

**STEEL ■
HECTOR
■ DAVIS**

Steel Hector & Davis LLP
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Norman Davis
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BY TELECOPY & MAIL

May 3, 1998

Robert G. Sugarman, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Re: Jerry Greenberg, et al. v. National Geographic Society, et al.

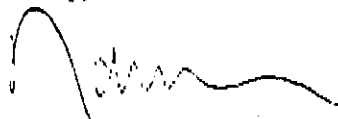
Dear Bob:

I was surprised to read that my April 24 letter had adopted "a far from conciliatory tone," inasmuch as my dictionary defines conciliatory as involving a friendly and unantagonistic manner. I have re-read my letter in vain to find anything unfriendly or antagonistic in it.

Your principal concern appears to be that the Greenbergs' most recent settlement proposal sought more money than did the original proposal. But the offer extended most recently is still below the level of relief the Greenbergs will request from the court, and that is the essence of settlement as I understand the term. You will disagree with that request, of course, and everyone here understands that the court may even agree with you. Then again, perhaps it will not.

Notwithstanding the statement in your letter that "further negotiations would serve no purpose," the Greenbergs are willing to participate in court-sponsored mediation in a timely manner. I assume that you will provide us with a draft of such a request.

Sincerely,



Norman Davis

DRAFT

BY TELECOPY & MAIL

January 16, 1998

Robert G. Sugarman, Esq.
Weil, Gotshal & Manges LLP
767 Fifth Avenue
New York, NY 10153

Re: Jerry Greenberg, et al. v. National Geographic Society, et al.

Dear Mr. Sugarman:

You and I have had telephone discussions this week regarding the prospect for settling Count I and Count II of the Amended Complaint. The Greenbergs have no enthusiasm for a partial settlement of their case, but are willing to resolve those two counts with the National Geographic Society ("the Society") on the basis described below. This proposal is tendered solely as a compromise for the purpose of settlement with the expectation that it will be used for no other purpose.

- (1) The Society will pay to the Greenbergs the sum of \$40,000.00. That sum is inclusive of all legal expense to date that is related to the claims in Counts I and II.
- (2) Additionally, the Society will pay to the Greenbergs each year the sum of \$2,000.00 as a license fee for the continued use by Educational Insights, Inc. of the disputed images in its product. The fee for 1998 will be paid with the amount stated in (1) above. Fees for any subsequent years will be paid by January 1 of each year of license. The license will expire and no further fees will be required upon receipt by the Greenbergs of a sworn statement by an officer of Educational Insights, Inc. or the Society that all manufacture, distribution and sale of the product containing the disputed images has ended.
- (3) In order to safeguard against any future problems, the Society (and its affiliates, if applicable) will promptly provide to Mr. Greenberg a visual inventory of all photographs, copies or derivatives, created originally by him, that the Society is holding in its files, archives, libraries, databases or elsewhere. Mr. Greenberg will thereupon identify on the inventory all such items for which he holds copyright and for which he can demonstrate such copyright, and provide such identification to the Society. The Society will provide written assurance that no photographs or items so identified will ever be published, distributed, licensed, sold or otherwise

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Robert G. Sugarman, Esq.
January 16, 1998
page two

utilized by the Society, or by others with its consent or participation, without a prior written agreement with Mr. Greenberg.

(4) Copyright in the disputed images in the Educational Insights product will be assigned to Mr. Greenberg by the Society. Such assignment will not be effective as to any other images contained in that product.

The proposal set forth above represents significant compromise in terms of any previous proposal. The money amount incorporates legal expense incurred in preparation of the complaint, and it incorporates as well the infringement (admitted by the Society) embodied in Count II. The license fee has been reduced from a former demand. The Greenbergs have instructed me that some flexibility remains as to some details in the proposal, but not as to its substance. They are otherwise willing to see the claims through to the end. The proposal is offered in good faith, and in the expectation that it will be resolved, one way or another, with the least delay.

Sincerely,

Norman Davis

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

Suzanne Ross McDowell
April 23, 1997
page two

protective of its own rights -- has adopted a cavalier position here where demonstrable rights of another are at issue. Your statement, for example, that copyright protection is available for photographs of natural objects only if a copy is virtually identical, if true, would surely pose grave difficulties for the Society's own storehouse of photographs). In due course we will allow a court to decide the proper standard for infringement of such photographs.

Very truly yours,

Norman Davis

BY CERTIFIED MAIL

April 23, 1997

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Very truly yours,

Norman Davis

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June 4, 1997

Tom Stanton
Director, CD-ROM Product Management
National Geographic Interactive
1145 17th Street, N.W.
Washington, DC 20036-4688

Re: Doubilet Photography, Inc.

Dear Mr. Stanton:

On behalf of our client, Doubilet Photography, Inc., we are responding to your May 21, 1997 letter and requiring a complete explanation of "the Society's position on this matter". Unfortunately for both parties involved, your letter forces us to respond in this manner. It is totally inadequate to tell a world renowned photographer of David Doubilet's stature that NGS is paying him nothing for an extensive (indeed, total) electronic reuse of his photographs (estimated at 700+ images over 27 years) and to "explain" this in a single paragraph starting with the words "This does not lend itself to a simple or easy explanation," followed by a summary which is plainly disingenuous and incorrect as a matter of law. Mr. Doubilet has had a long amicable and mutually productive relationship with NGS for over a quarter of a century and expects to be treated in a fair and equitable manner.

The fact that the CD-ROM product known as the Complete National Geographic: 108 years of National Geographic Magazine on CD-ROM (the "Product") is indeed complete is irrelevant to the legal issues at hand. This is not a simple reprint of the magazine nor is it at all analogous to microfiche which is basically a non-commercial storage device used principally by libraries and archives. The Product is a new (i.e. further) very commercial use of Mr. Doubilet's photographs in digital (rather than print) form on a disk which is a derivative work adding search engine software, indexing and, presumably, HTML coding. Under the NGS contracts with Mr. Doubilet's company, NGS is obliged to make "an additional appropriate payment" for any further use of photo selects; the word "editorial"

NGS 016/0596

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describing one type of use is merely an example. Moreover, the Product includes a number of non-contract photographs, copyright in which is owned by Doubilet, which were originally licensed to NGS for one time print media use only. Further use of these without a new license is a copyright infringement.

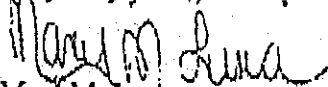
We are unimpressed by your point that the Product price is "affordable," that NGS will not do more than "break even" and that the Product is intended for "educational institutions and families". The Product is hardly educational, since it is being distributed broadly to the home as well as the school markets by Mindscape, one of the U.S. largest distributors, and is being supported by Kodak ad tie-ins. Doubilet is not obliged to make a further "free" contribution.

Equally upsetting is your indication that the Product enables end users to print the photographs. You make no mention of copy-protect or an end-user license with restrictive terms preventing printing and further distribution in any form, whether hard copy, networked computer systems or even the Internet. You pass this off with the comment that the print quality is inferior, although this is clearly a temporary problem of current technology dealing with certain pixel ratios--hardly insuperable.

NGS has an established course of dealing with Doubilet under which it has traditionally paid \$100 per photo for electronic use. In addition, NGS has approached at least some agencies and possibly some other photographers through Total Clearance offering \$20 per photo for a twenty year license for the Product. We have no idea what the current status of this offer may be or why the offer was made only to a limited group of those affected. Whether or not NGS makes a profit on the Product, Doubilet (and other photographers) are entitled to their fees, whether at established rates or at specially negotiated rates intended only for the Product (either a fixed fee per photo or a royalty based on the sales success of the Product). Negotiation is not a unilateral letter offering zero. This is totally unacceptable to Mr. Doubilet and, we are certain, to a large group of other similarly situated photographers.

We expect a prompt and complete response and are willing to discuss different approaches to a mutually satisfactory payment arrangement to resolve this matter. Mr. Doubilet values and wishes to preserve his relationship with NGS. However, NGS current position may establish a precedent highly adverse to his interests to which he is obliged to respond at this time through legal counsel.

Very truly yours,


Mary M. Luria

cc: David Doubilet

NGS 016/0597

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June 4, 1997

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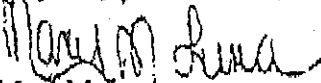
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Very truly yours,


Mary M. Luria

cc: David Doubilet

NGS 016/0597



NATIONAL
GEOGRAPHIC
INTERACTIVE

TOM STANTON
Director, CD-ROM Product Management

May 21, 1997

Fred Ward
7106 Saunders Court
Bethesda, Maryland 20817

Dear Magazine Contributor:

As you know, the Society is making a digital archive of NATIONAL GEOGRAPHIC magazine from 1888 through 1996. *The Complete NATIONAL GEOGRAPHIC: 108 Years of NATIONAL GEOGRAPHIC Magazine on CD-ROM* contains a digital image of every page of the magazine, including advertisements, without any changes, additions, or modifications.

This CD-ROM contains a search engine based on the National Geographic Society proprietary indexing scheme. It does not allow users to cut and paste photographs or text, and while photographs and text can be printed, the quality is inferior to a photocopy of the magazine itself.

The NATIONAL GEOGRAPHIC on CD-ROM was designed as a low-cost reference tool for educators, librarians, students, and families. Producing a CD-ROM of this size is an expensive proposition. We have deliberately priced the 30-volume set at \$199 to make it more affordable for educational institutions and families.

The 40-million-dollar CD-ROM marketing and distribution contract with Mindscape, Inc., that some of you have read about in the media covers 11 titles over a three-year period, including *The National Geographic Photo Gallery*, *Really Wild Animals*, *Geo Bee Challenge*, and *The Complete NATIONAL GEOGRAPHIC: 108 Years of NATIONAL GEOGRAPHIC Magazine on CD-ROM*. These four titles will be released in 1997, and seven additional products are scheduled for release in 1998. This \$40 million represents the total retail sales Mindscape hopes to generate from its distribution arrangement. National Geographic's expected proceeds are a small fraction of this amount; the Society does not expect to do more than break even on these products. Kodak is identified as a sponsor of the project as part of a larger advertising arrangement with the Society.

We are aware that some photographers and writers, whose work has appeared in NATIONAL GEOGRAPHIC and, therefore, will be in the CD-ROM archive, are questioning whether they will be paid for this use of their work. As Director of CD-ROM Product Management, I want to convey to you the Society's position on this matter.

This does not lend itself to a simple or easy explanation, as it is a blend of copyright law, magazine publishing lore, National Geographic contract interpretation, etc., but I will attempt to summarize. Because the CD-ROM archive consists of an exact image of every page as it was originally published, this reissuance (or reprint) is not a "further editorial use" of material such as requires additional payment to the photographers whose contracts commit the Society to payment under those circumstances. The Society holds copyrights in the magazine issues as collective works, and we believe that the continuing copyrights permit the Society to republish its magazine archive in this CD-ROM delivery mechanism. This is comparable to magazines being made available on microfiche.

Beyond this, I don't want to make any blanket statement about individualized contracts. I do want to state, however, that the NATIONAL GEOGRAPHIC on CD-ROM is a unique situation. The Society does pay, where appropriate, for electronic/digital reproduction rights. For example, we will pay photographers for the digital rights to another CD-ROM—*The National Geographic Photo Gallery*—a product which is clearly a "further editorial use" of preexisting material. We have also paid for digital rights on all other interactive products including CD-ROMs and Web site content modules. It has been, and will continue to be, the Society's position to pay fair market value for the content we publish.

Sincerely,

A handwritten signature in black ink that reads "Tom Stanton". The signature is written in a cursive style with a long, sweeping underline that extends to the left.

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& DAVIS

Steel Hector & Davis LLP
200 South Biscayne Boulevard
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March 13, 1997

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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.

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

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Suzanne Ross McDowell, Esq.
March 13, 1997
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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

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■ 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.
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page 5

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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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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.

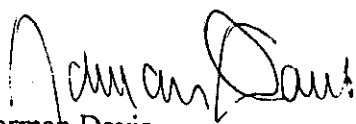
Mr. Greenberg's objective is to resolve *all* of the matters set forth in this letter, completely and with finality, and not on a piecemeal basis. Enclosed is a settlement proposal -- containing two separate options -- that can accomplish that objective. If a settlement cannot be concluded to our client's 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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■ DAVIS

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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.

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305.577.7000
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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 3410 Fax

Key West
305 292 7272
305 292 7271 Fax

Caracas
582 951 4105
582 951 4106 Fax

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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

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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

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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

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Very truly yours,



Norman Davis

Enclosures

bcc: Jerry Greenberg

Option A

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Option B

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