

STEEL ■
HECTOR
■ DAVIS

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

March 13, 1997

Norman Davis
305.577.2988

Suzanne Ross McDowell
Assistant Vice President
Legal Affairs, Publications
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036-4688

Dear Ms. McDowell:

This letter has two objectives. In Part I, we will take up again the matter of Educational Insights, Inc., which has been the subject of previous correspondence. In Part II, we will set forth our concerns as to other matters disputed by our client, Jerry Greenberg, with reference to the National Geographic Society ("the Society").

Part I

We believe that our client's copyrights have been infringed through the unauthorized copying, display, sale and/or preparation of derivative works, by the Society and by Educational Insights, of original works created by Jerry Greenberg. It appears from the Educational Insights materials, purchased in Florida last year, that the images our client is disputing were acquired by that company from the Society, complete with copyright notice asserted by the Society as to the disputed images (and others) in the Educational Insights products. You indicated in your most recent letter that the Society accepts responsibility for responding to our concerns. It appears that Educational Insights may not initially have been aware of any infringement, but our correspondence to them provided notice of copyright protection. Notwithstanding that notice, Educational Insights has continued the distribution and sale of the disputed materials; our client advises that a set of the disputed materials was purchased recently in Florida. Educational Insights, therefore, may have its own exposure in this dispute.

In your letter of November 18, 1996, you attempted to persuade us that no infringement of copyright has occurred in the circumstances here. You conceded that "there are similarities" with respect to the images but insisted that there are "significant differences" between the Society's illustrations and our client's photographs. Our view -- markedly different -- is that the Society's illustrations are at least substantially similar to the original works. We will discuss each illustration, as you did in that letter.

West Palm Beach
561 650.7200
561 655.1509 Fax

Tallahassee
904 222 2300
904 222 2410 Fax

Key West
305.292.7272
305.292.7271 Fax

Caracas
582 951 4105
582 951 4106 Fax

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Suzanne Ross McDowell, Esq.

March 13, 1997

page 2

An exhibit, in a loose-leaf binder ("Exhibit 1"), is enclosed that demonstrates the infringements. On page 1, the images highlighted in yellow are those being challenged. On the following pages, the side-by-side comparative images are supplemented with transparencies made from each image in the Educational Insights product and overlaid on our client's original works. Each of the challenged images is discussed below.

(1) Redband parrotfish. [Exhibit 1, page 3] You stated that the angle of the fish is different from the photograph, but that is not correct. The angle of the fish is almost precisely the same, including bends in the body and the angle of the tail. The perspective from which our client's photograph was taken is also reflected in the copy. You stated that the shape of the fish is unavoidably the same, but we do not agree. Hundreds of photographs or illustrations of a Redband parrotfish may exist, but not one matches the positioning and the contours captured in Mr. Greenberg's photograph. The color differences you cite are minor and not legally relevant. The photograph was originally published by Mr. Greenberg in "The Living Reef" (copyright 1972 A-397524) and is currently published in "The Coral Reef" (copyright 1975 A-722127). The photograph was never provided to the Society for any use of any kind, although several copies of "The Coral Reef" were sent to the Society many years ago.

(2) Stoplight parrotfish. [Exhibit 1, page 5] The differences you cite are minimal. The similarities are substantial. Our client will continue to insist that his photograph was infringed. The photograph was originally published in "The Living Reef" and is currently published in "The Coral Reef." Both the original and the copy are identical in size. The photograph was never provided to the Society for any use of any kind.

(3) Green moray. [Exhibit 1, page 7] Your letter states that the photograph depicts a green moray eel but that the illustration shows a goldentail. Significantly, the Society's illustration labels the creature a "moray eel." In its underwater life, a moray rarely presents much of its body out of its lair. The Greenberg photograph shows a moray emerging about halfway. Other similarities in the photograph and the copy are substantial, as the exhibit indicates. The moray photograph was originally published in "The Living Reef" and is currently published in "The Coral Reef." The photograph was never provided to the Society for any use of any kind.

(4) Divers. We categorically disagree with your depiction of differences between our client's photographs and the illustrations in your package. The comparisons speak for

Suzanne Ross McDowell, Esq.

March 13, 1997

page 3

themselves, and the overlays on pages 9 and 11 of Exhibit 1 plainly demonstrate a striking similarity.

(a) The lead diver [Exhibit 1, page 9] was originally published by National Geographic Magazine in January 1962 (copyright 1962 B-960824). Copyright as to that photograph was assigned to Jerry Greenberg on December 18, 1985, and Mr. Greenberg renewed the copyright in 1989 (RE-478-546). The photograph is currently published in "The Coral Reef." You will note that the lead diver is using an old-style two-hose regulator, with double tanks.

(b) The flowing-hair diver [Exhibit 1, page 11] was originally published in "The Living Reef" and was also published in a poster titled "Living Corals of the Tropical Atlantic" (copyright 1974 K-107129). That diver is using a customized mini-double tank rig made for the Greenbergs' son. The tanks are floating upward because the rig did not have a crotch strap for fastening the tanks down.

(5) Bull shark. [Exhibit 1, pages 13 and 15] Your November 18 letter ignored our discussion of a bull shark illustration in Educational Insights' "Creatures of the Open Ocean" (Code 3907). The bull shark photograph was provided to the Society from Mr. Greenberg's files in 1963 with other materials pertaining to a photo essay on sharks and shark research. The essay was eventually published by the Society, but the bull shark photograph was not used, and his photograph was belatedly returned to Mr. Greenberg. The bull shark photograph was first published by Mr. Greenberg in "Fish Men Fear: Shark" (copyright 1969 A-106-687), and subsequently in his poster titled "Shark!" (copyright 1974 K-107-130). The photograph is currently published in "Sharks and Other Dangerous Sea Creatures" (copyright 1981 VA-70-254), and in "Beneath Coral Seas" (copyright 1986 VA-240-616).

The enclosed Exhibit 1 has two separate comparisons of the bull shark image. On page 13 is an overlay, prepared from the Society's image, placed atop Mr. Greenberg's file photograph. The images are exactly the same with the exception of the tail. The modified tail in the Society's image was taken from a separate Greenberg photograph of a bull shark that was provided to the Society, and the tail modification can be quickly seen in the display on page 15 of Exhibit 1.

In a letter to Mr. Greenberg, dated December 29, 1967, Bryan Hodgson stated that Mr. Greenberg's shark transparencies "were in the possession of Bill Bond, who used them

ST E E L ■
H E C T O R
■ D A V I S

Suzanne Ross McDowell, Esq.
March 13, 1997
page 4

as reference material for his painting in the SHARKS story." Our contention is that they were not used merely for reference purposes but were copied. The painting referred to by Bond is the same used in Educational Insights' "Creatures of the Open Sea" (Code 3907).

(6) Other sharks. Inadvertently not included in our correspondence with Educational Insights was discussion regarding three other shark images that are contained in their "Creatures of the Open Sea." Other unauthorized copies include a great hammerhead shark, an oceanic whitetip shark, and a silky shark that Mr. Greenberg believes were copied from photographs provided to the Society by him for the article that was published in 1968. Comparisons of the whitetip shark images are shown on pages 16 and 17 of Exhibit 1. The whitetip photograph was delivered by Mr. Greenberg to the Society in the 1960s, but was never published in the magazine. The Society may have kept other unpublished slides from the shark assignment and used them for these illustrations.

Resolution of the dispute regarding the images in the Educational Insights material is discussed below, following Part II.

Part II

Mr. Greenberg, as you may be aware, has had a professional and business relationship with the Society spanning a period of some three decades. He has carefully documented that relationship. Many photographs were provided by him to the Society's publications pursuant to contracts, according to the terms of each. Many other photographs were provided in good faith by Mr. Greenberg for the Society's consideration, without the protection of a contract. On some assignments when submitted photographs were not published, the Society retained "selects" that should have been returned to him. Mr. Greenberg eventually discovered, however, that the Society, without his permission, had published, or permitted the publication of, various materials for which the Society had no copyright or contract rights, but for which Mr. Greenberg had proprietary rights.

A separate loose-leaf exhibit ("Exhibit 2") is enclosed that illustrates the unauthorized uses discussed below.

(A) An infringement appeared in a promotional piece for the Society that was published in September 1975. Mr. Greenberg possessed a copyright in the photograph used. The infringing photograph, showing a scuba diver cruising among reefs and fans, first

Suzanne Ross McDowell, Esq.
March 13, 1997
page 5

appeared by arrangement with Mr. Greenberg in 1967 in the Society's book titled "World Beneath the Sea." The photograph subsequently was published by Mr. Greenberg in 1969 in a book titled "Adventures of a Reefcomber" (A-129-935). It was subsequently published by Mr. Greenberg in 1972 in "The Living Reef" (A-397-524). Both books contained copyright notice, and each copyright was registered. In 1973, by agreement with Mr. Greenberg, the Society republished the photograph in a second edition of "World Beneath the Sea." No further use by the Society was ever authorized. Exhibit 2, pages 1-2.

(B) An unauthorized use appeared in the March/April 1994 issue of Traveler magazine, published by the Society. Displayed on page 70 of the issue was a photograph of a skin diver "swimming through a coral jungle," in the language of the caption. That photograph originally appeared in the Winter 1985/86 issue of Traveler, pursuant to a written agreement between Mr. Greenberg and the Society. That agreement, by its terms, limited the Society's rights to one-time publication. The photograph was copyrighted in 1985 by Mr. Greenberg (VA-417-426). The 1994 publication was not authorized by the agreement. The Society eventually conceded that the use was unauthorized and paid Mr. Greenberg. Exhibit 2, pages 3-4.

(C) A photograph of a sea fan, originally authorized by Mr. Greenberg for one-time use in the Society's magazine in July 1990, was improperly included in a color brochure promoting the 1996 Jason Project. The Society acknowledged the impropriety, with apologies, in a letter dated October 26, 1995, from Rock Wheeler. That infringement has not been resolved. In a letter to Mr. Greenberg dated October 26, 1995, Rock Wheeler admitted that the Society had violated Mr. Greenberg's copyright by using the photograph. "We realize the importance of copyright," Mr. Wheeler wrote, "and that we have committed a serious violation." Exhibit 2, pages 5-6.

Mr. Greenberg has attempted on literally dozens of occasions through the years to guard against unauthorized uses of his photographs by the Society and to recover photographs that the Society had no legal right to retain. There may have been other unauthorized uses. In at least one instance his request for the return of materials was adamantly refused. In a letter to Mr. Greenberg dated April 18, 1994, W. Allan Royce advised that the Society was entitled by contract to retain photographs created by Mr. Greenberg pursuant to assignments given to him by the Society's magazine. "None of this material," he wrote, "is going to be returned to you." We challenge the Society to demonstrate, through the written agreements to which Mr. Royce's letter referred, that the

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Suzanne Ross McDowell, Esq.

March 13, 1997

page 6

Society ever obtained any right to retain in its files any material provided by Mr. Greenberg, after the one-time publication to which he agreed, and for the article on which the assignment was based, had been satisfied.

The one exception to that principle was an agreement between Mr. Greenberg and the Society in 1962, in which the magazine was permitted to pull and to keep "a few selects," which we understand to be photographs not published but with ongoing potential for publication. Instead, more than 50 selects were pulled. It is a reasonable inference that the Society has hundreds of Mr. Greenberg's photographs in hard-copy files, on videodisc, or in other electronic storage and retrieval systems that may be in use. You will appreciate that each photograph submitted on assignment by Mr. Greenberg and actually used in a Society publication was accompanied by literally dozens of other photographs from which a final selection was made. Samples of the Society's photographic indexing in Mr. Greenberg's possession make it clear that materials created by him can be located in the Society's files.

Mr. Greenberg, for a period of years, allowed the Society to retain photographs by him that were never intended for publication. That era of good faith reliance on his part has passed. We believe that at least one of the unauthorized uses of his photographs described in this Part II, as well as those described in Part I, are actionable in the U. S. District Court for the Southern District of Florida. The unauthorized uses of his copyrighted works is one aspect of the problem. The fact that the Society is using some of those works in publications and for purposes that compete unfairly with Mr. Greenberg in his own business ventures is another.

Mr. Greenberg's objective is to resolve *all* of the matters set forth in this letter, completely and with finality, and not on a piecemeal basis. Enclosed is a settlement proposal -- containing two separate options -- that can accomplish that objective. If a settlement cannot be concluded to our client's satisfaction, we will proceed with an action in federal court in Florida that will name the Society as defendant. Educational Insights, Inc. may also be named because of its continuing use of the protected photographs. Our client is not interested in protracted negotiations. We must receive a response from the Society with respect to the two enclosed options by the close of business on Friday, April 18, 1997. Mr. Greenberg's legal expense to date is incorporated in the settlement options. Any additional legal expense more than nominal in nature will change the damage amounts sought. The enclosed loose-leaf exhibits are the property of Mr. Greenberg and must be returned upon the conclusion of this matter.

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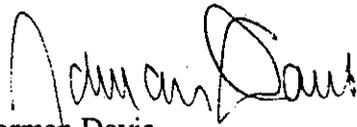
Suzanne Ross McDowell, Esq.

March 13, 1997

page 7

We have represented Mr. Greenberg on copyright matters for many years and have found him to be eminently reasonable in demands directed to infringing parties. That fact is reinforced by the infrequent occasions when it has been necessary to seek the assistance of a federal court, and on each such occasion the effort has been successful. We look forward to a response on or before the aforesaid date.

Very truly yours,



Norman Davis

Enclosures

bcc: Jerry Greenberg

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Option A

- (1) Mr. Greenberg must be paid damages by the Society, for itself and for Educational Insights, Inc., in the amount of \$35,000, inclusive of legal expense incurred by him to date.
- (2) Educational Insights, Inc. must immediately and permanently cease and desist from any further use in any manner of the disputed images.
- (3) The Society must immediately and permanently cease and desist from any use in any manner, by itself or by others with its consent, of any original works of Jerry Greenberg, or copies thereof, that may be in the Society's possession or control.
- (4) The Society must provide assurances, satisfactory to Mr. Greenberg, that no photographs ever provided by him to the Society, or copies or derivatives, will ever be published, distributed, licensed, sold or otherwise utilized by the Society, or by others with its consent or participation, in any manner whatsoever.
- (5) Copyright in the disputed images in the Educational Insights products must be assigned to Mr. Greenberg by the National Geographic Society on a form that we will provide. The assignment will not be effective as to any other images contained in those products.
- (6) Copyright asserted by the Society on all photographs by Mr. Greenberg that have been published in the Society's publications must be assigned to Mr. Greenberg on a form that we will provide.

Option B

(1) Mr. Greenberg must be paid damages by the Society, for itself and for Educational Insights, Inc., in the amount of \$40,000, inclusive of legal expense incurred by him to date. Such payment will entitle Educational Insights, Inc. to continue to utilize the disputed images only, and only in presently-existing products, for the remainder of 1997.

(2) After 1997, Educational Insights, Inc. and/or the National Geographic Society may enter into a license agreement that permits Educational Insights, Inc. to continue to utilize the disputed images only, and only in presently-existing products, for all of 1998. The license fee for that period is \$4,000, whether or not the disputed images are utilized during the entire period. Such payment must be received by Mr. Greenberg no later than December 31, 1997. The licensee(s) will have the option of renewing the license on the same terms, for a license fee of \$4,000, for any succeeding year, provided that notice of renewal and the license fee are received by Mr. Greenberg no later than December 31 of the year of the expiring license. If the license is not renewed for any year, all rights of the licensee(s) will end at the expiration of an existing license, and neither the Society nor Educational Insights, Inc. may thereafter use any of the disputed images in any manner. We will prepare the license agreement.

(3) The Society must provide assurances, satisfactory to Mr. Greenberg, that no photographs ever provided by him to the Society, or copies or derivatives, will ever be published, distributed, licensed, sold or otherwise utilized by the Society, or by others with its consent or participation, in any manner whatsoever (apart from the uses contemplated in paragraph (2) above).

(4) Copyright in the disputed images in the Educational Insights products must be assigned to Mr. Greenberg by the National Geographic Society on a form that we will provide. The assignment will not be effective as to any other images contained in those products.

(5) Copyright asserted by the Society on all photographs by Mr. Greenberg that have been published in the Society's publications must be assigned to Mr. Greenberg on a form that we will provide.

DRAFT

BY CERTIFIED MAIL

April 23, 1997

Suzanne Ross McDowell
Assistant Vice President
Legal Affairs, Publications
National Geographic Society
1145 17th Street, N.W.
Washington, D.C. 20036-4688

Dear Ms. McDowell:

This will acknowledge receipt of your letter dated April 18, 1997, which responded to our letter to you dated March 13, 1997. Your conclusion that no infringement has occurred with respect to the Educational Insights materials appears to foreclose any possibility of resolving that dispute without litigation. Your proposal to pay Mr. Greenberg \$500 for the use of his sea fan photograph was unacceptable when first made and is unacceptable now. Mr. Greenberg has serious concerns in other areas, as indicated in our letter, but is interested only in a global resolution of all matters covered in the letter.

We will proceed as indicated in the March 13 letter, and in any action that is brought in the Southern District of Florida we expect to name Educational Insights, Inc. as an additional defendant. The nature of a purported licensing agreement between that company and the Society as to the disputed materials is unclear to us, but in any event such an agreement is external to our client's interests.

Mr. Greenberg has become aware that the Society is embarked on a project that apparently will reproduce on one or more CD-ROMs, for distribution and sale, past issues of the Society's magazine covering 100 years. This is notice that any photographs provided by Mr. Greenberg to the Society which appeared in past issues of the magazine -- for which Mr. Greenberg owns exclusive copyright or for which Mr. Greenberg authorized one-time use for a single issue -- may not be used for the CD-ROM project, or any other project, without his prior written permission. The Society has no right -- under copyright, contract, or any other theory -- to use Mr. Greenberg's creative works for purposes other than those that were authorized by him with respect to particular issues of the magazine. In view of this notice, Mr. Greenberg will regard any unauthorized use of his works in the CD-ROM project as willful infringement, and he will seek the fullest remedies available to him.

In view of the impasse in the matter, please return to the undersigned the exhibit book that was specially prepared and provided to you for negotiation purposes. As stated in our March 13 letter, that exhibit was and is the property of Mr. Greenberg.

Your courteous response to our March 13 letter, while seriously deficient, in our view, in its discussion of applicable law, is appreciated. It is unfortunate that the Society -- zealously

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BY TELECOPY

Norman Davis
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January 16, 1997

Suzanne Ross McDowell
Assistant Vice President
National Geographic Society
1145 17th Street, N. W.
Washington, DC 20036-4688

Dear Ms. McDowell:

On December 19, 1996, I wrote to you with reference to our clients' dispute with Educational Insights, Inc. to determine what responsibility the National Geographic Society is prepared to accept in the matter. We have received no response. Our clients are interested in proceeding without further delay, and a clarification of the Society's role will be appreciated.

Sincerely,



Norman Davis

bcc: Jerry Greenberg

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561.655.1509 Fax

Tallahassee
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904.222.8410 Fax

Key West
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305.292.7271 Fax

Caracas
582.951.4105
582.951.4106 Fax



**NATIONAL
GEOGRAPHIC
SOCIETY**

SUZANNE ROSS McDOWELL
Assistant Vice President
LEGAL AFFAIRS, PUBLICATIONS

February 28, 1997

Norman Davis, Esq.
Steel Hector & Davis LLP
200 South Biscayne Boulevard
Miami, FL 33131-2398

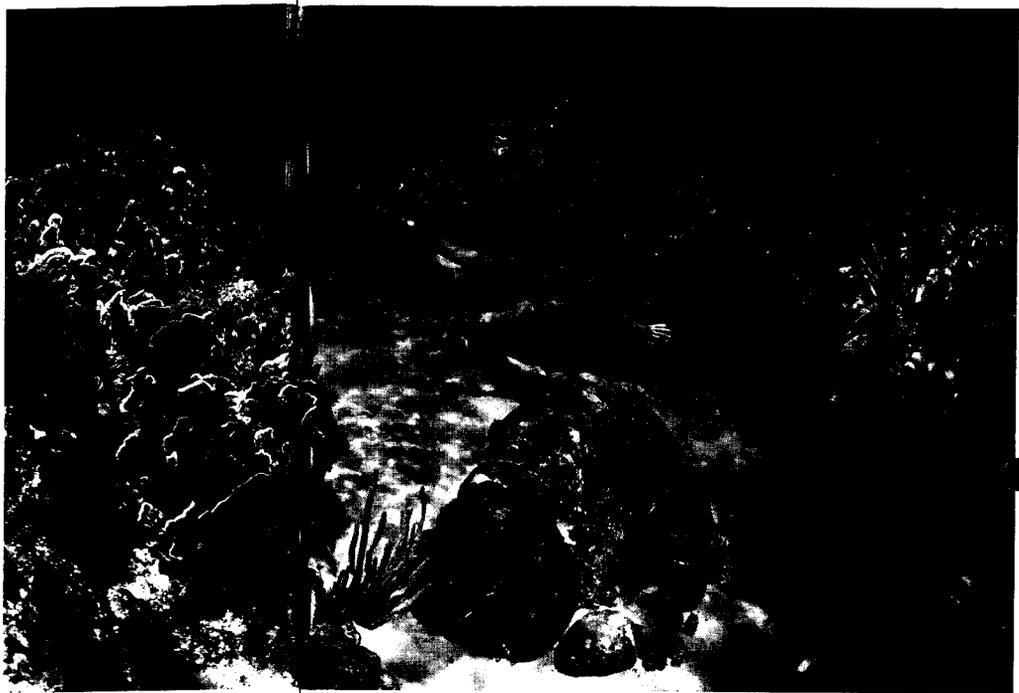
Dear Mr. Davis:

I am responding to your letter of January 16, 1997 in which you ask what responsibility the Society is prepared to accept concerning your client's dispute with Educational Insights. With respect to the editorial content that the Society provided to Educational Insights, we are prepared to defend any copyright infringement claims and Educational Insights is prepared to defer to us in this matter.

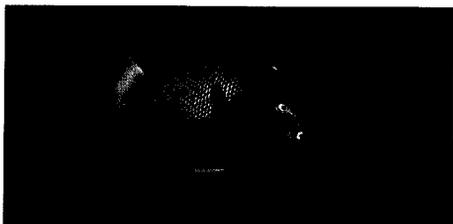
Sincerely,

s:\drafts\davisedu.ltr





*liver finds that it takes all
 ; elkhorn and staghorn coral in
 i but a housing development,
 mall animals called polyps,
 on—the reef as predator.
 npetfish (right), stands on its
 sucks up unsuspecting prey
 (above, left) would rather
 es to an unobtrusive color for
 ny, the friendly queen
 roach within a few feet.*



MARCH/APRIL
1994
TRAVELER

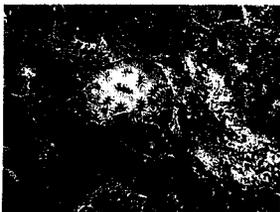
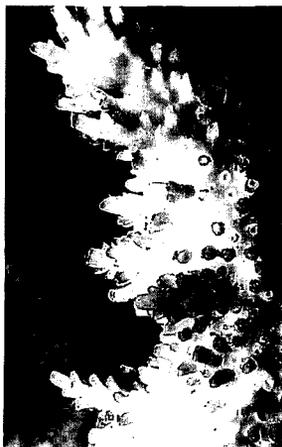
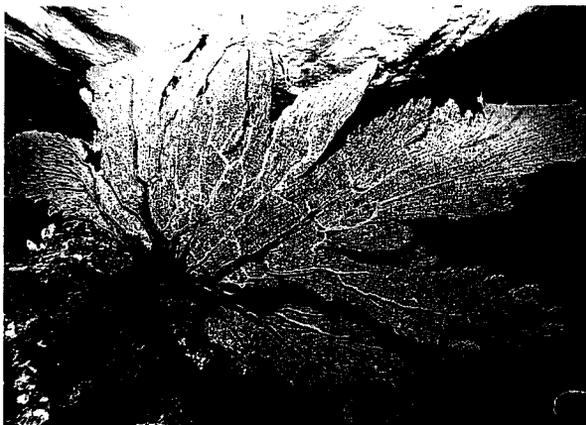


Christ of the Deep (right) presides over a coral sanctuary in the underwater park (above).

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

That fatal "anything" can
come from almost anywhere.

Agricultural runoff, garbage,
sewage, and thousands of prod-
ucts that humans discard have
seriously raised the level of
nutrients in the water around
the

1996
JASON
PROJECT

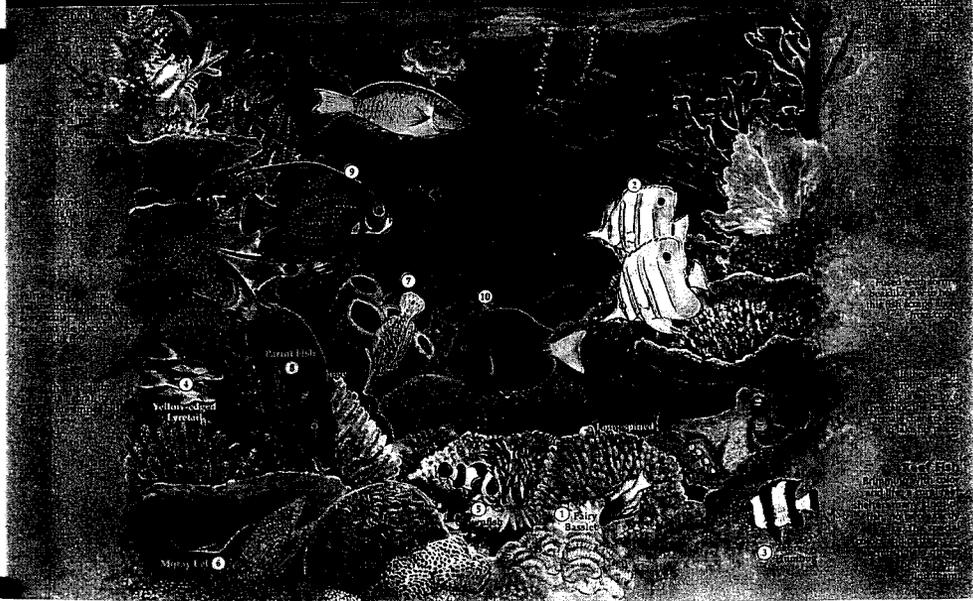
ting to a nging Sea



A biologist studies a young crocodile to understand how the endangered species is adapting to the changing environment of south Florida.

...comings from the...
...arun and...
...and...
...schemes in south Florida and the Everglades may affect the endangered American crocodile.

Match the lighted clue to its picture, then press the picture's number on the keyboard.



1995/1996
EDUCATIONAL
INSIGHTS

URES OF THE OPEN OCEAN

Match the lighted clue to its picture, then press the picture's number on the keyboard.

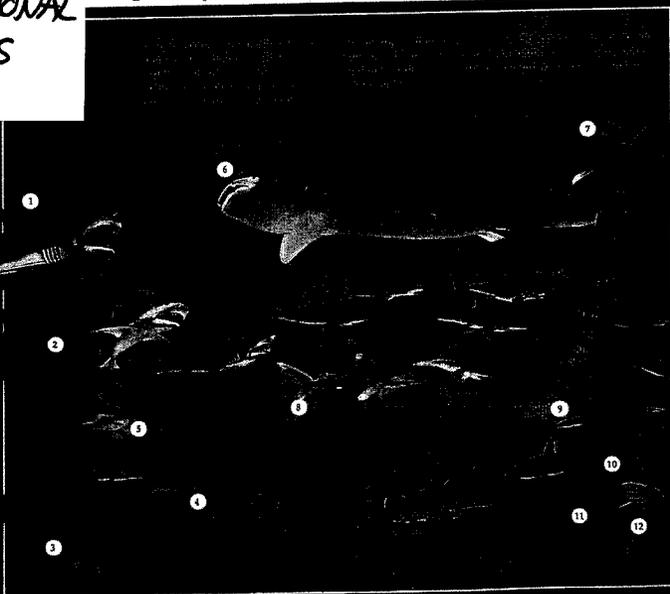
Many great live-in
fish. In fact, make short
work of seals, dolphins,
and other sharks.

This shark is named
for its unusual shape
of its head.

The only shark
species that lives
in fresh and
salt water. It
drinks seawater,
which empties
into the sea.

White sand rips on the
edge of its head fins
identify this shark.

The fins of this shark
sometimes curl up in a
crescent shape.



This voracious
shark such as lobsters and
other shellfish from
underwater reefs.

Although it is the
world's largest fish and
weighs as much as 11
tons, it eats mainly
plankton and tiny fish.

This shark
glides along the
coastal waters of
an Arabian land.

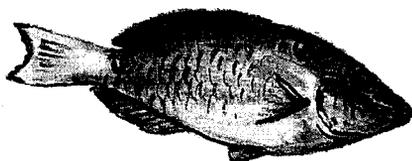
The shark is
found in ponds.

It feeds on small
fish and a healthy
amount.

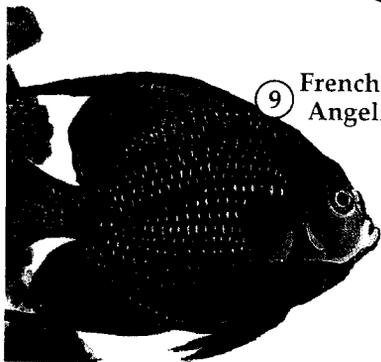
It feeds on fish
swimming at 40 as it
feeds on plankton
at the sea's surface.

THE CORAL REEF

- Match the lighted clue to its picture, then press the picture's nu



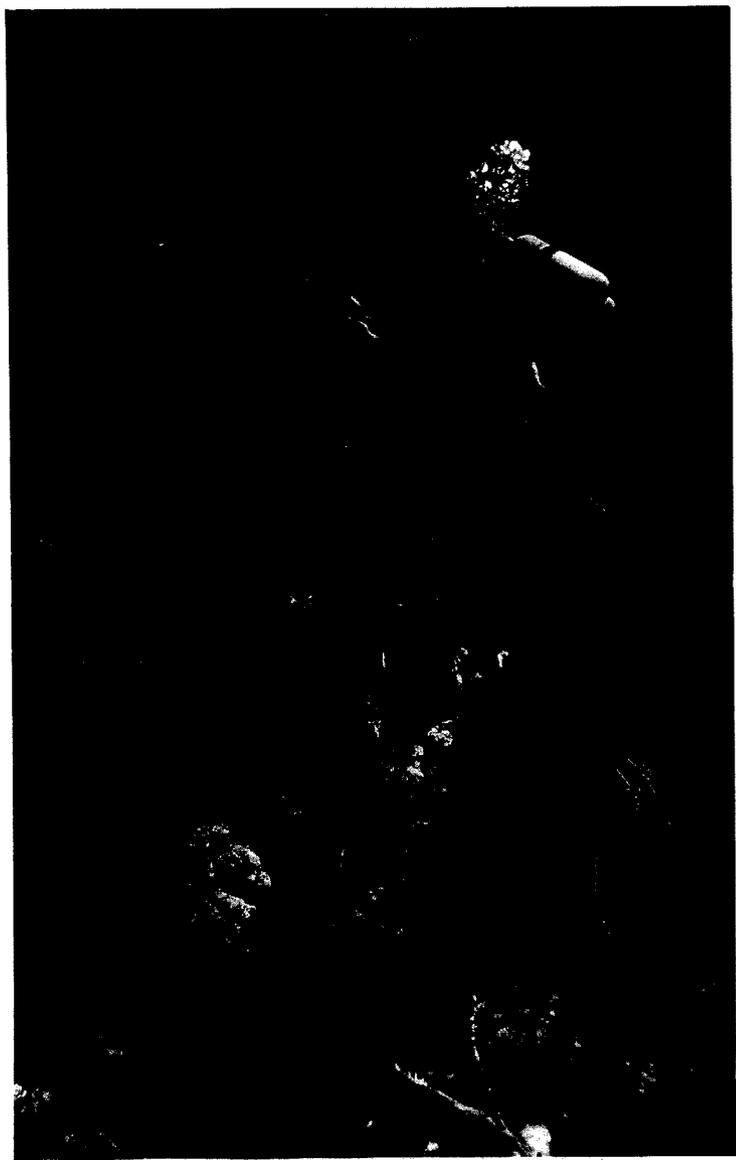
9 French Angelfish

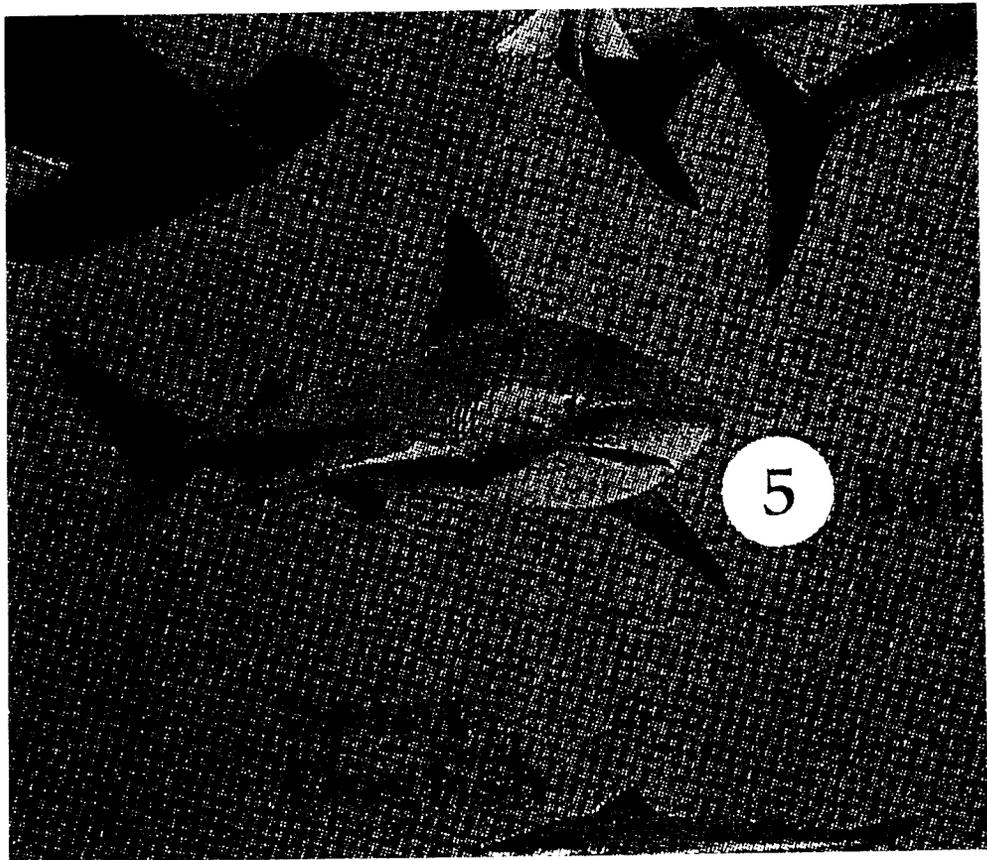


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