UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CASE NO. 97-3924-CIV-SIMONTON

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

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

Defendants.
_____/

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE CHALLENGES TO ELEVENTH CIRCUIT DECISION

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (together "Greenberg"), submit this reply memorandum in support of their Motion in Limine to Exclude Challenges to Eleventh Circuit Decision.

Greenberg has filed a Memorandum of Law in Opposition to Motion in Limine or for Summary Judgment to Limit the Scope of the Trial on Statutory Damages and to Preclude the Introduction of Any Evidence Regarding Willfulness. Greenberg adopts here the argument in that memorandum.

The defendants' memorandum states that Greenberg seeks "to have this Court preclude Defendants from introducing any evidence as to their state of mind after the Eleventh Circuit

issued its opinion . . . ." Mem. at 2. That greatly overstates the objective of Greenberg's motion. "The state of mind of a defendant," the Society says, "is the critical factor when a jury computes an award of statutory damages . . . ," particularly as to the question of willful infringement. Id. Greenberg does not disagree with a bit of that, so long as the "state of mind" does not rely on a unilateral disavowal of the decision in Greenberg v. National Geographic Society, 244 F.3d 1262 (11th Cir. 2001).

A "good faith" belief about infringing conduct cannot arise from just any set of circumstances; otherwise, "good faith" would spring up like dandelions to nullify court decisions in willfulness disputes. The defendants' state of mind as it pertains to willful infringement must have been reasonable as a matter of law. Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381, 1392 (6th Cir. 1996). In that case, the question was whether the defendant reasonably could believe, in advance of any court decision in the circumstances, that the "fair use" doctrine in copyright law would justify continued use of the copyrighted material. The Sixth Circuit said that such a belief was reasonable in view of the unsettled law on the "fair use" defense.

Here, the defendants' "state of mind" belief -- that their continued use of the Greenberg photographs is not infringing -- is not reasonable as a matter of law because the Eleventh Circuit decided that infringement had occurred in the CNG and because that law has not been overturned. That cannot be changed by attorney Robert Sugarman's statement, in a declaration attached to the defendants' memorandum, that "I therefore respectfully disagree . . . with this Court's determination that Tasini is not contrary to the Eleventh Circuit's decision." Mr. Sugarman's disagreement is acknowledged, but it does not trump Judge Lenard's order of May

29, 2002 which expressly rejected the Tasini contention. In that order, Judge Lenard ruled that Tasini was not a "contrary decision of law by a controlling authority."

> The law of the case doctrine generally binds a court to its own previous decision on issues arising earlier in the litigation as well as to decisions entered by a higher court earlier in the litigation. When, in the interim between the first and the second decisions of the lower court, a higher court to which the court owes obedience issues an opinion directly on point and irreconcilable with the earlier decision, the court is to disregard the law of the case and is to apply the new precedent.

18 MOORE'S FEDERAL PRACTICE, 3d ed. § 134.21[3][b] at 134-53. The defendants asked Judge Lenard to rule that the Supreme Court's Tasini decision negated the Eleventh Circuit's decision in Greenberg, and she entered an order declining to do so.

The Eleventh Circuit decision is the law of this case. Judge Lenard's order is the law of this case. The parties are still litigating issues in this case. The defendants cannot wish away the Eleventh Circuit's decision on any basis within this case. The issue of willful infringement is to be decided in this case, and the Eleventh Circuit's decision must control. What the defendants want to contend in some other case, where law affecting different parties and different facts has not been established, cannot change the legal reality here.

The law of the case doctrine "does not reach questions which were not decided in a former proceeding, but does comprehend 'things decided by necessary implication as well as those decided explicitly.'" Equal Employment Opportunity Commission v. International Longshoremen's Ass'n, 623 F.2d 1054, 1058 (5th Cir. 1980), quoting Carpa, Inc. v. Ward Foods, Inc., 567 F.2d 1316, 1320 (5th Cir. 1978). By necessary implication, the finding of infringement in Greenberg is directly relevant to the question of willful infringement post-Greenberg. The Eleventh Circuit found that the CNG product infringed Greenberg's photographs. That is the

law. The continued infringement of copyrights in the photographs, contrary to that law, must lead inevitably to a finding of willful infringement. The defendants have not produced a single court decision supporting their proposition that a good faith belief can overturn a decision by a federal appellate court that is adverse to them. We have found none.

If the Court should decide that the jury must hear the defendants' evidence of a good faith belief that the Eleventh Circuit's decision was wrong, the Court should instruct the jury that that decision is controlling as a matter of law without regard to the decision of any other court. Said another way, if the defendants' reasonableness as to their state of mind is a jury question, the jury must be informed that the ignoring by the defendants of a decision in this case by an appellate court cannot be reasonable as a matter of law.

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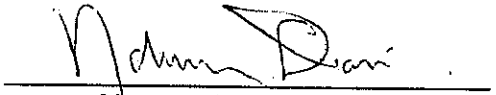
Certificate of Service

I hereby certify that a copy of the foregoing memorandum was served by mail on Edward Soto, Esq., Weil, Gotshal & Manges LLP, 701 Brickell Avenue, Suite 2100, Miami, FL 33131; and on Stephen N. Zack, Boies, Schiller & Flexner LLP, 2800 Bank of America Tower, 100 Southeast Second Street, Miami, FL 33131; and by facsimile and mail on Robert G. Sugarman, Esq., Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York NY 10153 this 22nd day of January, 2003.



Norman Davis