The transformative nature of the GeoPack weighs in the Society's favor.

### 3. The Society Does Not Exploit Plaintiffs' Photographs For Commercial Gain In The Geopack.

While the Supreme Court has stated that copying which serves a commercial or profit-making activity is presumptively unfair, Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417, 448-9 (1984), it has emphasized that this is not a "hard evidentiary presumption," but merely one element of the inquiry into the first factor which should not be given dispositive weight. Campbell v. Acuff-Rose Music, Inc., 510 U.S. at 583-4; see also Maxtone-Graham v. Burtchaell, 803 F.2d 1253, 1262 (2d Cir. 1986) (in analyzing commerciality, need not "make a clear-cut choice between two polar characterizations, 'commercial' and 'non-profit'). Indeed, if commerciality alone were determinative of fair

use, "the presumption would swallow nearly all of the illustrative uses listed in the preamble paragraph of §107, including news reporting, comment, criticism, teaching, scholarship, and research, since these activities 'are generally conducted for profit in this country.'"

Campbell, 510 U.S. at 584 (quoting Harper & Row, 471 U.S. at 592 (Brennan, J., dissenting)); see also American Geophysical Union v. Texaco, Inc., 60 F.3d 916 (2d Cir. 1995) (since most secondary users seek some measure of commercial gain from use, unduly emphasizing commercial motivation leads to overly restrictive view of fair use).

Applying the same reasoning, the Fifth Circuit, in Triangle Publications, 626 F.2d 1171 (5th Cir. 1980), found that purely commercial use could constitute fair use. In that case, the Miami Herald displayed the cover of TV Guide Magazine in an advertisement for its own competing television guide. Id. at 1172-3. The District Court ruled against the Miami Herald on the sole ground that the use of the TV Guide cover was to obtain commercial advantage. Id. at 1175. The Fifth Circuit reversed, rejecting the lower court's "per se rule that commercial motive destroys the defense of fair use." Id. The court found that the circumstances of the use undercut its commercial nature. Id. at 1175-6. The TV Guide cover was used in a truthful comparative advertisement, and the Court took note of the public interest in disseminating "important information to consumers [which] assists them in making rational purchase decisions." Id. at 1176 n. 13 (quoting 16 C.F.R. §14.15(c) (1980)). Thus, even though the Miami Herald used the TV Guide cover expressly for the purpose of gaining a competitive advantage in the market for television guides, the manner in which it did so constituted fair use. Id. at 1176.

Moreover, the inquiry into commerciality specifically focuses on whether the alleged infringer stands to gain from "exploitation of the *copyrighted material*," Harper & Row, 471 U.S. at 562, not whether the new work, as a whole, is commercial in nature. See Penelope v. Brown, 792 F. Supp. 132, 137 (D. Mass. 1992); Haberman v. Hustler Magazine, Inc., 626 F. Supp. 201 (D. Mass. 1986) (citing Harper & Row, 471 U.S. at 562). In analyzing the first fair use factor, the Haberman court emphasized that "[t]he fact that Hustler magazine is offered for sale. . . does not dictate a finding that the reproduction of Haberman's [two photographs] was a commercial use." Haberman, 626 F. Supp. at 210. Haberman's photographs were displayed inside the magazine and were not advertised on the

cover or otherwise made evident to prospective purchasers. Id. Thus, the court ruled that the manner of Hustler's use was "not a strong factor militating against a finding of fair use."

Finally, the fair use defense is broader with respect to works which, though intended to be profitable, aspire to serve broader public purposes. Twin Peaks Prods., Inc. v. Publications Int'l, Ltd., 996 F.2d 1366, 1375 (2d Cir. 1993); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523 (9th Cir. 1993). This public benefit need not be direct or tangible in order to claim fair use. Sega, 977 F.2d at 1523.

Thus, while the GeoPack is sold, that fact does not affect the core educational purpose of the Society's mission to further the diffusion of geographic knowledge. The purpose of the GeoPack is to teach children about undersea life. Rosbotham Decl. at ¶ 2. In light of the significant educational value of the GeoPack, the fact that it is offered for sale carries little or no weight in the first factor analysis.

#### 4. The Society Has Acted In Good Faith.

The conduct of the allegedly infringing user is also relevant to the first fair use factor because "fair use presupposes 'good faith' and 'fair dealing.'" Harper & Row, 471 U.S. at 562 (citations omitted); see also Weissman v. Freeman, 868 F.2d 1313, 1323 (2d Cir. 1989). Consequently, the deliberate exploitation of a copyrighted work for one's own personal gain weighs heavily against a finding of fair use. Harper & Row, 471 U.S. at 563 (The Nation's "knowing[] exploitation [of] a purloined manuscript" in an effort to "scoop" Time Magazine militated strongly against a finding of fair use); Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997) (no fair use where television station broadcast competing station's videotape of Reginald Denny beating and did not attribute tape to competitor); Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992) (no fair use where artist deliberately removed copyright notice from photograph before unauthorized copying).

The Society has acted in good faith with respect to the GeoPack. Mr. Rosbotham, the art director for the GeoPack, testified that, when supervising the work of freelance artists such as Mr. Cutler, he is conscious of the sanctity of copyright and would take action if he had any reason to be concerned about copyright issues. Rosbotham Dep. at 45:11-46:4; Cutler Dep. at 16:1-20. Moreover, although Mr. Cutler testified that he referred to "The Living Reef" in the course of preparing his artwork, there has been no

suggestion that he traced or otherwise copied Plaintiffs' photographs. Cutler Dep. at 51:7-12; 51:22-52:5; 62:9-16; 63:16-65:9.

Because the GeoPack is educational, because the use is transformative, because the Society does not seek to exploit Plaintiffs' photographs for commercial gain, and because the Society has acted in good faith, the first fair use factor weighs in the Society's favor.

B. The Elements Of Plaintiffs' Photographs Used Are Factual In Nature And Have Already Been Published

The second fair use factor assesses "the nature of the copyrighted work." Among the considerations brought to bear in deciding this factor are whether the work is factual and whether it has been published.

1. The Portions Of Plaintiffs' Photographs Used In The Geopack Are Factual.

The scope of fair use is broader with respect to factual rather than creative works. New Era Publications Int'l v. Carol Publishing Group, 904 F.2d 152 (2d Cir. 1990). As demonstrated in Section I, supra, the portions of Plaintiffs' photographs at issue here are depictions of the physical features of fish. Because such depictions are factual in nature, they are not protectable. The factual nature of the portions of Plaintiffs' photographs used in the GeoPack weighs in favor of the Society in deciding the second factor.

2. Plaintiffs' Photographs Have Already Been Published.

Whether a copyrighted work has already been published is a critical element in determining the second factor. Harper & Row, 471 U.S. at 563. The scope of the fair use defense is broader with respect to works that have already been published. Harper & Row, 471 U.S. at 563; Arica Institute, Inc. v. Palmer, 970 F.2d 1067 (2d Cir. 1992) (finding fair use by psychiatrist of published ego fixation model in book); Haberman v. Hustler Magazine, Inc., 626 F. Supp. 201 (D. Mass. 1986) (fact that photographs had been published undercut weight of creativity and originality in examination of second fair use factor). This is because the creator of the original work has an interest in controlling its first publication. Harper & Row, 471 U.S. at 564; Wright, 953 F.2d at 737; Haberman, 626 F. Supp. at 212.

Plaintiffs' photographs, like the photographs in Haberman, have already been published: they appeared in "The Living Reef." Greenberg Aff. at ¶ 13. Therefore, Plaintiffs' interest in controlling their first publication is not at stake here as it was in Harper

& Row. The factual nature of Plaintiffs' work and the fact that it has been published tips the second factor in favor of the Society.

C. The Uses Involved In The Geopack Are Not Substantial Uses

The third fair use factor considers "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C.A. §201(c). It has been conclusively established that copying an entire work does not preclude a fair use defense. See Sony Corp. v. Universal City Studios, Inc., 464 U.S. 417 (1984); Triangle Publications, Inc. v. Knight-Ridder Publications, Inc., 626 F.2d 1171 (5th Cir. 1980) (finding fair use of entire cover of TV guide in advertisement for competing television programming guide); Sandoval v. New Line Cinema Corp., 973 F. Supp. 409 (S.D.N.Y. 1997) (finding fair use of photographs which were displayed for approximately 90 seconds in motion picture).

Here, the copyrighted work is the book, "The Living Reef." Greenberg Aff. at ¶¶ 7, 13. Plaintiffs do not assert copyrights in the individual images. Thus, the Society has only used a small portion of the copyrighted work. Moreover, most of the GeoPack uses do not involve Plaintiffs' entire photographs, but rather individual elements of those photographs. The photograph of the redband parrotfish also shows numerous types of coral, both in the foreground and in the surrounding context of the photograph. Greenberg Aff. Attachment A at p. 49. One of the scuba diver photographs focuses not on the diver, but on an enormous school of fish swimming between the photographer and the diver. Id. at pp. 73-74. The other diver is shown to the side of an enormous mountain of coral. Id. at p. 17. Therefore, the third fair use factor weighs in the Society's favor.

D. The Geopack Has No Effect On The Potential Market For "The Living Reef"

The fourth fair use factor examines "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C.A. §201(c). In Campbell, the Supreme Court rejected the Court of Appeals' presumption, stemming from the Supreme Court's earlier decision in Sony, that any finding of commercial use under the first factor dictates a finding of market harm under the fourth factor. Campbell, 510 U.S. at 590-1. The Supreme Court limited the Sony presumption of market harm to cases involving exact copying for purely commercial purposes. Id. Thus, one who duplicates a work exactly and then makes a profit by distributing the copy to the *same market* as that of the original work

cannot claim fair use. Pacific & Southern Co., Inc. v. Duncan, 744 F.2d 1490, 1496 (11th Cir. 1984) (under fourth factor, "court can measure the success of the original purpose and single out those purposes that most directly threaten the incentives for creativity which the copyright tries to protect").

As demonstrated above at pp. 11-12, the GeoPack and "The Living Reef" are targeted at totally disparate markets and serve totally different purposes. While "The Living Reef" is a purely commercial product, the GeoPack is an educational game aimed at children. It is therefore difficult to imagine how a child (or parent) could purchase the GeoPack as a substitute for "The Living Reef," thereby harming the market for Plaintiffs' works. As a result, the fourth factor weighs in the Society's favor.

V. THE SOCIETY'S USE OF THE SEA FAN IN THE POSTER  
CONSTITUTES FAIR USE

The legal standards governing fair use are enumerated above and will not be repeated.

A. The Poster Relates To An Educational And Public Service Endeavor Of The Society And Does Not Seek To Exploit The Sea Fan For Commercial Gain

1. The Jason Project Is An Educational And Public Service Endeavor.

The goal of the Jason Project is to excite and engage students in science and technology and to provide professional development for their teachers. Wheeler Decl. at ¶ 3. Students in the Society's auditorium in Washington, D.C. watch live footage of scientists in the field and interact with them via satellite link, thus experiencing an unparalleled opportunity to stretch the learning experience beyond the boundaries of the classroom and into the real world of science and nature. Id. at ¶¶ 3-4. Not only is the nature of the Jason Project clearly educational, but at the time of the 1996 Jason voyage, the Society did not charge a fee for members of the public to participate. Id. at ¶ 3. Then as now, the Society's involvement in the Jason Project was purely a matter of public service. Thus, the purpose of the Jason Project is not for the Society (a non-profit organization) to make money, but to further its organizational mandate for the increase and diffusion of geographic knowledge in its broadest sense. This weighs in the Society's favor.

2. The Jason Poster Makes "Transformative" Use Of  
The Sea Fan, Which Weighs In Favor Of Finding Fair Use.

Plaintiffs concede that the Society's use of the Sea Fan in the Jason Poster is transformative. Pl. Mem. at p. 9 ("Society altered the [Sea Fan] . . . by 'flopping' [it] and by 'cropping' it"). The Sea Fan's orientation was reversed, and the edge of it was cropped off, so that it fit into a small area in the upper right-hand corner of the poster. Wheeler Decl. Exh. A; Greenberg Aff. Exh. 7. In addition, the Poster shows the Sea Fan surrounded by a school of fish, which did not appear in Greenberg's original photograph. Wheeler Decl. Exh. A; Greenberg Aff. Exh. 7. Elsewhere, the Poster displays prominent images of a biologist cradling a young crocodile; a U.S. Navy submarine; a scuba diver alongside a mother lemon shark, holding up one of the shark's newborn pups; and students in the Society's electronic theater in Washington, D.C. Greenberg Aff. Exh. 7. The Poster also contains text describing the content and purpose of Jason generally, and specifically discussing various aspects of the voyage entitled "Adapting to a Changing Sea." *Id.* Thus, the Sea Fan comprises a small portion of a visual and textual ensemble which is designed to evoke the variety and richness of the scientific experience offered by Jason. The transformative nature of the Sea Fan's use in the Poster weighs in the Society's favor.

3. The Society Does Not Exploit The Sea Fan For  
Commercial Gain In The Poster.

The Society does not seek commercial gain from its participation in the Jason Project, and all copies of the Poster were given away at no charge. Wheeler Decl. at ¶ 6. Since neither the Poster nor the Jason Project itself is a commercial venture, it is impossible for the Society's use of the Sea Fan in the Poster to constitute a commercial exploitation of the work.

4. The Society Has Acted In Good Faith.

The Society has acted in the utmost good faith with respect to the Sea Fan. Plaintiffs, in stating that "[i]n 1995, Greenberg learned that the Society had re-published a copy of the [Sea Fan] in promotional literature for the Society's Jason Project," Pl. Mem. at p. 9, conspicuously fail to note that it was the Society which voluntarily contacted Greenberg to inform him of the inadvertent unauthorized use. Wheeler Decl. at ¶ 7. Upon discovering



that the Sea Fan had been used without Plaintiffs' permission, the Society contacted Greenberg in the spirit of cooperation, honesty and fair dealing. Id. Greenberg himself acknowledged that such conduct was "to the Society's credit." Id.

Moreover, the Society credited the Sea Fan to Greenberg. Wheeler Decl. at ¶ 5; Greenberg Aff. Exh. 7. This favors a finding of fair use. Cf. Los Angeles News Serv. v. KCAL-TV Channel 9, 108 F.3d 1119 (9th Cir. 1997) (no fair use where television station broadcast competing station's videotape of Reginald Denny beating and did not attribute tape to competitor); Rogers v. Koons, 960 F.2d 301, 308 (2d Cir. 1992) (no fair use where artist deliberately removed copyright notice from photograph before unauthorized copying). Thus, the Society's good faith weighs in its favor.

Because the nature of the Poster is educational and not-for-profit rather than commercial, because the use is transformative, because the Society does not seek to gain any profit directly from the use of the Sea Fan, and because the Society has acted in good faith, the first fair use factor weighs in the Society's favor.

B. The Element Of Greenberg's Photograph At Issue Here Is Factual In Nature.

1. The Portion Of Plaintiffs' Photograph Used By The Society Is Factual.

As demonstrated in Section I, supra, the portion of Plaintiffs' photograph at issue here is a depiction of a type of coral. Because such a depiction is factual in nature it is not protectable. Moreover, the scope of fair use is broader with respect to factual works, see p. 15 supra. The factual nature of the portion of Plaintiffs' photograph used by the Society weighs in favor of the Society in deciding the second factor.

2. The Sea Fan Has Already Been Published.

The Sea Fan, like the photographs in Haberman, has already been published: it appeared in the July 1990 issue of the Magazine. Wheeler Decl. at ¶ 5 and Exh. A thereto. Therefore, Plaintiffs' interest in controlling its first publication is not at stake here as it was in Harper & Row. The factual nature of Plaintiffs' work and the fact that it has been published tips the second factor in favor of the Society.

C. The Sea Fan's Marginal Appearance In  
The Poster Is Not A Substantial Use

As Plaintiffs note (see Pl. Mem. at p. 9), the Society did not use the entire Sea Fan in the Poster. Moreover, the Sea Fan occupies a very small amount of space in the upper right-hand corner of the poster, far from the visual focus of the ensemble. Greenberg Aff. Exh. 7. This use hardly captures the Sea Fan's "essence or value," see Sandoval, 973 F. Supp. at 413, or its "heart," see Harper & Row, 471 U.S. at 564; Wright, 953 F.2d at 738; Triangle Publications, 626 F.2d at 1177. Thus, this factor weighs in favor of the Society.

D. The Poster Has No Effect On The Potential  
Market For The Sea Fan

The Sea Fan cannot displace market demand for Plaintiffs' photograph. A portion of the Sea Fan is cropped out of the Poster; it is shown surrounded by a school of fish rather than in the context of Greenberg's original photograph; it serves as background to a portion of the title of the Poster, and is thus obscured in part by the large, yellow lettering. Greenberg Aff. Exh. 7. A potential purchaser of the Sea Fan could not, therefore, substitute the version shown in the Poster for the complete Greenberg photograph. As a result, the fourth factor weighs heavily in favor of the Society.

Since all of the factors weigh in the Society's favor, the Society's use of the Sea Fan in the Poster is fair use and, therefore, is not infringing.

Conclusion

For the reasons enumerated above, Plaintiffs' Motion For Summary Judgment should be denied and the Court should exercise its discretion and grant summary judgment to the Society.

Dated: October 15, 1998

Robert G. Sugarman, Esq.  
Naomi Jane Gray, Esq.  
Salvatore A. Romanello, Esq.  
(not admitted in the Southern  
District of Florida)

JG  
COPY

Wheeler Decl.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

JERRY GREENBERG, individually,  
and IDAZ GREENBERG, individually,

Plaintiffs,

CASE NO. 97-3924  
CIV-LENARD

v.

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

**DECLARATION OF  
ROCK WHEELER**

Defendants.

---

Rock Wheeler affirms as follows, under penalty of perjury:

1. I am a Coordinator in the Lectures and Public Programs Division of the National Geographic Society (the "Society"). I am responsible for researching the rights to photographs that the Division intends to use in its various programs and handling the resulting payments to the photographers who own copyright in those photographs. I make this declaration based upon personal knowledge.

2. The Society is the world's largest nonprofit scientific and educational organization, with 9.5 million members, and is dedicated to the diffusion of geographic knowledge in its broadest sense. The Society and its subsidiaries produce periodicals, television programs, maps and atlases, educational games, and like products.

3. The Society participates in numerous public service activities, including the Jason Project, an educational program whose goal is to excite and engage students in science and technology and to provide professional development for their teachers. The Jason Project was founded by explorer Dr. Robert Ballard and is sponsored by the Society, along with a consortium of private industry, scientific research facilities, museums, government and educational organizations. As a member of this worldwide network, the Society hosts an electronic theater with giant video screens and an interactive communications center that permits students to experience the thrill of exploration and research remotely, via telepresence -- live broadcasts incorporating technologies from robotics to satellite communications. At the time of the 1996 Jason Project voyage, the Society invited teachers, students in grades 3-9, and parents to participate in the Jason Project free of charge.<sup>1</sup>

4. On the April 1996 Jason Project voyage, "Adapting to a Changing Sea," a U.S. Navy nuclear submarine descended 600 feet below the ocean surface to study an ancient coral reef previously untouched by humans. At the Society's electronic theater in Washington, D.C., students interacted live with scientists aboard the submarine to learn invaluable lessons in reef ecology, climate change, marine biology and a host of additional subjects. Moreover, prior to the voyage itself, participating teachers attended professional development workshops rich in hands-on lessons in science, technology and geography which formed an integral part of the students' overall scientific curriculum.

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1. Today, the Society charges a nominal registration fee for the Jason Project. However, the Jason Project remains a non-profit, public service endeavor by the Society.

5. The Society produced a poster (the "Poster") in order to inform area educators of the April 1996 Jason Project voyage (attached as Exhibit 7 to the Affidavit of Jerry Greenberg dated September 28, 1998 (hereinafter "Greenberg Aff.")). The Poster, measuring 24 inches by 11 inches, contains text describing the voyage and several photographs depicting various aspects of marine life as well as the U.S. Navy submarine and the Society's electronic theater. Id. A photograph of a sea fan (the "Sea Fan"), taken by Jerry Greenberg ("Greenberg") and originally published in the July 1990 issue of National Geographic Magazine (attached hereto as Exhibit A), appears in the upper right-hand corner of the Poster. Greenberg Aff. Exh. 7. The Sea Fan is surrounded by a school of fish, and portions of the image are obscured by the lettering in the title of the Poster. Id. It occupies a space measuring approximately 3 1/2 inches by 3 inches. Id. A caption beneath the Sea Fan reads: "This colorful sea fan, a coral species, grows on healthy reefs off the Florida Keys. Jerry Greenburg." Id.

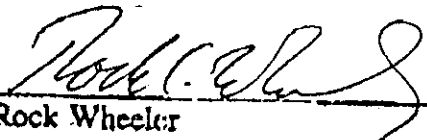
6. The Society printed approximately 7,000 copies of the Poster. Roughly 5,000 copies were mailed at no charge to teachers who had already expressed interest in the Jason Project, along with registration packets. The remainder of the copies were given away for free in Explorers' Hall at the Society's corporate headquarters in Washington, D.C. At no time did the Society ever charge a fee for the Poster.

7. In late 1995 and early 1996, I was a Coordinator in the Society's Audiovisual Division and was responsible for researching the rights to photographs that the Society used in the Poster and handling the resulting payments to the photographers who owned copyright in those photographs. Through inadvertence, the Society did not obtain the

right to use the Sea Fan from Jerry Greenberg ("Greenberg") before printing the Poster. When the Society discovered this oversight, I promptly wrote to Greenberg advising him of the use and offering him compensation. At that time, it was the Society's practice to pay \$50 for the type of use involved in the Poster. Because we had inadvertently used Greenberg's photograph without obtaining advance permission, however, we offered him compensation in the amount of \$500. *Id.* When Greenberg subsequently contacted me, he acknowledged that it was "to the Society's credit" that we had taken affirmative steps to inform him of the use and offer him compensation.

8. I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 15, 1998

  
 Rock Wheeler

I HAVE NO RECORD  
 OF CORRESPONDENCE  
 WITH ROCK WHEELER  
 AFTER I RECEIVED  
 HIS LETTER OF  
 OCTOBER 26, 1995



RECYCLED PAPER



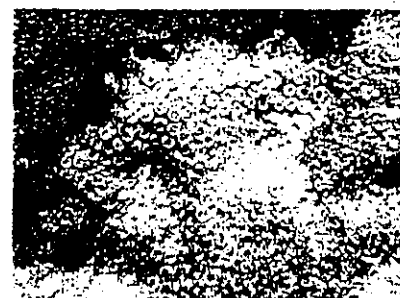
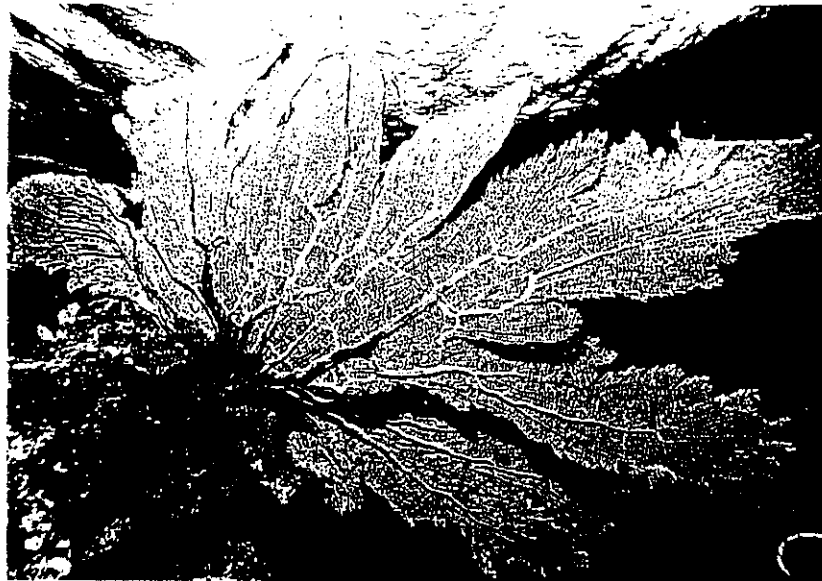


The ruddy glow of its branches reflects the health of a sea fan (right), which grows best in warm, clean water with a low nutrient level. A dying coral of the same species haunts the deep like a specter (facing page), perhaps the victim of parasites or polluted water.

Lifeless white limestone discolors a branch of elkhorn coral after the spread of white band disease (bottom left), whose cause remains a mystery. Produced by bacteria, black band disease, here infecting a star coral (center right), can kill a 200-year-old formation in two months. Experiments to stop the disease and treat infected coral so far have failed.

Known as golf ball coral, *Favia fragum* (bottom right) is smothered by algae, which then use the remains as a base for further growth.

Life on a reef is typically balanced, with a variety of corals coexisting with coral-eating parrotfish, algae, sea urchins, and damselfish. Normally corals have the ability to cleanse and heal themselves of disease and impact wounds. At Pennekamp the reefs may no longer be able to withstand the stresses of their environment.



"There are almost no butterflies left where the county sprays. The number of birds has declined because their food is killed in the process of killing mosquitoes."

Carl Nielsen notes the county is supposed to cut off the spray as planes fly over the park or over water, but, he says, "We pick up those pesticides in our water samples. Anything that lands on Key Largo ends up in the park."

Once water quality deteriorates, corals may not have the strength to recover from the

stresses of people, boats, storms, silt, chemicals. Anything can push them over the edge.

That fatal "anything" can come from almost anywhere. Richard Curry, resource management coordinator for Biscayne National Park, reports, "We pick up paper plants' residues from the Midwest brought down by the country's sewer, the Mississippi River, mixed in the Gulf of Mexico, and carried here by the Gulf Stream. Every product that people make is found around our reefs—including far too many nutrients."

Agricultural runoff, garbage, sewage, and thousands of products that humans discard have seriously raised the level of nutrients in the water around the keys.

"Nutrient loading could make the Florida Keys reef tract the first in the world to be killed by humans," says Brian Lapointe, water-quality expert with the Florida Keys Land & Sea Trust. Calling the keys an "ecosystem dysfunction," he notes, "Coral reefs thrive only in a low-nutrient environment. Pollution is pushing Florida's

Rosbotham Decl.

JG  
COPY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

JERRY GREENBERG, individually,  
and IDAZ GREENBERG, individually,

Plaintiffs,

CASE NO. 97-3924  
CIV-LENARD

v.

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

**DECLARATION OF  
LYLE ROSBOTHAM**

Defendants.

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Lyle Rosbotham affirms as follows, under penalty of perjury:

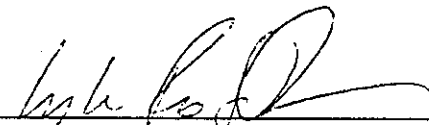
1. I am a Senior Art Director in the Book Division of the National Geographic Society (the "Society"). I am responsible for supervising and directing the creation of artwork used by the Society in a variety of its publications and products. I make this declaration based upon personal knowledge.

2. In 1995, the Society and Educational Insights, Inc. produced a children's educational game referred to as the "3D GeoPack" (hereinafter the "GeoPack"). The GeoPack was designed to teach children about various aspects of undersea life, and includes depictions and descriptions of many different types of sea flora and fauna.

3. In order accurately to depict the marine life in the GeoPack, the Society hired Warren Cutler ("Cutler"), an experienced illustrator, to prepare artwork portraying various sea plants and creatures. Accuracy was essential in order for the GeoPack to fulfill its educational mission -- to teach children about undersea life. Thus, Cutler was expected to paint the images of the fish as accurately as possible. Accordingly, Cutler painted pictures of several fish and other aspects of undersea life which were creatively depicted on multiple layers of transparencies to create the GeoPack's three-dimensional effect.

4. I declare under penalty of perjury that the foregoing is true and correct.

Dated: October 14, 1998

  
Lyle Rosbotham

FISHES ARE ILLUSTRATED ACCURATELY  
BUT PROPER NAMES FOR VARIOUS  
SPECIES ARE MISSING OR ARE  
INCOMPLETE OR INACCURATE!

ALSO, ENTIRE PRESENTATION  
OF CORAL REEF IS INACCURATE!  
THEY HAVE MIXED IN INDO-PACIFIC  
SPECIES AND ATLANTIC-CARIBBEAN  
SPECIES ON ONE PLATE. DOES NOT  
APPEAR THAT WAY IN NATURE.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

JERRY GREENBERG, individually,  
and IDAZ GREENBERG, individually,

Plaintiffs,

CASE NO. 97-3924  
CIV-LENARD  
Magistrate Judge Turnoff

v.

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

**ORDER**

Defendants.

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THIS CAUSE having come before the Court on Plaintiffs' motion for summary judgment on liability for Counts I and II of Amended Complaint, and the Court having reviewed same, and being otherwise duly advised, it is **ORDERED** that Plaintiffs' motion summary judgment on liability for Counts I and II is hereby **DENIED** and summary judgment is hereby **GRANTED** to Defendant National Geographic Society.

**DONE AND ORDERED** in Chambers, Miami, Dade County, Florida, this \_\_  
day of \_\_\_\_\_, 199\_.

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Joan A. Lenard  
United States District Judge

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JG  
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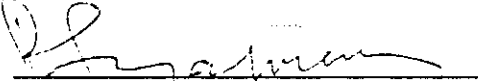
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