

# PAUL KILMER'S DEPO.

Jerry,

Here are about 60 pages of excerpts from Paul Kilmer's deposition. Andy and two others deposed him in Dec. There is a lot of material in here of interest to you so I read through the whole 175 pages to pull out the gems for you.

Read it on screen if you like or print out what you like.... you will find many areas of interest I'm sure. The thing is huge, even this portion of it, but the NGS direction is so clear that you will gain enormously by digesting it all.

Fred

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19 Q. Did you, when you turned the program  
20 on, notice any opening messages or any opening  
21 videos?

22 A. Yes, there was an opening sequence.

23 Q. Which sequence are you referring to?

24 A. I think there may have been two. I

25 think there was one that I would call an

28

1 Kilmer  
2 advertisement by, I think, Kodak. And there was a  
3 second one that has subsequently been referred to  
4 by some as a montage. And it's, I believe, some  
5 covers of prior National Geographic magazines.

6 Q. How do you refer to it?

7 A. We can call it the montage. That  
8 seems to be a common way to talk about it.

9 Q. You'll agree with me that microfilm  
10 or microfiche do not have opening montages?

11 MR. SUGARMAN: I object to the form.

12 A. They don't have opening montages.  
13 They do have occasional opening bits, if you will.

14 Q. Okay. And you'll also agree with me  
15 that microfilm or microfiche don't have Kodak  
16 advertisements with music and sound?

17 MR. SUGARMAN: I object to the form.

18 A. It would be a physical impossibility,  
19 so you are right.

20 Q. In fact, microfilm or microfiche does  
21 not have music or sound, correct?

22 A. It's the nature of the medium, it  
23 could not.

24 Q. And do you know whether the CD 108  
25 that you used had a link to the Internet?

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1 Kilmer

2 A. I don't recall.

3 Q. Or a link to National Geographic's

4 website?

5 A. I don't recall. If it does, it's  
6 nothing that I ever had occasion to use, but I do  
7 not, you know, recall.

=====

24 Q. And were you aware as well at that  
25 time that stock images would be used in the CD

41

1 Kilmer  
2 108?  
3 A. I was not advised of that at that  
4 time, no.

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5 Q. Before I ask you questions about the  
6 business plan in front of you, let me just jump  
7 ahead, if I could, and ask you about just one  
8 aspect of your second opinion, which is dated  
9 February 21st, 1997, which I hand you now. We'll  
10 come back to more questions about this opinion  
11 later.

12 Take a look, if you will, at the last  
13 paragraph of this -- or the next to the last  
14 paragraph of this opinion, on the second page, and  
15 see if that helps you remember or refresh your

16 recollection as to when you learned that the CD  
17 108 was going to be marketed to consumers as  
18 opposed to institutions that traditionally use  
19 microfilm?

20 A. My testimony would be the same. I  
21 believe this -- the statement here, that we were  
22 not aware it would be a consumer product, is in  
23 error, as I reflected on my notes.

24 Q. Is in error?

25 A. Is in error.

42

1 Kilmer

2 Q. In other words, you did know back in  
3 1996 that the CDs would be distributed to  
4 consumers as opposed to educational institutions?

5 A. Yes.

6 Q. Now, did you tell National  
7 Geographic, after you sent this February 1997  
8 opinion, that you had made that error?

9 A. No. I didn't realize the error had  
10 been made until I was preparing for this  
11 deposition.

12 Q. Now you said, reflecting on your

13 notes. What notes are you referring to?

14 A. Specifically, the exhibit we just  
15 discussed from Ms. Dupre prior to my finalization  
16 of the January/February 1996 letter.

17 Q. And where in that exhibit does it  
18 refer to the commercial or consumer aspect of the  
19 product?

20 A. In the final paragraph it states,  
21 "The user will be able to print the screen and  
22 apparently color printers are now available at a  
23 price that can attract the home user." The home  
24 user.

25 Q. I see. So did that -- did you

43

1 Kilmer  
2 discuss that aspect of what Ms. Dupre said with  
3 her?

4 A. No, I did not. It really was not a  
5 focus of my initial analysis in the  
6 January/February 1996 time frame.

7 Q. So is it fair to say that you  
8 assumed, based on what she said, that this product  
9 would be sold to consumers?

10       A.  As I say, I really didn't focus on  
11 that language and I didn't realize I was even  
12 aware of the home use of the product until the  
13 February 1997 time frame.  I had not focused on  
14 that particular sentence that I just read from  
15 Exhibit 219 until I was preparing for this  
16 deposition.

17       Q.  Now, having prepared for this  
18 deposition, having seen other documents, having  
19 prepared a second opinion we just referred to  
20 briefly, do you believe that any of the  
21 conclusions that you reached in your initial  
22 opinion were incorrect?

23       A.  No, I don't.

24       Q.  Are you aware of the Greenberg  
25 decision?

44

1                   Kilmer

2       A.  Yes, I am.

3       Q.  And I assume you've read that?

4       A.  Yes, I have.

5       Q.  And that hasn't changed your view at  
6 all about the correctness of your opinion?

NOT PUBLICATION  
QUALITY REPROD

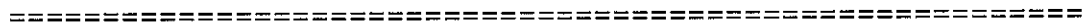
7 A. Of course, I didn't have the benefit  
8 of Greenberg when I was forming my opinion.

9 Q. So having had that benefit, have you  
10 now changed your opinion?

11 A. No, I have not.

12 Q. And I assume you read other  
13 decisions, including the Supreme Court's  
14 determination in the Tasini case. That hasn't  
15 changed your opinion either, has it?

16 A. That has not.



18 Q. I think we went through before that  
19 Ms. Dupre gave you the memo which was 219 in which  
20 she did tell you that -- she says here, "As yet  
21 unclear is the quality of the image that will be  
22 available." And then she continues, "No way will  
23 it be publication-quality reproduction."

24 So is that where you got the  
25 information that you referred to here on the

1 Kilmer  
2 bottom of the page 2?

3 A. No. I recall having a conversation

4 prior to writing the February 3rd letter, February  
5 3rd, 19 -- 1996 letter. And it may have been with  
6 Ms. Dupre, but it certainly was confirmed to me  
7 that it was not going to be a publication-quality  
8 reproduction.

9 Q. Have you ever printed anything from  
10 the CD 108?

11 A. Yes, I have.

12 Q. And is it your view, having done so,  
13 that the reproduction is not publication quality?

14 A. Yes, it's not reproduction  
15 publication quality.

NOT REPRODUCTION  
PUBLICATION  
QUALITY!

=====

14 A. No, I have never seen this document.

15 Q. Now this is a memo from a Charles  
16 McCarry, who was, I believe, the text editor at  
17 National Geographic, and he says in his first  
18 paragraph, "Our invariable practice has been to  
19 hand over the entire fee for Readers Digest  
20 reprints of the Geographic articles to the  
21 author."

22 Did Ms. Dupre tell you that that was  
23 the invariable practice at the time you wrote your  
24 1996 letter?



25 A. I don't believe so, no.

52

1 Kilmer

2 Q. Now, Mr. McCarry goes on in the  
3 second paragraph and says, "Where freelancers are  
4 concerned, we have no choice in the matter."

5 Ms. Dupre didn't tell you that  
6 either, did she?

7 A. She didn't allude to that, no.

8 Q. Taking a look at your opinion, again,  
9 on page 4, you say in the first full paragraph,  
10 "On balance," and then go on to say, "the fact  
11 that NGS is adding nothing new to the articles,"  
12 et cetera.

13 A. Uh-huh.

14 Q. Do you still believe that to be true?

15 A. Yes.

16 Q. I thought we discussed before that  
17 there are at least three or four introductory  
18 messages that you and I see when we turn the  
19 product on that are added to the product.

20 A. It's not added to the product. I'm  
21 discussing here specifically the articles. Having

22 flipped through the 108 years in several parts, I  
23 have found nothing new added to any of the  
24 articles.

25 Q. But the articles are contained in a

53

1 Kilmer  
2 piece of software, are they not?

3 A. Contained in -- well, they are  
4 contained on a CD-ROM.

5 Q. Which is, would you say -- okay, they  
6 are contained on a CD-ROM. And the CD-ROM has  
7 elements that were never present in the magazine,  
8 correct?

9 A. Correct.

10 Q. And those elements added are not  
11 referred to in your letter, are they?

12 A. No.

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3 Did Ms. Dupre ever tell you that with  
4 respect to electronic products, "included but not  
5 limited to CD-ROMs, NGS shall seek permission and  
6 pay a negotiated fee for such use"?

7 A. I have never seen this provision  
8 before nor have I had it discussed with me by

9 Ms. Dupre.

10 Q. Now did Ms. Dupre tell you that --  
11 this is back in 1996 -- that photographers,  
12 including the outside photographers whose  
13 contracts you reviewed, and I'm focusing on  
14 paragraph 13B, had in some cases received an  
15 assignment of their copyright back?

16 A. Yes. Not an assignment of their  
17 copyright but an assignment of National  
18 Geographic's copyright.

19 Q. An assignment of the copyright work  
20 that they had created, which they had given to  
21 Geographic was then returned to the creator?

22 A. Right. The copyright in which  
23 National Geographic was the author had been  
24 assigned to the photographer who had originally  
25 taken the work, yes.

55

1 Kilmer

2 Q. So you were aware that in some cases  
3 National Geographic had assigned copyright back to  
4 the photographer at the time that you wrote your  
5 1996 opinion?

6 A. Yes.

7 MR. SUGARMAN: I object to form.

8 A. As to form, that would be inaccurate,  
9 but National Geographic had assigned to  
10 photographers copyrighting works that the  
11 photographers had taken, yes.

12 Q. And did you express any opinion on  
13 whether National Geographic could reproduce works  
14 whose copyright it had assigned back to the  
15 photographer?

16 MR. SUGARMAN: I object to the form.

17 Q. When you wrote your 1996 letter?

18 A. Not as to any product other than the  
19 108 year CD-ROM.

20 Q. Let's deal with the 108. Let's  
21 assume that a photographer had created a  
22 photograph for the 108, National Geographic owned  
23 the copyright, and then assigned it back to the  
24 photographer.

25 MR. SUGARMAN: You used the word

56

1 Kilmer

2 "back."

3 Q. Assigned it to the photographer.

4 Did you express an opinion in 1996  
5 whether Geographic could use that copyright in the  
6 CD 108?

7 A. Not as to all photographers I didn't,  
8 no.

9 Q. I'm just speaking about the  
10 photographer who had received an assignment of  
11 copyright from National Geographic.

12 A. The only opinion I delivered was in  
13 regard to section 13 of one of the photographers'  
14 agreements. That was the only thing I reviewed  
15 and the only thing I provided an opinion  
16 regarding.

17 Q. Now, were you aware of any industry  
18 standard in 1996 with respect to whether repayment  
19 should be made when photographers' works were  
20 reused in the CD 108?

21 A. I was not, no.

22 Q. Let me show you what was marked in an  
23 earlier deposition as Plaintiffs' 51 and ask you  
24 if you've ever seen it before.

25 Now this is a memo from a Maura

1 Kilmer

2 Mulvihill. I assume you know her?

3 A. Yes, I met her, yes.

4 Q. Did you speak with her in 1996 before  
5 you wrote your opinion?

6 A. No.

7 Q. So you were not aware of the  
8 conclusion that she reached in this document that  
9 appears in the next to the last sentence of this  
10 paragraph, where she states, "I told them that  
11 this was not the industry standard"?

12 A. I was not aware of her opinion, no.

13 Q. Have you ever seen this document?

14 A. No, I have not.

15 Q. Were you aware in 1996 whether  
16 Geographic, when it licensed works that it owned  
17 copyright to, to others for use in CD-ROM, charged  
18 for that CD-ROM use?

19 MR. SUGARMAN: I object to the form.

20 THE WITNESS: You have to read that  
21 one back to me, I'm sorry.

22 (Record read)

23 A. I don't recall.

24 Q. Let me show you another memo from  
25 Ms. Mulvihill, which is Plaintiffs' 52, and ask

58

1 Kilmer  
2 you if you've ever seen it before.

3 A. No, I have not.

4 Q. Now just focus, if you can, on the  
5 second paragraph. It's the third sentence, which  
6 begins, "I routinely refuse publishers..." Read  
7 that sentence to yourself, please.

8 A. Yes.

9 Q. Ms. Mulvihill states there. And I'm  
10 paraphrasing, "I routinely," and then she goes on,  
11 charge for use of images on CD even if it is the  
12 same title and product as the print version.

13 Were you aware of that practice in  
14 1996?

15 A. No, I was not.

16 Q. Are you aware of it today, other than  
17 having seen this memo?

18 A. No, I'm not.

=====  
12 Q. So let's turn our attention now to

13 1997. When was the first time that the subject of  
14 the CD 108 reappeared?

15 A. In January of 1997.

16 Q. What happened then?

17 A. I was asked at that point in time to  
18 do an assessment of whether if National Geographic  
19 were successfully sued for copyright infringement,  
20 what the nature and extent of their monetary  
21 and -- I guess just monetary exposure might be. I  
22 believe that was all.

23 Q. And who gave that request to you?

24 A. Again, I believe -- I know it came  
25 from the offices of general counsel. I can't

65

1 Kilmer

2 remember whether it was Susan Dupre or someone  
3 else.

4 Q. What was said other than, give me an  
5 assessment of statutory damages?

6 A. I was provided with some numbers, a  
7 number of photographs that might be involved in a  
8 damage assessment if National Geographic were to  
9 be found guilty of copyright infringement over the



10 108-year CDs.

11 Q. Why was Geographic seeking this  
12 information from you?

13 A. They wanted to know what their  
14 monetary exposure might be in the event they were  
15 successfully sued for copyright infringement. It  
16 was part of a risk analysis that they were  
17 conducting.

18 Q. Why did Geographic think they would  
19 be sued about this project?

20 MR. SUGARMAN: I object to form.

21 A. My understanding, they had received  
22 either telephone calls or written communication of  
23 some kind from photographers, raising questions,  
24 issues and even, I would say, objections to the  
25 prospect of the 108-year CD-ROMs being created and

THEY RECEIVED  
CALLS & LETTERS  
FROM PHOTOGRAPHERS

66

1 Kilmer

2 distributed.

3 Q. But I take it that you did not look  
4 into the bona fides of those claims? Instead you  
5 were simply focused on determining what the  
6 exposure might be, correct?

7 A. That's correct.

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4 Q. The next page refers to various  
5 numbers. Now, I take it your reference on the  
6 right to Maura is a reference to Ms. Mulvihill,  
7 and I guess is what she's saying there, "If  
8 150,000 units are sold, it's a hit in multimedia."  
9 Is that what she's saying?

10 A. I'm a little lost as to where you  
11 are.

12 Q. Right on the top of the page.

13 A. Yes, that was her comment.

14 Q. Did anybody disagree with that?

15 A. Did anyone --

16 Q. Disagree with that?

17 A. Disagree. No.

18 Q. Further on on page 3 there is a  
19 reference to possible suits from Jerry Greenberg  
20 and Fred Ward. Did anyone indicate why those  
21 persons might sue?

22 A. To the best of my recollection, they  
23 were persons who had contributed articles or  
24 photographs, I believe photographs, to the  
25 National Geographic magazine and they were

JERRY GREENBERG  
& FRED WARD

1                   Kilmer  
2   questioning whether the CD-ROM could be produced,  
3   distributed and sold without their consent or  
4   payment to them. That's the best of my  
5   recollection.

6       Q.   Did anyone comment on the merits of  
7   their possible claims at that meeting?

8       A.   Not that I recall. Because here  
9   again, my focus in this meeting was the nature and  
10   extent of damages, really, if there were going to  
11   be damages. So I don't recall a discussion of a  
12   liability issue.

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24       Q.   Now, next there is a reference there  
25   to CD-ROM for textbooks. What's that refer to, if

1                   Kilmer  
2   you know?  
3       A.   My recollection is that I was advised  
4   and the group was advised, and I can't recall by  
5   whom, that if images that National Geographic  
6   Society controlled were used in textbooks, that

7 were also available in part or in whole on CD-ROM  
8 containing the same image, that there was an  
9 additional fee charged for the CD-ROM used in that  
10 context.

11 Q. Was any information given as to what  
12 Geographic charged for that CD-ROM use per image?

13 A. Not that I recall.

14 Q. The top of page 5 refers to the  
15 danger period for text. What did you mean by  
16 that?

17 A. Apparently, what I was told was that  
18 the National Geographic's contracts for text usage  
19 of independent contractors had changed over time,  
20 and that there was a period of 20 to 25 years  
21 where there was at least a question in some  
22 people's minds as to the exact extent of National  
23 Geographic's rights and use of articles that had  
24 been created for the magazine by independent  
25 contractors.

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3 Q. I know you weren't asked to opine on  
4 that subject, but when you saw those contracts,  
5 you realized that because they provided for  
6 assignment of copyright to the author of the

7 article after a 60-day period, that there was a  
8 risk that Geographic was running if it used those  
9 articles in the CD, correct?

10 MR. SUGARMAN: I object to the form.

11 A. Yes.

12 Q. And you conveyed that feeling or that  
13 opinion to Geographic after you looked at those  
14 contracts?

15 A. Yes.

16 Q. What did Geographic say in response?

17 A. Well, after I delivered my thoughts  
18 to them, they were, I believe, under the  
19 impression that they -- that those contracts were  
20 much -- were going to be treated much like the  
21 photographers' contracts, and my impression was  
22 that it didn't alter their view that they could  
23 lawfully proceed with the 108-year CD-ROM.

24 Q. Why did Geographic believe that text  
25 contracts would be treated like the photographers'

79

1 Kilmer

2 contracts?

3 A. I'm not certain.

4 Q. And who said this to you, that they  
5 would be treated the same?

6 A. I believe it was Susan Dupre with  
7 whom I had that discussion.

8 Q. But she gave you no basis or reason  
9 why she felt those two kinds of contracts, text  
10 and photography, would be treated the same?

11 A. I can't recall. I'm sorry. I can't  
12 recall.

13 Q. Continuing on the memo here we've got  
14 in front of us, you say, "Up to 1976 we appear to  
15 have all rights in text," and then you go on, "to  
16 1996 contracts we have electronic rights."

17 What about the period between 1976  
18 and 1996?

19 A. I believe this was the period of time  
20 referred to as the quote-unquote danger period in  
21 the preceding paragraph.

-----  
15 Q. Now did Ms. Dupre ever tell you about  
16 Geographic's past practices in 1996 with respect  
17 to its payment for additional use?

18 A. Not that I recall.

19 Q. Did she ever tell you that there had  
20 been a long series of payments to photographers

PREVIOUS  
/  
PAYMENTS

21 when their photographs had been additionally used  
22 for editorial purposes or advertising purposes by  
23 National Geographic or third parties?

24 A. I was advised at some point in time,  
25 and I can't tell you whether it was Ms. Dupre or

81

1 Kilmer

2 someone else, but I had been advised prior to  
3 January of 1996 that some payments were made to  
4 some photographers when their works were licensed  
5 to others, other than National Geographic Society.

6 Q. What about when Geographic used their  
7 products, were you ever advised whether it made  
8 payment to photographers?

9 A. At some point in time, and I believe  
10 it was in 1996, probably early '96 but I can't  
11 give you a date, I was advised that if a  
12 photograph -- depending on the contract that the  
13 photographer entered into, on occasion  
14 photographers will be reimbursed if the same  
15 photograph were to appear in National Geographic  
16 World, for example, as it appeared in the  
17 magazine. I remember having a discussion about

18 that, but I can't give you a time frame, I'm  
19 afraid.

20 Q. And that discussion was with  
21 Ms. Dupre?

22 A. I believe so. But it probably was  
23 not in the context of the 108-year CD-ROM.

24 Q. It was some other context?

25 A. Yes.

82

1 Kilmer

2 Q. Now let me show you a letter that was  
3 written by a Robert Gilka. Did you ever have any  
4 contact with Mr. Gilka?

5 A. Not that I recall.

6 Q. Let me show you --

7 MR. BERGER: Actually, let's mark  
8 this as the next exhibit, which would be  
9 Plaintiffs' 228.

10 (Whereupon, letter from Robert Gilka  
11 marked Plaintiffs' Exhibit 228 for  
12 identification, as of this date.)

13 Q. I take it you have never seen 228  
14 before?



15 A. No, I haven't.

16 Q. Going back to your notes of the 2/7  
17 meeting, just a couple of questions on page 5, I  
18 believe -- page 6.

19 The middle of the page, you refer to  
20 clearing rights payment and then there is, I  
21 think, a number of \$15 million.

22 A. Uh-huh.

23 Q. What is after that number?

24 A. I think 40,000 units gross is what  
25 that says.

83

1 Kilmer

2 Q. And what does that mean?

3 A. Would you mind if I reviewed the  
4 preceding content, just to see if it helps to  
5 refresh my recollection? Because I don't  
6 immediately recall.

7 Q. Okay.

8 A. I really don't immediately recall. I  
9 know it was in the context of trying to assess  
10 actual damages as opposed to statutory damages,  
11 but I can't tell you what precisely the reference

12 is to.

13 Q. Are you saying here that if the  
14 product sold 40,000 units, that there might be an  
15 actual damage payment assuming liability of \$15  
16 million?

17 A. I don't believe that was what  
18 Ms. Mulvihill had indicated. But I am just too  
19 hazy right at the moment to tell you what exactly  
20 she meant by that.

21 Q. Well, did she mean that if rights  
22 were to be cleared, that the payment might have to  
23 be as much as \$15 million to clear those rights?

24 A. Although a possibility, I can't  
25 definitively tell you at this moment.

=====

3 Q. Which are stock photos?

4 A. That's what I was told, all stock  
5 photos, as it says there.

6 Q. So why, if you know, were the  
7 one-time use images purchased separately  
8 categorized here?

9 A. There was a concern at the Society  
10 that they might have some copyright exposure on  
11 the 108-year CD-ROM for a certain number of stock  
12 photo images, which they had indicated to me were

13 1629 in number, of which Ms. Dupre advised me were  
14 licensed for quote-unquote one-time use.

15 Q. Well, did you share that concern?

16 A. I had not reviewed the agreement, so  
17 I had no idea if the concern was legitimate or  
18 not.

19 Q. Well, you had opined before that the  
20 CD-ROM was not another use, correct?

21 MR. SUGARMAN: I object to the form.

22 A. Right, yes, that's correct.

23 Q. And --

24 A. Not a further use.

25 Q. Not a further use.

97

1 Kilmer

2 A. Right. I don't know that I ever  
3 opined as to whether it was another use or not,  
4 because that was not the contract language I was  
5 looking at.

=====

16 Q. So you determined that the CD-ROM was

17 not a further use, correct?

18 A. Right.

19 Q. And so if images had been purchased  
20 for one-time use and there was not going to be a  
21 further use, as you opined, in the CD-ROM, then  
22 those images were not deserving of further  
23 payment, correct?

24 MR. SUGARMAN: I object to the form.

25 A. Are you asking me how would I believe

98

1 Kilmer  
2 now or what was said then?

3 Q. Well, let's talk about then and then  
4 we'll talk about now.

5 A. I didn't render an opinion on that at  
6 the time that I recall. I was not asked to review  
7 those agreements, so I didn't have the precise  
8 language in front of me. All that was said to me  
9 was there was concern about this number of images  
10 and if, if the Society were to be found to have  
11 infringed copyright in this number of images, what  
12 was the potential exposure in terms of damages, as  
13 I indicate down here, and attorneys' fees. That's  
14 all I was asked and that's all I remember giving  
15 an opinion regarding.

16 Q. Now with respect to -- you said then

17 and now. Let's talk about now.

18 Knowing what you know now and knowing  
19 that these are images purchased from stock houses  
20 for one-time use that were reused in the CD-ROM  
21 project, were those images deserving of further  
22 payment?

23 A. I don't believe so.

24 Q. Did Mr. Radcliffe agree with you?

25 A. I believe he took a very conservative

99

1 Kilmer

2 position and I have seen, at least as written, one  
3 of his written opinions, I don't know if there is  
4 more. I have seen one of his written opinions and  
5 if I recall correctly, he was concerned that the  
6 Society did have infringement liability exposure  
7 as to the stock photographs. I can't remember  
8 exactly his rationale at this point, though.

9 Q. The question was did he agree with  
10 you that the images purchased for one-time use  
11 were not deserving of further payment?

12 MR. SUGARMAN: I object to the form.

13       A.   I think he took a contrary view.

14       Q.   So he disagreed?

15       A.   I think so.

16       Q.   Now, sitting here today and

17       examining, let's assume a hypothetical license

18       agreement in front of you from a stock house that

19       says, we license to you, Mr. Kilmer, an image to

20       use in your magazine for one-time use, and then

21       you decide you're going to use that image in a

22       CD-ROM project of the kind you have here, are you

23       telling me, sitting here today, that you believe

24       that such a CD-ROM product is not a further use?

25       A.   Yes.

100

1                   Kilmer

2       Q.   Why is that?

3       MR. SUGARMAN: He certainly can

4       answer, but I object because I don't

5       believe that this basic line of

6       questioning is relevant to anything.

7       Because what Mr. Kilmer might believe,

8       sitting here today, is irrelevant. The

9       judge will decide, sitting here today,

10 what is or isn't the law of this case.

11 Mr. Kilmer is here to talk about his  
12 advice to Geographic and the basis for  
13 that advice. But cognizant of the dangers  
14 of directing witnesses not to answer, I  
15 won't, but that's my position and view.

16 MR. BERGER: Also since Mr. Kilmer, I  
17 assume, still represents National  
18 Geographic --

19 Correct?

20 THE WITNESS: Yes.

21 MR. BERGER: -- he may have at some  
22 point in time passed on his rationale to  
23 Geographic and that would then go to  
24 Geographic's conduct, possible willful  
25 conduct in the course of its continuing

101

1 Kilmer  
2 sales of its product. So I'm not going to  
3 get involved too much more, but I think  
4 it's relevant for lots of reasons.

5 Since we don't have an instruction,  
6 and I appreciate that --

7 Q. Tell me why, Mr. Kilmer, you believe  
8 that in my hypothetical, that use in your CD-ROM  
9 project of a license -- of an image licensed to  
10 you for one-time use is not a further use?

11 A. I believe under section 201C of the  
12 Copyright Act, that use of that image in the  
13 context of the original publication would be  
14 merely use for quote-unquote that work and would  
15 not be a work -- a use beyond the context  
16 permitted by Section 201C of the Copyright Act.

17 MR. BERGER: Could I have the answer  
18 read back, please?

19 (Record read)

20 Q. Have you so advised National  
21 Geographic, at any point in time after you wrote  
22 your second opinion, of the opinion you just gave  
23 me?

24 MR. SUGARMAN: You can answer the  
25 question.

102

1 Kilmer

2 A. No.

=====



NATIONAL  
GEO. ENTERPRISES

9 Q. Let me show you what was marked at an  
10 earlier deposition as Plaintiffs' 118 and ask you  
11 if she ever gave that to you. That's a 1997  
12 Geographic Mindscape marketing plan?

13 A. No, she did not.

14 Q. You conclude that the risks of the  
15 project "have clearly increased."

16 Is it fair to say that they increased  
17 for the reasons that you set forth in this  
18 paragraph on page 2, or were there other reasons  
19 that also increased the risk of the CD-ROM that  
20 you didn't cover in this paragraph?

21 A. My statement that it was perceived  
22 the risk had increased was based solely upon the  
23 stock photo issue.

=====

22 Q. Now, were you aware that Geographic  
23 had transferred any rights in the magazine to its  
24 for-profit subsidiary, National Geographic  
25 Enterprises?

108

1 Kilmer

2 A. No.

3 Q. Did anyone ever show you a license

4 agreement between the two? Let me show you what's  
5 been marked as Plaintiffs' 20, a trademark and  
6 copyright license agreement, and ask you if you've  
7 ever seen it before?

8 A. No, I do not believe I have ever seen  
9 this or a copy of this previously.

10 Q. Had anyone ever told you at any time  
11 that National Geographic had transferred whatever  
12 rights it had in the copyrights in the magazine to  
13 a for-profit subsidiary?

14 A. No.

15 Q. So you're learning about that for the  
16 first time today?

17 A. That's correct.

18 Q. Had you ever seen a distribution  
19 agreement between the for-profit subsidiary,  
20 National Geographic Enterprises, and a company  
21 called Mindscape?

22 A. No.

=====

16 Q. Well, then give me a fair  
17 characterization instead.

18 A. It was my impression that National  
19 Geographic had received, already, letters of  
20 concern and objection from photographers, also

TRANSFER OF  
© TO NGENT.

21 from stock photo houses, as to the idea of  
22 creating, distributing and selling 108-year  
23 CD-ROM. And Geographic wanted to know at this  
24 time if they were found guilty of copyright  
25 infringement, what the statutory damage exposure

110

1 Kilmer

2 would be in that situation.

3 Q. Would you characterize your opinion  
4 as kind of an in terrorem letter as to possible  
5 damages?

6 A. Could you explain that? I'm sorry.

7 Q. Well, in terrorem means a warning.

8 A. My letter I don't think was intended  
9 as a warning so much as an explanation of the  
10 extent of the potential damage risk. There were  
11 those at Geographic who had obviously a concern  
12 that if they were facing hundreds of thousands or  
13 millions of dollars in damages, that that might be  
14 a factor going into -- whether or not the project  
15 was completed.

16 Q. Let me show you Ms. Dupre's letter to  
17 Mr. Sugarman which was marked at another

18 deposition as Plaintiffs' 71. Take a look at the  
19 second point in that letter.

20 A. Okay.

21 Q. Do you disagree with Ms. Dupre's  
22 characterization of your letter as kind of an in  
23 terrorem letter re possible damages?

24 A. As a warning letter of possible  
25 damages, I wouldn't disagree with that

111

1 Kilmer

2 characterization. I think it was a warning letter  
3 as to possible -- the possible amount of damage  
4 they might be facing.

5 Q. I take it that you know a  
6 Ms. Hohenlohe?

7 A. Yes. Nora Hohenlohe.

8 Q. I guess it's spelled  
9 H-o-h-e-n-l-o-h-e. And Ms. Hohenlohe sent you  
10 some documents at some point in time, did she not?

11 Let me show you what's been marked as  
12 Plaintiffs' 64 and ask you if these are the  
13 documents you received from Ms. Hohenlohe in April  
14 1997?

15 MR. SUGARMAN: I don't see  
16 Mr. Radcliffe's reply in the package.

17 MR. BERGER: Correct. It was not  
18 part of the document, but I have it as  
19 well to give you.

20 A. This is part of what she sent me,  
21 yes.

22 Q. Other than Mr. Radcliffe's response,  
23 everything else that she faxed to you is there,  
24 correct?

25 A. Yes. It is, yes.

112

1 Kilmer

2 Q. I didn't mean to confuse you on that.

3 I agree it's not there.

4 My question was simply did she send  
5 you these documents.

6 Now why did Ms. Hohenlohe do so?

7 A. I think because -- if I remember  
8 correctly, it was because of the complaint -- a  
9 complaint that had been received, not a legal  
10 complaint, I should take that back. An objection  
11 the Society had received, and I can't just

12 remember from whom, but I think it was an  
13 objection they had received or an inquiry they had  
14 received from a stock photo house as to how stock  
15 photos were going to be treated in the 108-year  
16 CD-ROM.

17 Q. She's sending you here writers'  
18 contracts. That's what she indicates in her fax  
19 cover sheet. So does that help you remember why  
20 you received these documents?

21 A. It's my recollection that at this  
22 point in time, in April of 1997, they had  
23 advised -- Geographic -- National Geographic  
24 Society, through Susan Dupre, had advised me they  
25 had retained Mark Radcliffe of the Gray Cary firm

113

1 Kilmer  
2 to render a further opinion on some of the  
3 copyright issues. Nora felt that I should have in  
4 front of me some of the materials relevant to what  
5 they were going to ask Mark Radcliffe and also  
6 wanted to specifically ask me about the writers'  
7 contracts and what my opinion of those was in  
8 terms of using certain writings in the 108-year

9 CD-ROM.

10 Q. So was National Geographic asking for  
11 another opinion from you?

12 A. They really weren't, other than an  
13 impression, if you will. Not a written opinion  
14 but they wanted an impression or opinion given to  
15 them orally, over the phone, as it turned out.

16 Q. They wanted further advice?

17 A. Right.

18 Q. And you read the writers' contracts?

19 A. Uh-huh.

20 Q. And as a result, what advice did you  
21 give?

22 A. My recollection is that I indicated  
23 it would require a 201C analysis that I had not  
24 done. And I said basically, sitting there, with  
25 201C and these contracts with -- I think it is

114

1 Kilmer

2 Mr. Theroux and Mr. Conniff, C-o-n-n-i-f-f.

3 Q. Is Mr. Theroux the same name you  
4 mentioned before?

5 A. Right, Paul Theroux, the writer on

6 China, and in particular on this instance, that  
7 off the cuff -- and here again, without the  
8 benefit of very much judicial decision-making at  
9 the time, I thought these would fit within 201C,  
10 but I did not perform any extensive legal research  
11 on that issue.

12 Q. What was your reasoning for why they  
13 would fit?

14 A. That the project as it had been  
15 described to me, 108-year CD-ROM project as it had  
16 been described to me, was a purely linear  
17 page-for-page reproduction of the magazine, and  
18 that as a consequence, it was either the work or a  
19 revision of the work as stated in 201C.

20 Q. And the fact that the CD had a number  
21 of additions that we discussed before, the opening  
22 montage and the opening global video and the Kodak  
23 message, et cetera, that didn't change your  
24 analysis at all as to whether this was a linear  
25 reproduction?

115

1 Kilmer

2 A. No, it did not change my analysis.



=====

7 Q. Did you ever talk to Mr. Radcliffe

8 about this opinion?

9 A. About this opinion, I don't believe

10 so, no. I talked to Mark about other things, but

11 I don't think I ever talked to him about this

12 opinion.

13 Q. You know Mr. Radcliffe?

14 A. Yes.

15 Q. And you've had professional dealings

16 with him of some kind?

17 A. Occasionally, yes.

18 Q. Now he concludes on the second page,

19 the first full paragraph, next to the last

20 sentence, "As discussed above, none of the

21 agreements," which were sent to him, "or any

22 reviewed appear to permit this use in the CD

23 project."

24 Did you disagree with that opinion?

25 A. I don't know that I ever assessed

117

1 Kilmer

2 that question. Do I now disagree with that

3 opinion?

4 Q. Weren't you asked to assess that  
5 opinion when you received this letter?

6 A. I may have been.

7 Q. Isn't that why Geographic sent it to  
8 you, so you could look at it and give Geographic  
9 your advice about the bona fides of that opinion?

10 A. And I have to admit by the time I  
11 received the April 9th communication, I had been  
12 advised I was basically out of the loop on this  
13 project. I can't say my advice was being sought  
14 any longer in terms of using my advice on a going  
15 forward basis.

16 My recollection is I did not review  
17 this in any great detail. As indicated in my  
18 earlier letter in February of '97, there was  
19 already concern about the stock houses at the time  
20 I wrote that. I was certainly aware of that, but  
21 I don't recall reviewing this in any great detail.  
22 The only thing I recall saying is, as I indicated  
23 before, that I believed that based on my reading  
24 of 201C, that National Geographic, despite Mark's  
25 letter, had a defense. And that's really all I

1 Kilmer

2 remember.

3 Q. Did you tell Geographic that  
4 Mr. Radcliffe was wrong?

5 A. I don't -- no, I don't believe I said  
6 it in so many words. As I said, my recollection  
7 is that I simply said, I don't think Mark took  
8 into consideration 201C. I think the Society has  
9 a defense, do you want me to look at that issue?  
10 And they said no, hold off on that. And that -- I  
11 mean that's my recollection.

12 Q. Why were you out of the loop?

13 A. I'm not altogether sure. It was  
14 never -- it really was never explained to me.

15 Q. Who told you that you were out of the  
16 loop?

17 MR. SUGARMAN: I object to the form.

18 A. I'm trying to think. No one said,  
19 you're actually out of the loop.

20 MR. BERGER: What's wrong with the  
21 form?

22 MR. SUGARMAN: You are assuming  
23 someone told him that.

24 Q. How did you learn that you were out  
25 of the loop?

119

1 Kilmer

2 A. I think in --

3 MR. SUGARMAN: The same objection.

4 You can answer the question.

5 A. It's fair to say that in April, when  
6 I learned that Mark had been brought in and I had  
7 not been consulted since February of '97, that I  
8 concluded at that point that I was no longer  
9 leading the charge, as it were, in analyzing the  
10 copyright on the 108-year CD-ROM project.

11 Q. Did you know that as of early  
12 February, that Mr. Sugarman was about to be  
13 brought in?

14 A. No, I did not.

=====

10 Q. Let's just walk through these notes  
11 for a second, if we could.

12 I notice there is a reference here to  
13 breakeven product. What do you mean by that?

14 A. My recollection of that is that at  
15 the time of this discussion on April 10th, the

16 Society had actually scaled back its expectations  
17 for the sale of this product, on an 108-year  
18 CD-ROM. Although it still felt the product was  
19 important, they were crossing their fingers that  
20 the product would break even, if that.

21 Q. Uh-huh. Later on or actually right  
22 below that, you refer to reassignment upon  
23 request. Reassignment of what?

24 A. This would be reassignment of  
25 copyright upon request, and it would have been a

125

1 Kilmer  
2 request of the photographer or the writer. I  
3 can't recall which. It was probably the writer's  
4 because the Theroux agreement and so forth were in  
5 the package that she had faxed me.

6 Q. So are you saying here that between  
7 May of 1989 and sometime in 1995, there were, to  
8 use your words, reassignments of copyrights to  
9 creators of content for the magazine?

10 A. That's my recollection.

11 Q. And you are not sure whether that  
12 includes both writers and photographers or just

13 writers?

14 A. I can't recall at this time, but I --

15 I believe we may have been discussing writers at  
16 that point in time.

17 Q. And then below that, from '83 to '89,  
18 what do you mean by one-time rights and On  
19 Assignment?

20 A. Okay. One-time rights is a reference  
21 to, I believe, the stock photo agreements where  
22 some of them, there again, refer to granting of  
23 one-time publication rights, and I can't remember  
24 why I wrote '83 to '89 there, but it must be a  
25 comment that applied to just, at least in Nora's

126

1 Kilmer

2 view, certain of the contracts.

=====

2 Q. Let me ask it again.

3 Geographic licenses and images from a  
4 stock house, the stock house says on it's  
5 agreement, no electronic use. What opinion did  
6 you have, then, as to whether Geographic could use  
7 that image in the CD product?

8 MR. SUGARMAN: Objection.

9 A. My opinion at the time was that 201C  
10 offered a defense. I do not recall opining,  
11 because I had not done research on the issue as to  
12 how strong I thought the defense was, as it were,  
13 but I said that it offers the Society a defense.

14 Q. Did the Society tell you what they  
15 intended to do with respect to stock houses who  
16 had so restricted use of photographs by providing  
17 no electronic use?

18 A. All that I was told about that was  
19 that they had contacted someone in California, I  
20 believe it was, to carry on some negotiations or  
21 discussions on behalf of the Society with the  
22 stock houses. That's all I recall being told.

=====

16 Q. Now the next two lines below refers  
17 to "our adversary" or "our ADV." What is that?

18 A. I'm not sure. It's ADV. She may  
19 have meant adversary, I'm not sure.

20 Q. Okay. And there's a reference there  
21 to -- what follows that?

22 A. It looks like "Reagan and Bush  
23 appointees." I'm not sure what's after that.

24 Q. Is that something that you said?

25 A. I may have, but I have no current

135

1 Kilmer

2 recollection.

3 Q. And if you said it, you were

4 referring to Reagan and Bush appointed judges on

5 the lower courts?

6 A. As I say, I have no current

7 recollection of what that was about.

8 Q. Well --

9 A. I don't even recall that being

10 discussed, Reagan and Bush appointees being

11 discussed.

12 Q. Well, is that something that

13 Ms. Dupre brought up?

14 A. I don't know that this conversation

15 was with Ms. Dupre.

16 Q. With whom was it?

17 A. I have it in my head it was with

18 Ms. Hohenlohe, but I could be mistaken.

19 Q. Is Ms. Hohenlohe a litigator?

20 A. Not at the time she was at



13 notes. What notes are you referring to?

14 A. Specifically, the exhibit we just  
15 discussed from Ms. Dupre prior to my finalization  
16 of the January/February 1996 letter.

17 Q. And where in that exhibit does it  
18 refer to the commercial or consumer aspect of the  
19 product?

20 A. In the final paragraph it states,  
21 "The user will be able to print the screen and  
22 apparently color printers are now available at a  
23 price that can attract the home user." The home  
24 user.

25 Q. I see. So did that -- did you

43

1 Kilmer  
2 discuss that aspect of what Ms. Dupre said with  
3 her?

4 A. No, I did not. It really was not a  
5 focus of my initial analysis in the  
6 January/February 1996 time frame.

7 Q. So is it fair to say that you  
8 assumed, based on what she said, that this product  
9 would be sold to consumers?

21 Geographic. I can't recall whether she was  
22 previously.

23 Q. Now there is a reference after the  
24 Reagan and Bush appointees to "80 percent gives us  
25 better than 50 percent." What does that mean?

136

1 Kilmer

2 A. Here again, this harkens back,  
3 apparently, to something we talked about in terms  
4 of the Reagan and Bush appointees. As I said, we  
5 may well have talked about it, but I have  
6 absolutely no present memory of what in the world  
7 we were talking about there.

8 Q. Well, wasn't the reference here that  
9 if this case went to court and it was assigned to  
10 a Reagan or Bush-appointed judge in the lower  
11 courts, that because they would take a more pro  
12 business stance, you stood an 80 percent rather  
13 than 50 percent chance of winning? Isn't that a  
14 fair interpretation --

15 A. Of what this says?

16 MR. SUGARMAN: I object to that.

17 Whether it's a fair interpretation is

18.           really not what's relevant here.

19       A.    It could have been what was in Nora's

20   mind, but I'm sorry, I just have no present

21   recollection of this.

22       Q.    Wasn't that also in your mind?

23       A.    I don't -- as I say, I don't even

24   recall this part of the discussion.  It may well

25   have taken place but I honestly don't recall this

137

1                   Kilmer

2   part of the discussion.

3       Q.    Well, if the case did go -- I mean

4   you have been practicing in Washington for many

5   years, correct?

6       A.    Since 1980, yes.

7       Q.    So that's 20 years plus, right?

8       A.    Yes.

9       Q.    And you are familiar with the lower

10   courts, the district courts in Washington, are you

11   not?

12       A.    I have to say I brought two cases in

13   the lower courts in Washington in the last eight

14   years, and that's it.  Most of the time I litigate

15 outside of Washington. Very few cases are brought  
16 in this field in the copyright field in D.C. or in  
17 the intellectual property field in D.C.

18 Q. But you do litigate?

19 A. Yes.

20 Q. So you have some general sense of the  
21 pro business stance of certain judges, correct?

22 A. Yes. Yes, I think that's fair to  
23 say.

24 Q. And it's also fair to say that if a  
25 lower court judge had been appointed by President

138

1 Kilmer

2 Reagan or President Bush, they might be more pro  
3 business, correct?

4 A. I think that's a fair statement.

=====

21 Q. Did there come a time when you  
22 registered the CD 108 with the Copyright Office?

23 A. There came a time I was pulled into  
24 the registration process, yes.

25 Q. Who pulled you in?

140

NGS VA  
© FORM

1 Kilmer

2 A. I was asked by Angelo Grima to field  
3 an inquiry from the Copyright Office. I cannot  
4 tell you the date, but the Copyright Office had  
5 requested that for purposes of the collection of  
6 the Library of Congress, the 108-year CD-ROM be  
7 deposited.

8 Q. And they wanted as the deposit the  
9 entire CD-ROM?

10 A. That's correct.

11 Q. And is that why Mr. Grima called you?

12 A. There was some confusion at National  
13 Geographic as to whether a request from the  
14 Library of Congress for a deposit constituted a  
15 request for registration of a work. As a result  
16 of that confusion, the Society had prepared and  
17 filed a copyright application, which I believe was  
18 prepared by a secretary of Ms. Dupre, and in  
19 conjunction with the required requested deposits  
20 or contribution of the work to the library, an  
21 application for copyright registration was  
22 submitted. And the Copyright Office had  
23 apparently advised Geographic in a conversation, I  
24 did not participate in, that there were some

25 difficulties with the application.

141

1 Kilmer

2 Q. So I understand your testimony, what  
3 you are saying is that before an application of  
4 registration had been prepared, the Library of  
5 Congress asked for a deposit?

6 A. Correct, that's my understanding of  
7 the situation.

8 Q. Why would the Library of Congress  
9 seek a deposit of a work that was not under  
10 registration?

11 A. It is done from time to time to  
12 complete the collection of the library, which is  
13 really the reason the U.S. copyright has a  
14 registration system, oddly enough, which is to  
15 provide free works to the Library of Congress.

16 Q. So in response to the Copyright  
17 Office's request for a deposit, a registration  
18 application was prepared by a secretary of  
19 someone?

20 A. That's my recollection, yes. I think  
21 it was Sheila Hawken, I believe.

LET'S SEE  
THE LOFC  
REQUEST!

22 Q. And after that application was filed,  
23 was there some question that Mr. Grima asked you  
24 to get involved in?

25 A. They, the Society, had received a

142

1 Kilmer

2 call from the Copyright Office as to the nature of  
3 any copyrightable elements, if you will, in the  
4 108-year CD-ROM, and Mr. Grima asked me to respond  
5 to that.

6 Q. Copyrightable elements that belonged  
7 to Geographic or copyrightable elements in  
8 general?

9 A. Present in the work of the 108-year  
10 CD-ROM.

11 Q. Owned by anybody?

12 A. Owned by anybody.

13 Q. Including stock houses?

14 A. That was never raised. When I talked  
15 to the Copyright Office, that was not the concern  
16 at all.

17 Q. Including photographers to whom  
18 assignments had been made of copyrights?

19 A. That was not one of the issues that  
20 the Copyright Office raised.

21 Q. And it wasn't raised that certain  
22 contracts, including the one that you did look at,  
23 that Ms. Dupre gave you in 1996, provided for the  
24 transfer of copyright to the photographer within  
25 60 days of publication? That was not raised as

143

1 Kilmer

2 well?

3 A. Not raised much.

4 Q. And the fact that this company that  
5 we referred to before as Pegasus or Pegasus  
6 Imaging owned a registered copyright and  
7 decompression tool, that was not something that  
8 the Copyright Office raised at that time?

9 A. There was mention of software in my  
10 discussion with the Copyright Office.

11 Q. There was mention of software?

12 A. Yes.

13 Q. And were you aware of Pegasus'  
14 ownership of a registered copyright used in the CD  
15 108 during that discussion?



16 A. No.

17 Q. Mr. Grima didn't tell you about that?

18 A. It wasn't necessary for him to tell  
19 me there was software on the CD-ROM project  
20 product.

21 Q. He didn't tell you about that?

22 A. No, he didn't.

23 MR. BERGER: Let's mark the  
24 registration as Plaintiffs' Exhibit 231.  
25 (Whereupon, copyright registration

144

1 Kilmer

2 marked Plaintiffs' Exhibit 231 for  
3 identification, as of this date.)

4 Q. What was Geographic attempting to  
5 register by this form?

6 MR. SUGARMAN: I object to the form.

7 Q. Or what was Geographic registering by  
8 this form?

9 A. The only element that they were  
10 seeking to register here was material other than  
11 the contents of the magazine for the 108-year  
12 period.

DID KILMER  
EVER LOOK  
@ 108 CDROM?

13 Q. How do you know that?  
14 A. That's what I was advised by the  
15 Copyright Office when I spoke with -- I'm not sure  
16 exactly who I spoke with at this point in time.  
17 I'm not sure. I know I didn't make any notes  
18 about it, but it was examined -- it was an  
19 examiner at the Copyright Office.

20 Q. And the examiner told you what was  
21 being registered, or did you tell him?

22 A. Oh, the examiner told me what they  
23 were willing to register.

24 Q. Which was?

25 A. Which was you are not going to

145

1 Kilmer  
2 register software because we know that every  
3 CD-ROM we get has got driver software of some kind  
4 or another and display software of some kind or  
5 another, and we don't register those as separate  
6 elements, so forget about that. The magazine  
7 itself is a pre-existing work, you can't register  
8 that in and of itself. So the only thing, as it  
9 indicates here, that we're going to let you

WHY DID THEY  
PLACE © 1997  
ON EVERY PAGE?

10 register is the brief introductory materials and  
11 the audiovisual montage to which you earlier  
12 referred.

13 Q. The top of the second page refers to  
14 an amendment per telephone conversation with you.  
15 What was amended?

16 A. Which makes it look volitional. What  
17 was amended was in space 6B as in boy, where there  
18 is an amendment from a brief introductory, I think  
19 it was graphic material to a brief introductory  
20 audiovisual montage. I think that was the only  
21 change that we made.

22 Q. Why was graphical material taken out?

23 A. Because it wasn't a static image and  
24 if I remember correctly, the examiner's  
25 interpretation of graphic material was that it

146

1 Kilmer  
2 would have to be a static image to qualify as what  
3 the Copyright Office would call graphic material.  
4 But if it was a moving image, it would be  
5 considered audiovisual as opposed to graphic, and  
6 therefore, had to be called something else.

7 Q. There is also or at least there  
8 appears to be a change in space 2 on the first  
9 page.

10 A. Uh-huh.

11 Q. Where --

12 A. Yes.

13 Q. Where photographic and text are taken  
14 out and something is inserted?

15 A. Right. Again, it's introductory  
16 audiovisual montage. The same authorship.

17 Q. Were those the changes that you  
18 authorized?

19 A. Right, yes. There are two places  
20 that say introductory audiovisual montage.

21 Q. Did you get involved, if at all, in  
22 registration of any CD-ROM 108 progeny?

23 A. No, I did not.

24 Q. Do you know whether Geographic  
25 registered the CD 109 or the CD 110?

147

1 Kilmer

2 A. I have no idea.

3 Q. So I take it you had only one

4 conversation with the Copyright Office with  
5 respect to this registration?

6 A. That's correct.

7 Q. And changes were made as reflected on  
8 it?

9 A. Yes.

=====

17 Q. Now, in answering the question as to  
18 whether additional compensation is required, what  
19 did you do to ensure that you were fully up to  
20 speed on what the use was going to be?

21 A. The only things that came into my  
22 possession are what we discussed. And that is I  
23 needed to know what the intent of the product was,  
24 how it was going to be, as it were, executed on  
25 the CD-ROM. I knew it was going to go onto a

165

1 Kilmer  
2 CD-ROM. And what I was advised, as I testified  
3 earlier, is that it was going to be a  
4 page-for-page reproduction of the magazine from  
5 the beginning of time until a certain point in the  
6 1990s and that it was going to have a search

7 engine and an index, and that's what I was advised  
8 was the current contemplated product at the time  
9 of my review.

10 Q. So at the time that you wrote your  
11 opinion letter in 1996, that's all you knew about  
12 the use?

13 A. That's correct.

14 Q. And that's all you had been told  
15 about the use?

16 A. That's correct.

17 Q. When did you first obtain a copy of  
18 the CD-ROM yourself, in your own personal physical  
19 possession?

20 A. I believe it was at some point in  
21 1998.

22 Q. So it was after you wrote your first  
23 letter in '96?

24 A. Yes.

25 Q. It was after you wrote your second

NO INFO FROM  
NGS ABOUT  
EVIDENCED ©

166

1 Kilmer

2 letter in 1997?

3 A. Yes.

4 Q. So when you wrote both of those  
5 letters, you didn't have a product available to  
6 you at all?

7 A. That's correct.

8 Q. Now, if somebody at National  
9 Geographic was to say in testimony that we went  
10 ahead on this project because Paul Kilmer told us  
11 we were okay from a copyright standpoint, would  
12 that be a proper characterization of your opinions  
13 in '96 and '97, from your viewpoint?

14 A. No.

15 MR. SUGARMAN: I object to the form.

16 THE WITNESS: Sorry.

17 Q. You never gave that opinion, did you?

18 A. That's correct.

19 Q. You never told National Geographic or  
20 your contacts at National Geographic that you  
21 signed off on this project from a copyright  
22 standpoint, did you?

23 A. No.

24 Q. When you were looking at the 13B  
25 issue, Exhibit 222, did you have a copy of the

NEVER GAVE  
HIS OK ON 108!

1 Kilmer

2 freelance photographer's contract?

3 A. Unless that is the other four-page

4 contract, I did not, no.

5 Q. And you've already told Mr. Berger

6 you didn't have a copy of the stock house

7 contracts?

8 A. Correct.

9 Q. So at best, you could only have given

10 opinion as to the 13B issue in 222 and the

11 contract you had in 223?

12 A. In 1996, right, and that's all I was

13 asked to do, yes.

14 Q. I mean you could only analyze what

15 you were given?

16 A. Exactly.

17 Q. And that's all you did do?

18 A. At some point in time, yes.

19 Q. At some point did you get the feel

20 that National Geographic was utilizing your

21 opinion beyond its intent?

22 A. No.

23 Q. You went to several meetings with

24 National Geographic people. And here in this



25 deposition today, you've seen the internal

168

1 Kilmer

2 struggle between the various groups in National

3 Geographic?

4 A. I was aware of that, yes.

5 Q. You were aware of that at the time?

6 A. Yes.

7 Q. You made some references to that,

8 correct?

9 A. Yes.

10 Q. You've seen in the documents provided

11 to you by Mr. Berger several references to the

12 fact that "our independent counsel okayed the

13 project." Have you seen those references?

14 A. I have seen reference to corporate

15 counsel and copyright counsel. As to corporate

16 counsel, I think I testified I'm not exactly sure

17 who they are referring to. As to copyright

18 counsel, there is some confusion, because of

19 overlapping representations, as to whether I'm the

20 only one being referred to. But yes, I mean I'm

21 aware of that.

22 Q. Up to the time that they sought the  
23 second opinion from Mr. Radcliffe in California,  
24 you were the copyright counsel?

25 A. I was the copyright counsel.

169

1 Kilmer

2 Q. I'm not a copyright lawyer,  
3 Mr. Kilmer, like everybody else in this room is,  
4 but what is the purpose of a publishing entity or  
5 society like the National Geographic going outside  
6 their own legal counsel to get an independent  
7 opinion?

8 A. You mean going outside of their  
9 in-house counsel?

10 Q. Yes.

11 A. I was just going to say National  
12 Geographic's in-house counsel did not claim any  
13 great copyright expertise at that point in time.

=====

5 Q. When you issued your 1997 letter, it  
6 was an analysis of potential exposure, liability  
7 damages, was it not?

8 A. Damages, right.

9 Q. And when Mr. Radcliffe issued his

10 opinion, he also was very strong in urging  
11 National Geographic to get clearance of rights  
12 prior to publication, was he not?

13 MR. SUGARMAN: I object to the form.

14 A. My impression of his memo, which is  
15 the only thing I can go from, was that he had  
16 concerns, certainly, about liability exposure  
17 vis-a-vis the stock photo houses.

18 Q. And with your analysis of damages and  
19 Mr. Radcliffe's concerns, you are aware that  
20 National Geographic went ahead and published  
21 anyway?

22 MR. SUGARMAN: I object to the form.

23 A. They went ahead and published anyway,  
24 yes.

25 Q. Now, you said that in reviewing

176

1 Kilmer

2 Mr. Radcliffe's memo, you felt that National  
3 Geographic, your client, had a defense. Do you  
4 recall that testimony?

5 A. Yes.

6 Q. Now, when a lawyer who is a litigator

7 says that his client has a defense, that doesn't  
8 necessarily mean it's a good defense, does it?

9 A. That's correct.

10 Q. And most good litigators can come up  
11 with a defense to almost any issue, can they not?

12 MR. SUGARMAN: I object to the form.

13 A. They do, yes.

=====

24 Q. When did you first become aware of  
25 the fact that these products were being marketed

183

1 Kilmer  
2 by for-profit subsidiaries of National Geographic  
3 Society?

4 A. Today.

5 Q. This is the first time?

6 A. Yes.

7 Q. When your bills were submitted to  
8 National Geographic Society for the consulting  
9 work that you did regarding your '96 and '97  
10 opinion letters, were those bills, to your  
11 knowledge, paid by the Society or someone else?

12 A. They were paid by the Society, to the

13 best of my knowledge.

=====

24 Q. My name is William Gardner. I'm with  
25 Weingrad & Weingrad and I represent other

184

1 Kilmer  
2 plaintiffs in related cases.

3 You mentioned earlier that you  
4 disagreed with the Greenberg opinion, Greenberg  
5 versus National Geographic. What is the  
6 foundation for your disagreement?

7 A. It's severalfold.

8 MR. SUGARMAN: I object to the form.

9 But you can answer.

10 A. It's severalfold. Firstly, the  
11 position that the software elements, if you will,  
12 of the CD-ROM should have been revealed to the  
13 Copyright Office. The Copyright Office, as I  
14 indicated in my prior testimony, was well aware of  
15 the software drivers. And in fact, the Copyright  
16 Office, in one of its own circulars, has taken the  
17 position that underlying software for multimedia  
18 products need not, should not, will not, according

19 to them, be claimed in the registration  
20 certificate as a pre-existing work or otherwise.

21 That is one element of the Greenberg  
22 decision that I find absolutely wrong, quite  
23 honestly.

24 The position that the 108-year  
25 CD-ROM, which is how we're referring to the

185

1 Kilmer  
2 product today, is not covered by 201C of the  
3 Copyright Act, I believe it's an incorrect  
4 analysis by the court and I think it is contrary  
5 to the Supreme Court's decision in Tasini.

6 That the opening montage somehow  
7 makes the reproduction of the magazine on a CD-ROM  
8 a new product, I also disagree with.

9 Q. This may be a related question.

10 With regard to the copyright  
11 registration, which I believe is Plaintiffs'  
12 Exhibit 231, which you assisted in amending, to  
13 your knowledge, does this copyright only register  
14 the montage?

15 A. That's correct.

16 Q. Do you know if the National  
17 Geographic Society sought to register the 108-year  
18 CD-ROM as a compilation?

19 A. No, they did not want to register the  
20 108 years of the magazine as a compilation.

21 MR. GARDNER: That's all I have.

=====

24 EXAMINATION BY MR. SUGARMAN:

25 Q. Let me put before you, Mr. Kilmer,

186

1 Kilmer  
2 what's been marked as Exhibit 222 and ask you your  
3 understanding of what this is an excerpt.

4 A. My understanding is this is an  
5 excerpt from the independent contractor  
6 photographers agreements used by National  
7 Geographic Society between 1975 and 1995.

8 Q. Okay. When you say independent  
9 contractor, what do you mean by that?

10 A. That is, there were some  
11 photographers during that period of time who were  
12 on staff at National Geographic and it would not  
13 cover those individuals because they were regular  
14 employees, for example.

GARDNER:  
JERK!

15 Q. And it would cover the other  
16 photographers that took photographs for National  
17 Geographic?

18 A. Right, that were retained by National  
19 Geographic to take photographs, correct.

20 Q. Are those photographers, to your  
21 knowledge, sometimes referred to as freelancers?

22 A. Yes.

23 Q. So that the contract that you were  
24 reviewing covered freelance photographers; is that  
25 correct?

187

1 Kilmer

2 A. That's what I was advised, yes.

3 MR. SUGARMAN: I have no further  
4 questions.

-----  
19 Q. Did you, when you turned the program  
20 on, notice any opening messages or any opening  
21 videos?

22 A. Yes, there was an opening sequence.

23 Q. Which sequence are you referring to?

24 A. I think there may have been two. I



25 think there was one that I would call an

28

1 Kilmer

2 advertisement by, I think, Kodak. And there was a  
3 second one that has subsequently been referred to  
4 by some as a montage. And it's, I believe, some  
5 covers of prior National Geographic magazines.

6 Q. How do you refer to it?

7 A. We can call it the montage. That  
8 seems to be a common way to talk about it.

9 Q. You'll agree with me that microfilm  
10 or microfiche do not have opening montages?

11 MR. SUGARMAN: I object to the form.

12 A. They don't have opening montages.  
13 They do have occasional opening bits, if you will.

14 Q. Okay. And you'll also agree with me  
15 that microfilm or microfiche don't have Kodak  
16 advertisements with music and sound?

17 MR. SUGARMAN: I object to the form.

18 A. It would be a physical impossibility,  
19 so you are right.

20 Q. In fact, microfilm or microfiche does  
21 not have music or sound, correct?

22 A. It's the nature of the medium, it

23 could not.

24 Q. And do you know whether the CD 108

25 that you used had a link to the Internet?

29

1 Kilmer

2 A. I don't recall.

3 Q. Or a link to National Geographic's

4 website?

5 A. I don't recall. If it does, it's

6 nothing that I ever had occasion to use, but I do

7 not, you know, recall.

=====

24 Q. And were you aware as well at that

25 time that stock images would be used in the CD

41

1 Kilmer

2 108?

3 A. I was not advised of that at that

4 time, no.

=====

5 Q. Before I ask you questions about the

6 business plan in front of you, let me just jump  
7 ahead, if I could, and ask you about just one  
8 aspect of your second opinion, which is dated  
9 February 21st, 1997, which I hand you now. We'll  
10 come back to more questions about this opinion  
11 later.

12           Take a look, if you will, at the last  
13 paragraph of this -- or the next to the last  
14 paragraph of this opinion, on the second page, and  
15 see if that helps you remember or refresh your  
16 recollection as to when you learned that the CD  
17 108 was going to be marketed to consumers as  
18 opposed to institutions that traditionally use  
19 microfilm?

20       A. My testimony would be the same. I  
21 believe this -- the statement here, that we were  
22 not aware it would be a consumer product, is in  
23 error, as I reflected on my notes.

24       Q. Is in error?

25       A. Is in error.

42

1           Kilmer

2       Q. In other words, you did know back in

3 1996 that the CDs would be distributed to  
4 consumers as opposed to educational institutions?

5 A. Yes.

6 Q. Now, did you tell National  
7 Geographic, after you sent this February 1997  
8 opinion, that you had made that error?

9 A. No. I didn't realize the error had  
10 been made until I was preparing for this  
11 deposition.

12 Q. Now you said, reflecting on your  
13 notes. What notes are you referring to?

14 A. Specifically, the exhibit we just  
15 discussed from Ms. Dupre prior to my finalization  
16 of the January/February 1996 letter.

17 Q. And where in that exhibit does it  
18 refer to the commercial or consumer aspect of the  
19 product?

20 A. In the final paragraph it states,  
21 "The user will be able to print the screen and  
22 apparently color printers are now available at a  
23 price that can attract the home user." The home  
24 user.

25 Q. I see. So did that -- did you

1 Kilmer

2 discuss that aspect of what Ms. Dupre said with  
3 her?

4 A. No, I did not. It really was not a  
5 focus of my initial analysis in the  
6 January/February 1996 time frame.

7 Q. So is it fair to say that you  
8 assumed, based on what she said, that this product  
9 would be sold to consumers?

10 A. As I say, I really didn't focus on  
11 that language and I didn't realize I was even  
12 aware of the home use of the product until the  
13 February 1997 time frame. I had not focused on  
14 that particular sentence that I just read from  
15 Exhibit 219 until I was preparing for this  
16 deposition.

17 Q. Now, having prepared for this  
18 deposition, having seen other documents, having  
19 prepared a second opinion we just referred to  
20 briefly, do you believe that any of the  
21 conclusions that you reached in your initial  
22 opinion were incorrect?

23 A. No, I don't.

24 Q. Are you aware of the Greenberg

25 decision?

44

1 Kilmer

2 A. Yes, I am.

3 Q. And I assume you've read that?

4 A. Yes, I have.

5 Q. And that hasn't changed your view at

6 all about the correctness of your opinion?

7 A. Of course, I didn't have the benefit

8 of Greenberg when I was forming my opinion.

9 Q. So having had that benefit, have you

10 now changed your opinion?

11 A. No, I have not.

12 Q. And I assume you read other

13 decisions, including the Supreme Court's

14 determination in the Tasini case. That hasn't

15 changed your opinion either, has it?

16 A. That has not.

=====  
18 Q. I think we went through before that

19 Ms. Dupre gave you the memo which was 219 in which

20 she did tell you that -- she says here, "As yet

21 unclear is the quality of the image that will be

22 available." And then she continues, "No way will

23 it be publication-quality reproduction."

24 So is that where you got the

25 information that you referred to here on the

50

1 Kilmer

2 bottom of the page 2?

3 A. No. I recall having a conversation

4 prior to writing the February 3rd letter, February

5 3rd, 19 -- 1996 letter. And it may have been with

6 Ms. Dupre, but it certainly was confirmed to me

7 that it was not going to be a publication-quality

8 reproduction.

9 Q. Have you ever printed anything from

10 the CD 108?

11 A. Yes, I have.

12 Q. And is it your view, having done so,

13 that the reproduction is not publication quality?

14 A. Yes, it's not reproduction

15 publication quality.

=====

14 A. No, I have never seen this document.

15 Q. Now this is a memo from a Charles

NOT TRUE.  
IN THE EYE OF  
THE BEHOLDER!

16 McCarry, who was, I believe, the text editor at  
17 National Geographic, and he says in his first  
18 paragraph, "Our invariable practice has been to  
19 hand over the entire fee for Readers Digest  
20 reprints of the Geographic articles to the  
21 author."

22           Did Ms. Dupre tell you that that was  
23 the invariable practice at the time you wrote your  
24 1996 letter?

25           A. I don't believe so, no.

52

1           Kilmer

2           Q. Now, Mr. McCarry goes on in the  
3 second paragraph and says, "Where freelancers are  
4 concerned, we have no choice in the matter."

5           Ms. Dupre didn't tell you that  
6 either, did she?

7           A. She didn't allude to that, no.

8           Q. Taking a look at your opinion, again,  
9 on page 4, you say in the first full paragraph,  
10 "On balance," and then go on to say, "the fact  
11 that NGS is adding nothing new to the articles,"  
12 et cetera.



13 A. Uh-huh.

14 Q. Do you still believe that to be true?

15 A. Yes.

16 Q. I thought we discussed before that  
17 there are at least three or four introductory  
18 messages that you and I see when we turn the  
19 product on that are added to the product.

20 A. It's not added to the product. I'm  
21 discussing here specifically the articles. Having  
22 flipped through the 108 years in several parts, I  
23 have found nothing new added to any of the  
24 articles.

25 Q. But the articles are contained in a

53

1 Kilmer  
2 piece of software, are they not?

3 A. Contained in -- well, they are  
4 contained on a CD-ROM.

5 Q. Which is, would you say -- okay, they  
6 are contained on a CD-ROM. And the CD-ROM has  
7 elements that were never present in the magazine,  
8 correct?

9 A. Correct.

10 Q. And those elements added are not  
11 referred to in your letter, are they?

12 A. No.

=====

3 Did Ms. Dupre ever tell you that with  
4 respect to electronic products, "included but not  
5 limited to CD-ROMs, NGS shall seek permission and  
6 pay a negotiated fee for such use"?

7 A. I have never seen this provision  
8 before nor have I had it discussed with me by  
9 Ms. Dupre.

10 Q. Now did Ms. Dupre tell you that --  
11 this is back in 1996 -- that photographers,  
12 including the outside photographers whose  
13 contracts you reviewed, and I'm focusing on  
14 paragraph 13B, had in some cases received an  
15 assignment of their copyright back?

16 A. Yes. Not an assignment of their  
17 copyright but an assignment of National  
18 Geographic's copyright.

19 Q. An assignment of the copyright work  
20 that they had created, which they had given to  
21 Geographic was then returned to the creator?

22 A. Right. The copyright in which  
23 National Geographic was the author had been

24 assigned to the photographer who had originally  
25 taken the work, yes.

55

1 Kilmer

2 Q. So you were aware that in some cases  
3 National Geographic had assigned copyright back to  
4 the photographer at the time that you wrote your  
5 1996 opinion?

6 A. Yes.

7 MR. SUGARMAN: I object to form.

8 A. As to form, that would be inaccurate,  
9 but National Geographic had assigned to  
10 photographers copyrighting works that the  
11 photographers had taken, yes.

12 Q. And did you express any opinion on  
13 whether National Geographic could reproduce works  
14 whose copyright it had assigned back to the  
15 photographer?

16 MR. SUGARMAN: I object to the form.

17 Q. When you wrote your 1996 letter?

18 A. Not as to any product other than the  
19 108 year CD-ROM.

20 Q. Let's deal with the 108. Let's

21 assume that a photographer had created a  
22 photograph for the 108, National Geographic owned  
23 the copyright, and then assigned it back to the  
24 photographer.

25 MR. SUGARMAN: You used the word

56

1 Kilmer

2 "back."

3 Q. Assigned it to the photographer.

4 Did you express an opinion in 1996

5 whether Geographic could use that copyright in the

6 CD 108?

7 A. Not as to all photographers I didn't,

8 no.

9 Q. I'm just speaking about the

10 photographer who had received an assignment of

11 copyright from National Geographic.

12 A. The only opinion I delivered was in

13 regard to section 13 of one of the photographers'

14 agreements. That was the only thing I reviewed

15 and the only thing I provided an opinion

16 regarding.

17 Q. Now, were you aware of any industry

18 standard in 1996 with respect to whether repayment  
19 should be made when photographers' works were  
20 reused in the CD 108?

21 A. I was not, no.

22 Q. Let me show you what was marked in an  
23 earlier deposition as Plaintiffs' 51 and ask you  
24 if you've ever seen it before.

25 Now this is a memo from a Maura

57

1 Kilmer

2 Mulvihill. I assume you know her?

3 A. Yes, I met her, yes.

4 Q. Did you speak with her in 1996 before  
5 you wrote your opinion?

6 A. No.

7 Q. So you were not aware of the  
8 conclusion that she reached in this document that  
9 appears in the next to the last sentence of this  
10 paragraph, where she states, "I told them that  
11 this was not the industry standard"?

12 A. I was not aware of her opinion, no.

13 Q. Have you ever seen this document?

14 A. No, I have not.

15 Q. Were you aware in 1996 whether  
16 Geographic, when it licensed works that it owned  
17 copyright to, to others for use in CD-ROM, charged  
18 for that CD-ROM use?

19 MR. SUGARMAN: I object to the form.

20 THE WITNESS: You have to read that  
21 one back to me, I'm sorry.

22 (Record read)

23 A. I don't recall.

24 Q. Let me show you another memo from  
25 Ms. Mulvihill, which is Plaintiffs' 52, and ask

58

1 Kilmer  
2 you if you've ever seen it before.

3 A. No, I have not.

4 Q. Now just focus, if you can, on the  
5 second paragraph. It's the third sentence, which  
6 begins, "I routinely refuse publishers..." Read  
7 that sentence to yourself, please.

8 A. Yes.

9 Q. Ms. Mulvihill states there. And I'm  
10 paraphrasing, "I routinely," and then she goes on,  
11 charge for use of images on CD even if it is the

12 same title and product as the print version.

13 Were you aware of that practice in

14 1996?

15 A. No, I was not.

16 Q. Are you aware of it today, other than

17 having seen this memo?

18 A. No, I'm not.

=====

12 Q. So let's turn our attention now to

13 1997. When was the first time that the subject of

14 the CD 108 reappeared?

15 A. In January of 1997.

16 Q. What happened then?

17 A. I was asked at that point in time to

18 do an assessment of whether if National Geographic

19 were successfully sued for copyright infringement,

20 what the nature and extent of their monetary

21 and -- I guess just monetary exposure might be. I

22 believe that was all.

23 Q. And who gave that request to you?

24 A. Again, I believe -- I know it came

25 from the offices of general counsel. I can't

2ND ASSESSMENT  
FOR NGS, JAN. 1997

1 Kilmer

2 remember whether it was Susan Dupre or someone  
3 else.

4 Q. What was said other than, give me an  
5 assessment of statutory damages?

6 A. I was provided with some numbers, a  
7 number of photographs that might be involved in a  
8 damage assessment if National Geographic were to  
9 be found guilty of copyright infringement over the  
10 108-year CDs.

11 Q. Why was Geographic seeking this  
12 information from you?

13 A. They wanted to know what their  
14 monetary exposure might be in the event they were  
15 successfully sued for copyright infringement. It  
16 was part of a risk analysis that they were  
17 conducting.

18 Q. Why did Geographic think they would  
19 be sued about this project?

20 MR. SUGARMAN: I object to form.

21 A. My understanding, they had received  
22 either telephone calls or written communication of  
23 some kind from photographers, raising questions,  
24 issues and even, I would say, objections to the



25 prospect of the 108-year CD-ROMs being created and

66

1 Kilmer

2 distributed.

3 Q. But I take it that you did not look  
4 into the bona fides of those claims? Instead you  
5 were simply focused on determining what the  
6 exposure might be, correct?

7 A. That's correct.

=====

4 Q. The next page refers to various  
5 numbers. Now, I take it your reference on the  
6 right to Maura is a reference to Ms. Mulvihill,  
7 and I guess is what she's saying there, "If  
8 150,000 units are sold, it's a hit in multimedia."  
9 Is that what she's saying?

10 A. I'm a little lost as to where you  
11 are.

12 Q. Right on the top of the page.

13 A. Yes, that was her comment.

14 Q. Did anybody disagree with that?

15 A. Did anyone --

16 Q. Disagree with that?

17 A. Disagree. No.

18 Q. Further on on page 3 there is a  
19 reference to possible suits from Jerry Greenberg  
20 and Fred Ward. Did anyone indicate why those  
21 persons might sue?

22 A. To the best of my recollection, they  
23 were persons who had contributed articles or  
24 photographs, I believe photographs, to the  
25 National Geographic magazine and they were

73

1 Kilmer  
2 questioning whether the CD-ROM could be produced,  
3 distributed and sold without their consent or  
4 payment to them. That's the best of my  
5 recollection.

6 Q. Did anyone comment on the merits of  
7 their possible claims at that meeting?

8 A. Not that I recall. Because here  
9 again, my focus in this meeting was the nature and  
10 extent of damages, really, if there were going to  
11 be damages. So I don't recall a discussion of a  
12 liability issue.

=====  
24 Q. Now, next there is a reference there

25 to CD-ROM for textbooks. What's that refer to, if

75

1 Kilmer

2 you know?

3 A. My recollection is that I was advised  
4 and the group was advised, and I can't recall by  
5 whom, that if images that National Geographic  
6 Society controlled were used in textbooks, that  
7 were also available in part or in whole on CD-ROM  
8 containing the same image, that there was an  
9 additional fee charged for the CD-ROM used in that  
10 context.

11 Q. Was any information given as to what  
12 Geographic charged for that CD-ROM use per image?

13 A. Not that I recall.

14 Q. The top of page 5 refers to the  
15 danger period for text. What did you mean by  
16 that?

17 A. Apparently, what I was told was that  
18 the National Geographic's contracts for text usage  
19 of independent contractors had changed over time,  
20 and that there was a period of 20 to 25 years  
21 where there was at least a question in some

22 people's minds as to the exact extent of National  
23 Geographic's rights and use of articles that had  
24 been created for the magazine by independent  
25 contractors.

=====

3 Q. I know you weren't asked to opine on  
4 that subject, but when you saw those contracts,  
5 you realized that because they provided for  
6 assignment of copyright to the author of the  
7 article after a 60-day period, that there was a  
8 risk that Geographic was running if it used those  
9 articles in the CD, correct?

10 MR. SUGARMAN: I object to the form.

11 A. Yes.

12 Q. And you conveyed that feeling or that  
13 opinion to Geographic after you looked at those  
14 contracts?

15 A. Yes.

16 Q. What did Geographic say in response?

17 A. Well, after I delivered my thoughts  
18 to them, they were, I believe, under the  
19 impression that they -- that those contracts were  
20 much -- were going to be treated much like the  
21 photographers' contracts, and my impression was

22 that it didn't alter their view that they could  
23 lawfully proceed with the 108-year CD-ROM.

24 Q. Why did Geographic believe that text  
25 contracts would be treated like the photographers'

79

1 Kilmer

2 contracts?

3 A. I'm not certain.

4 Q. And who said this to you, that they  
5 would be treated the same?

6 A. I believe it was Susan Dupre with  
7 whom I had that discussion.

8 Q. But she gave you no basis or reason  
9 why she felt those two kinds of contracts, text  
10 and photography, would be treated the same?

11 A. I can't recall. I'm sorry. I can't  
12 recall.

13 Q. Continuing on the memo here we've got  
14 in front of us, you say, "Up to 1976 we appear to  
15 have all rights in text," and then you go on, "to  
16 1996 contracts we have electronic rights."

17 What about the period between 1976  
18 and 1996?

19 A. I believe this was the period of time  
20 referred to as the quote-unquote danger period in  
21 the preceding paragraph.

---

15 Q. Now did Ms. Dupre ever tell you about  
16 Geographic's past practices in 1996 with respect  
17 to its payment for additional use?

18 A. Not that I recall.

19 Q. Did she ever tell you that there had  
20 been a long series of payments to photographers  
21 when their photographs had been additionally used  
22 for editorial purposes or advertising purposes by  
23 National Geographic or third parties?

24 A. I was advised at some point in time,  
25 and I can't tell you whether it was Ms. Dupre or

81

1 Kilmer  
2 someone else, but I had been advised prior to  
3 January of 1996 that some payments were made to  
4 some photographers when their works were licensed  
5 to others, other than National Geographic Society.

6 Q. What about when Geographic used their  
7 products, were you ever advised whether it made  
8 payment to photographers?

9       A.   At some point in time, and I believe  
10   it was in 1996, probably early '96 but I can't  
11   give you a date, I was advised that if a  
12   photograph -- depending on the contract that the  
13   photographer entered into, on occasion  
14   photographers will be reimbursed if the same  
15   photograph were to appear in National Geographic  
16   World, for example, as it appeared in the  
17   magazine. I remember having a discussion about  
18   that, but I can't give you a time frame, I'm  
19   afraid.

20       Q.   And that discussion was with  
21   Ms. Dupre?

22       A.   I believe so. But it probably was  
23   not in the context of the 108-year CD-ROM.

24       Q.   It was some other context?

25       A.   Yes.

82

1                   Kilmer

2       Q.   Now let me show you a letter that was  
3   written by a Robert Gilka. Did you ever have any  
4   contact with Mr. Gilka?

5       A.   Not that I recall.

6 Q. Let me show you --

7 MR. BERGER: Actually, let's mark  
8 this as the next exhibit, which would be  
9 Plaintiffs' 228.

10 (Whereupon, letter from Robert Gilka  
11 marked Plaintiffs' Exhibit 228 for  
12 identification, as of this date.)

13 Q. I take it you have never seen 228  
14 before?

15 A. No, I haven't.

16 Q. Going back to your notes of the 2/7  
17 meeting, just a couple of questions on page 5, I  
18 believe -- page 6.

19 The middle of the page, you refer to  
20 clearing rights payment and then there is, I  
21 think, a number of \$15 million.

22 A. Uh-huh.

23 Q. What is after that number?

24 A. I think 40,000 units gross is what  
25 that says.

83

1 Kilmer

2 Q. And what does that mean?



3 A. Would you mind if I reviewed the  
4 preceding content, just to see if it helps to  
5 refresh my recollection? Because I don't  
6 immediately recall.

7 Q. Okay.

8 A. I really don't immediately recall. I  
9 know it was in the context of trying to assess  
10 actual damages as opposed to statutory damages,  
11 but I can't tell you what precisely the reference  
12 is to.

13 Q. Are you saying here that if the  
14 product sold 40,000 units, that there might be an  
15 actual damage payment assuming liability of \$15  
16 million?

17 A. I don't believe that was what  
18 Ms. Mulvihill had indicated. But I am just too  
19 hazy right at the moment to tell you what exactly  
20 she meant by that.

21 Q. Well, did she mean that if rights  
22 were to be cleared, that the payment might have to  
23 be as much as \$15 million to clear those rights?

24 A. Although a possibility, I can't  
25 definitively tell you at this moment.

=====

3 Q. Which are stock photos?

4       A.   That's what I was told, all stock  
5 photos, as it says there.

6       Q.   So why, if you know, were the  
7 one-time use images purchased separately  
8 categorized here?

9       A.   There was a concern at the Society  
10 that they might have some copyright exposure on  
11 the 108-year CD-ROM for a certain number of stock  
12 photo images, which they had indicated to me were  
13 1629 in number, of which Ms. Dupre advised me were  
14 licensed for quote-unquote one-time use.

15      Q.   Well, did you share that concern?

16      A.   I had not reviewed the agreement, so  
17 I had no idea if the concern was legitimate or  
18 not.

19      Q.   Well, you had opined before that the  
20 CD-ROM was not another use, correct?

21           MR. SUGARMAN: I object to the form.

22      A.   Right, yes, that's correct.

23      Q.   And --

24      A.   Not a further use.

25      Q.   Not a further use.

1 Kilmer

2 A. Right. I don't know that I ever  
3 opined as to whether it was another use or not,  
4 because that was not the contract language I was  
5 looking at.

=====

16 Q. So you determined that the CD-ROM was  
17 not a further use, correct?

18 A. Right.

19 Q. And so if images had been purchased  
20 for one-time use and there was not going to be a  
21 further use, as you opined, in the CD-ROM, then  
22 those images were not deserving of further  
23 payment, correct?

24 MR. SUGARMAN: I object to the form.

25 A. Are you asking me how would I believe

98

1 Kilmer

2 now or what was said then?

3 Q. Well, let's talk about then and then  
4 we'll talk about now.

5 A. I didn't render an opinion on that at  
6 the time that I recall. I was not asked to review

7 those agreements, so I didn't have the precise  
8 language in front of me. All that was said to me  
9 was there was concern about this number of images  
10 and if, if the Society were to be found to have  
11 infringed copyright in this number of images, what  
12 was the potential exposure in terms of damages, as  
13 I indicate down here, and attorneys' fees. That's  
14 all I was asked and that's all I remember giving  
15 an opinion regarding.

16 Q. Now with respect to -- you said then  
17 and now. Let's talk about now.

18 Knowing what you know now and knowing  
19 that these are images purchased from stock houses  
20 for one-time use that were reused in the CD-ROM  
21 project, were those images deserving of further  
22 payment?

23 A. I don't believe so.

24 Q. Did Mr. Radcliffe agree with you?

25 A. I believe he took a very conservative

99

1 Kilmer  
2 position and I have seen, at least as written, one  
3 of his written opinions, I don't know if there is

4 more. I have seen one of his written opinions and  
5 if I recall correctly, he was concerned that the  
6 Society did have infringement liability exposure  
7 as to the stock photographs. I can't remember  
8 exactly his rationale at this point, though.

9 Q. The question was did he agree with  
10 you that the images purchased for one-time use  
11 were not deserving of further payment?

12 MR. SUGARMAN: I object to the form.

13 A. I think he took a contrary view.

14 Q. So he disagreed?

15 A. I think so.

16 Q. Now, sitting here today and  
17 examining, let's assume a hypothetical license  
18 agreement in front of you from a stock house that  
19 says, we license to you, Mr. Kilmer, an image to  
20 use in your magazine for one-time use, and then  
21 you decide you're going to use that image in a  
22 CD-ROM project of the kind you have here, are you  
23 telling me, sitting here today, that you believe  
24 that such a CD-ROM product is not a further use?

25 A. Yes.

1 Kilmer

2 Q. Why is that?

3 MR. SUGARMAN: He certainly can  
4 answer, but I object because I don't  
5 believe that this basic line of  
6 questioning is relevant to anything.  
7 Because what Mr. Kilmer might believe,  
8 sitting here today, is irrelevant. The  
9 judge will decide, sitting here today,  
10 what is or isn't the law of this case.

11 Mr. Kilmer is here to talk about his  
12 advice to Geographic and the basis for  
13 that advice. But cognizant of the dangers  
14 of directing witnesses not to answer, I  
15 won't, but that's my position and view.

16 MR. BERGER: Also since Mr. Kilmer, I  
17 assume, still represents National  
18 Geographic --

19 Correct?

20 THE WITNESS: Yes.

21 MR. BERGER: -- he may have at some  
22 point in time passed on his rationale to  
23 Geographic and that would then go to  
24 Geographic's conduct, possible willful

25           conduct in the course of its continuing

101

1                   Kilmer

2           sales of its product. So I'm not going to

3           get involved too much more, but I think

4           it's relevant for lots of reasons.

5           Since we don't have an instruction,

6           and I appreciate that --

7           Q.    Tell me why, Mr. Kilmer, you believe

8           that in my hypothetical, that use in your CD-ROM

9           project of a license -- of an image licensed to

10          you for one-time use is not a further use?

11          A.    I believe under section 201C of the

12          Copyright Act, that use of that image in the

13          context of the original publication would be

14          merely use for quote-unquote that work and would

15          not be a work -- a use beyond the context

16          permitted by Section 201C of the Copyright Act.

17          MR. BERGER: Could I have the answer

18          read back, please?

19                   (Record read)

20          Q.    Have you so advised National

21          Geographic, at any point in time after you wrote

22 your second opinion, of the opinion you just gave

23 me?

24 MR. SUGARMAN: You can answer the

25 question.

102

1 Kilmer

2 A. No.

=====

9 Q. Let me show you what was marked at an  
10 earlier deposition as Plaintiffs' 118 and ask you  
11 if she ever gave that to you. That's a 1997  
12 Geographic Mindscape marketing plan?

13 A. No, she did not.

14 Q. You conclude that the risks of the  
15 project "have clearly increased."

16 Is it fair to say that they increased  
17 for the reasons that you set forth in this  
18 paragraph on page 2, or were there other reasons  
19 that also increased the risk of the CD-ROM that  
20 you didn't cover in this paragraph?

21 A. My statement that it was perceived  
22 the risk had increased was based solely upon the  
23 stock photo issue.

=====



22 Q. Now, were you aware that Geographic  
23 had transferred any rights in the magazine to its  
24 for-profit subsidiary, National Geographic  
25 Enterprises?

TRANSFER FROM  
A NOT FOR PROFIT  
TO A PROFIT  
SUBSIDIARY!

108

1 Kilmer

2 A. No.

3 Q. Did anyone ever show you a license  
4 agreement between the two? Let me show you what's  
5 been marked as Plaintiffs' 20, a trademark and  
6 copyright license agreement, and ask you if you've  
7 ever seen it before?

8 A. No, I do not believe I have ever seen  
9 this or a copy of this previously.

10 Q. Had anyone ever told you at any time  
11 that National Geographic had transferred whatever  
12 rights it had in the copyrights in the magazine to  
13 a for-profit subsidiary?

14 A. No.

15 Q. So you're learning about that for the  
16 first time today?

17 A. That's correct.

18 Q. Had you ever seen a distribution

19 agreement between the for-profit subsidiary,  
20 National Geographic Enterprises, and a company  
21 called Mindscape?

22 A. No.

=====

16 Q. Well, then give me a fair  
17 characterization instead.

18 A. It was my impression that National  
19 Geographic had received, already, letters of  
20 concern and objection from photographers, also  
21 from stock photo houses, as to the idea of  
22 creating, distributing and selling 108-year  
23 CD-ROM. And Geographic wanted to know at this  
24 time if they were found guilty of copyright  
25 infringement, what the statutory damage exposure

110

1 Kilmer

2 would be in that situation.

3 Q. Would you characterize your opinion  
4 as kind of an in terrorem letter as to possible  
5 damages?

6 A. Could you explain that? I'm sorry.

7 Q. Well, in terrorem means a warning.

8       A. My letter I don't think was intended  
9 as a warning so much as an explanation of the  
10 extent of the potential damage risk. There were  
11 those at Geographic who had obviously a concern  
12 that if they were facing hundreds of thousands or  
13 millions of dollars in damages, that that might be  
14 a factor going into -- whether or not the project  
15 was completed.

16       Q. Let me show you Ms. Dupre's letter to  
17 Mr. Sugarman which was marked at another  
18 deposition as Plaintiffs' 71. Take a look at the  
19 second point in that letter.

20       A. Okay.

21       Q. Do you disagree with Ms. Dupre's  
22 characterization of your letter as kind of an in  
23 terrorem letter re possible damages?

24       A. As a warning letter of possible  
25 damages, I wouldn't disagree with that

111

1           Kilmer  
2 characterization. I think it was a warning letter  
3 as to possible -- the possible amount of damage  
4 they might be facing.

5 Q. I take it that you know a

6 Ms. Hohenlohe?

7 A. Yes. Nora Hohenlohe.

8 Q. I guess it's spelled

9 H-o-h-e-n-l-o-h-e. And Ms. Hohenlohe sent you  
10 some documents at some point in time, did she not?

11 Let me show you what's been marked as

12 Plaintiffs' 64 and ask you if these are the

13 documents you received from Ms. Hohenlohe in April

14 1997?

15 MR. SUGARMAN: I don't see

16 Mr. Radcliffe's reply in the package.

17 MR. BERGER: Correct. It was not

18 part of the document, but I have it as

19 well to give you.

20 A. This is part of what she sent me,

21 yes.

22 Q. Other than Mr. Radcliffe's response,

23 everything else that she faxed to you is there,

24 correct?

25 A. Yes. It is, yes.

112

1 Kilmer

2 Q. I didn't mean to confuse you on that.

3 I agree it's not there.

4 My question was simply did she send  
5 you these documents.

6 Now why did Ms. Hohenlohe do so?

7 A. I think because -- if I remember  
8 correctly, it was because of the complaint -- a  
9 complaint that had been received, not a legal  
10 complaint, I should take that back. An objection  
11 the Society had received, and I can't just  
12 remember from whom, but I think it was an  
13 objection they had received or an inquiry they had  
14 received from a stock photo house as to how stock  
15 photos were going to be treated in the 108-year  
16 CD-ROM.

17 Q. She's sending you here writers'  
18 contracts. That's what she indicates in her fax  
19 cover sheet. So does that help you remember why  
20 you received these documents?

21 A. It's my recollection that at this  
22 point in time, in April of 1997, they had  
23 advised -- Geographic -- National Geographic  
24 Society, through Susan Dupre, had advised me they  
25 had retained Mark Radcliffe of the Gray Cary firm

1                   Kilmer  
2 to render a further opinion on some of the  
3 copyright issues. Nora felt that I should have in  
4 front of me some of the materials relevant to what  
5 they were going to ask Mark Radcliffe and also  
6 wanted to specifically ask me about the writers'  
7 contracts and what my opinion of those was in  
8 terms of using certain writings in the 108-year  
9 CD-ROM.

10       Q.   So was National Geographic asking for  
11 another opinion from you?

12       A.   They really weren't, other than an  
13 impression, if you will. Not a written opinion  
14 but they wanted an impression or opinion given to  
15 them orally, over the phone, as it turned out.

16       Q.   They wanted further advice?

17       A.   Right.

18       Q.   And you read the writers' contracts?

19       A.   Uh-huh.

20       Q.   And as a result, what advice did you  
21 give?

22       A.   My recollection is that I indicated  
23 it would require a 201C analysis that I had not

24 done. And I said basically, sitting there, with  
25 201C and these contracts with -- I think it is

114

1 Kilmer

2 Mr. Theroux and Mr. Conniff, C-o-n-n-i-f-f.

3 Q. Is Mr. Theroux the same name you  
4 mentioned before?

5 A. Right, Paul Theroux, the writer on  
6 China, and in particular on this instance, that  
7 off the cuff -- and here again, without the  
8 benefit of very much judicial decision-making at  
9 the time, I thought these would fit within 201C,  
10 but I did not perform any extensive legal research  
11 on that issue.

12 Q. What was your reasoning for why they  
13 would fit?

14 A. That the project as it had been  
15 described to me, 108-year CD-ROM project as it had  
16 been described to me, was a purely linear  
17 page-for-page reproduction of the magazine, and  
18 that as a consequence, it was either the work or a  
19 revision of the work as stated in 201C.

20 Q. And the fact that the CD had a number

21 of additions that we discussed before, the opening  
22 montage and the opening global video and the Kodak  
23 message, et cetera, that didn't change your  
24 analysis at all as to whether this was a linear  
25 reproduction?

115

1 Kilmer

2 A. No, it did not change my analysis.

=====

7 Q. Did you ever talk to Mr. Radcliffe

8 about this opinion?

9 A. About this opinion, I don't believe

10 so, no. I talked to Mark about other things, but

11 I don't think I ever talked to him about this

12 opinion.

13 Q. You know Mr. Radcliffe?

14 A. Yes.

15 Q. And you've had professional dealings

16 with him of some kind?

17 A. Occasionally, yes.

18 Q. Now he concludes on the second page,

19 the first full paragraph, next to the last

20 sentence, "As discussed above, none of the



21 agreements," which were sent to him, "or any  
22 reviewed appear to permit this use in the CD  
23 project."

24 Did you disagree with that opinion?

25 A. I don't know that I ever assessed

117

1 Kilmer

2 that question. Do I now disagree with that  
3 opinion?

4 Q. Weren't you asked to assess that

5 opinion when you received this letter?

6 A. I may have been.

7 Q. Isn't that why Geographic sent it to

8 you, so you could look at it and give Geographic

9 your advice about the bona fides of that opinion?

10 A. And I have to admit by the time I

11 received the April 9th communication, I had been

12 advised I was basically out of the loop on this

13 project. I can't say my advice was being sought

14 any longer in terms of using my advice on a going

15 forward basis.

16 My recollection is I did not review

17 this in any great detail. As indicated in my

18 earlier letter in February of '97, there was  
19 already concern about the stock houses at the time  
20 I wrote that. I was certainly aware of that, but  
21 I don't recall reviewing this in any great detail.  
22 The only thing I recall saying is, as I indicated  
23 before, that I believed that based on my reading  
24 of 201C, that National Geographic, despite Mark's  
25 letter, had a defense. And that's really all I

118

1 Kilmer

2 remember.

3 Q. Did you tell Geographic that  
4 Mr. Radcliffe was wrong?

5 A. I don't -- no, I don't believe I said  
6 it in so many words. As I said, my recollection  
7 is that I simply said, I don't think Mark took  
8 into consideration 201C. I think the Society has  
9 a defense, do you want me to look at that issue?  
10 And they said no, hold off on that. And that -- I  
11 mean that's my recollection.

12 Q. Why were you out of the loop?

13 A. I'm not altogether sure. It was  
14 never -- it really was never explained to me.

15 Q. Who told you that you were out of the  
16 loop?

17 MR. SUGARMAN: I object to the form.

18 A. I'm trying to think. No one said,  
19 you're actually out of the loop.

20 MR. BERGER: What's wrong with the  
21 form?

22 MR. SUGARMAN: You are assuming  
23 someone told him that.

24 Q. How did you learn that you were out  
25 of the loop?

119

1 Kilmer

2 A. I think in --

3 MR. SUGARMAN: The same objection.

4 You can answer the question.

5 A. It's fair to say that in April, when  
6 I learned that Mark had been brought in and I had  
7 not been consulted since February of '97, that I  
8 concluded at that point that I was no longer  
9 leading the charge, as it were, in analyzing the  
10 copyright on the 108-year CD-ROM project.

11 Q. Did you know that as of early

12 February, that Mr. Sugarman was about to be  
13 brought in?

14 A. No, I did not.

=====

10 Q. Let's just walk through these notes  
11 for a second, if we could.

12 I notice there is a reference here to  
13 breakeven product. What do you mean by that?

14 A. My recollection of that is that at  
15 the time of this discussion on April 10th, the  
16 Society had actually scaled back its expectations  
17 for the sale of this product, on an 108-year  
18 CD-ROM. Although it still felt the product was  
19 important, they were crossing their fingers that  
20 the product would break even, if that.

21 Q. Uh-huh. Later on or actually right  
22 below that, you refer to reassignment upon  
23 request. Reassignment of what?

24 A. This would be reassignment of  
25 copyright upon request, and it would have been a

125

1 Kilmer

2 request of the photographer or the writer. I

3 can't recall which. It was probably the writer's  
4 because the Theroux agreement and so forth were in  
5 the package that she had faxed me.

6 Q. So are you saying here that between  
7 May of 1989 and sometime in 1995, there were, to  
8 use your words, reassignments of copyrights to  
9 creators of content for the magazine?

10 A. That's my recollection.

11 Q. And you are not sure whether that  
12 includes both writers and photographers or just  
13 writers?

14 A. I can't recall at this time, but I --  
15 I believe we may have been discussing writers at  
16 that point in time.

17 Q. And then below that, from '83 to '89,  
18 what do you mean by one-time rights and On  
19 Assignment?

20 A. Okay. One-time rights is a reference  
21 to, I believe, the stock photo agreements where  
22 some of them, there again, refer to granting of  
23 one-time publication rights, and I can't remember  
24 why I wrote '83 to '89 there, but it must be a  
25 comment that applied to just, at least in Nora's

1 Kilmer

2 view, certain of the contracts.

=====

2 Q. Let me ask it again.

3 Geographic licenses and images from a  
4 stock house, the stock house says on it's  
5 agreement, no electronic use. What opinion did  
6 you have, then, as to whether Geographic could use  
7 that image in the CD product?

8 MR. SUGARMAN: Objection.

9 A. My opinion at the time was that 201C  
10 offered a defense. I do not recall opining,  
11 because I had not done research on the issue as to  
12 how strong I thought the defense was, as it were,  
13 but I said that it offers the Society a defense.

14 Q. Did the Society tell you what they  
15 intended to do with respect to stock houses who  
16 had so restricted use of photographs by providing  
17 no electronic use?

18 A. All that I was told about that was  
19 that they had contacted someone in California, I  
20 believe it was, to carry on some negotiations or  
21 discussions on behalf of the Society with the  
22 stock houses. That's all I recall being told.

=====

16 Q. Now the next two lines below refers  
17 to "our adversary" or "our ADV." What is that?  
18 A. I'm not sure. It's ADV. She may  
19 have meant adversary, I'm not sure.  
20 Q. Okay. And there's a reference there  
21 to -- what follows that?  
22 A. It looks like "Reagan and Bush  
23 appointees." I'm not sure what's after that.  
24 Q. Is that something that you said?  
25 A. I may have, but I have no current

135

1 Kilmer  
2 recollection.  
3 Q. And if you said it, you were  
4 referring to Reagan and Bush appointed judges on  
5 the lower courts?  
6 A. As I say, I have no current  
7 recollection of what that was about.  
8 Q. Well --  
9 A. I don't even recall that being  
10 discussed, Reagan and Bush appointees being  
11 discussed.

12 Q. Well, is that something that

13 Ms. Dupre brought up?

14 A. I don't know that this conversation

15 was with Ms. Dupre.

16 Q. With whom was it?

17 A. I have it in my head it was with

18 Ms. Hohenlohe, but I could be mistaken.

19 Q. Is Ms. Hohenlohe a litigator?

20 A. Not at the time she was at

21 Geographic. I can't recall whether she was

22 previously.

23 Q. Now there is a reference after the

24 Reagan and Bush appointees to "80 percent gives us

25 better than 50 percent." What does that mean?

136

1 Kilmer

2 A. Here again, this harkens back,

3 apparently, to something we talked about in terms

4 of the Reagan and Bush appointees. As I said, we

5 may well have talked about it, but I have

6 absolutely no present memory of what in the world

7 we were talking about there.

8 Q. Well, wasn't the reference here that



9 if this case went to court and it was assigned to  
10 a Reagan or Bush-appointed judge in the lower  
11 courts, that because they would take a more pro  
12 business stance, you stood an 80 percent rather  
13 than 50 percent chance of winning? Isn't that a  
14 fair interpretation --

15 A. Of what this says?

16 MR. SUGARMAN: I object to that.

17 Whether it's a fair interpretation is  
18 really not what's relevant here.

19 A. It could have been what was in Nora's  
20 mind, but I'm sorry, I just have no present  
21 recollection of this.

22 Q. Wasn't that also in your mind?

23 A. I don't -- as I say, I don't even  
24 recall this part of the discussion. It may well  
25 have taken place but I honestly don't recall this

137

1 Kilmer  
2 part of the discussion.

3 Q. Well, if the case did go -- I mean  
4 you have been practicing in Washington for many  
5 years, correct?

6 A. Since 1980, yes.

7 Q. So that's 20 years plus, right?

8 A. Yes.

9 Q. And you are familiar with the lower  
10 courts, the district courts in Washington, are you  
11 not?

12 A. I have to say I brought two cases in  
13 the lower courts in Washington in the last eight  
14 years, and that's it. Most of the time I litigate  
15 outside of Washington. Very few cases are brought  
16 in this field in the copyright field in D.C. or in  
17 the intellectual property field in D.C.

18 Q. But you do litigate?

19 A. Yes.

20 Q. So you have some general sense of the  
21 pro business stance of certain judges, correct?

22 A. Yes. Yes, I think that's fair to  
23 say.

24 Q. And it's also fair to say that if a  
25 lower court judge had been appointed by President

138

1 Kilmer

2 Reagan or President Bush, they might be more pro

3 business, correct?

4 A. I think that's a fair statement.

=====

21 Q. Did there come a time when you  
22 registered the CD 108 with the Copyright Office?

23 A. There came a time I was pulled into  
24 the registration process, yes.

25 Q. Who pulled you in?

140

1 Kilmer

2 A. I was asked by Angelo Grima to field  
3 an inquiry from the Copyright Office. I cannot  
4 tell you the date, but the Copyright Office had  
5 requested that for purposes of the collection of  
6 the Library of Congress, the 108-year CD-ROM be  
7 deposited.

8 Q. And they wanted as the deposit the  
9 entire CD-ROM?

10 A. That's correct.

11 Q. And is that why Mr. Grima called you?

12 A. There was some confusion at National  
13 Geographic as to whether a request from the  
14 Library of Congress for a deposit constituted a

15 request for registration of a work. As a result  
16 of that confusion, the Society had prepared and  
17 filed a copyright application, which I believe was  
18 prepared by a secretary of Ms. Dupre, and in  
19 conjunction with the required requested deposits  
20 or contribution of the work to the library, an  
21 application for copyright registration was  
22 submitted. And the Copyright Office had  
23 apparently advised Geographic in a conversation, I  
24 did not participate in, that there were some  
25 difficulties with the application.

141

1 Kilmer

2 Q. So I understand your testimony, what  
3 you are saying is that before an application of  
4 registration had been prepared, the Library of  
5 Congress asked for a deposit?

6 A. Correct, that's my understanding of  
7 the situation.

8 Q. Why would the Library of Congress  
9 seek a deposit of a work that was not under  
10 registration?

11 A. It is done from time to time to

12 complete the collection of the library, which is  
13 really the reason the U.S. copyright has a  
14 registration system, oddly enough, which is to  
15 provide free works to the Library of Congress.

16 Q. So in response to the Copyright  
17 Office's request for a deposit, a registration  
18 application was prepared by a secretary of  
19 someone?

20 A. That's my recollection, yes. I think  
21 it was Sheila Hawken, I believe.

22 Q. And after that application was filed,  
23 was there some question that Mr. Grima asked you  
24 to get involved in?

25 A. They, the Society, had received a

142

1 Kilmer  
2 call from the Copyright Office as to the nature of  
3 any copyrightable elements, if you will, in the  
4 108-year CD-ROM, and Mr. Grima asked me to respond  
5 to that.

6 Q. Copyrightable elements that belonged  
7 to Geographic or copyrightable elements in  
8 general?

NUTSI

9 A. Present in the work of the 108-year  
10 CD-ROM.

11 Q. Owned by anybody?

12 A. Owned by anybody.

13 Q. Including stock houses?

14 A. That was never raised. When I talked  
15 to the Copyright Office, that was not the concern  
16 at all.

17 Q. Including photographers to whom  
18 assignments had been made of copyrights?

19 A. That was not one of the issues that  
20 the Copyright Office raised.

21 Q. And it wasn't raised that certain  
22 contracts, including the one that you did look at,  
23 that Ms. Dupre gave you in 1996, provided for the  
24 transfer of copyright to the photographer within  
25 60 days of publication? That was not raised as

143

1 Kilmer

2 well?

3 A. Not raised much.

4 Q. And the fact that this company that  
5 we referred to before as Pegasus or Pegasus

6 Imaging owned a registered copyright and  
7 decompression tool, that was not something that  
8 the Copyright Office raised at that time?

9 A. There was mention of software in my  
10 discussion with the Copyright Office.

11 Q. There was mention of software?

12 A. Yes.

13 Q. And were you aware of Pegasus'  
14 ownership of a registered copyright used in the CD  
15 108 during that discussion?

16 A. No.

17 Q. Mr. Grima didn't tell you about that?

18 A. It wasn't necessary for him to tell  
19 me there was software on the CD-ROM project  
20 product.

21 Q. He didn't tell you about that?

22 A. No, he didn't.

23 MR. BERGER: Let's mark the  
24 registration as Plaintiffs' Exhibit 231.  
25 (Whereupon, copyright registration

144

1 Kilmer

2 marked Plaintiffs' Exhibit 231 for

3 identification, as of this date.)

4 Q. What was Geographic attempting to  
5 register by this form?

6 MR. SUGARMAN: I object to the form.

7 Q. Or what was Geographic registering by  
8 this form?

9 A. The only element that they were  
10 seeking to register here was material other than  
11 the contents of the magazine for the 108-year  
12 period.

13 Q. How do you know that?

14 A. That's what I was advised by the  
15 Copyright Office when I spoke with -- I'm not sure  
16 exactly who I spoke with at this point in time.  
17 I'm not sure. I know I didn't make any notes  
18 about it, but it was examined -- it was an  
19 examiner at the Copyright Office.

20 Q. And the examiner told you what was  
21 being registered, or did you tell him?

22 A. Oh, the examiner told me what they  
23 were willing to register.

24 Q. Which was?

25 A. Which was you are not going to



1                    Kilmer  
2 register software because we know that every  
3 CD-ROM we get has got driver software of some kind  
4 or another and display software of some kind or  
5 another, and we don't register those as separate  
6 elements, so forget about that. The magazine  
7 itself is a pre-existing work, you can't register  
8 that in and of itself. So the only thing, as it  
9 indicates here, that we're going to let you  
10 register is the brief introductory materials and  
11 the audiovisual montage to which you earlier  
12 referred.

13        Q.    The top of the second page refers to  
14 an amendment per telephone conversation with you.  
15 What was amended?

16        A.    Which makes it look volitional. What  
17 was amended was in space 6B as in boy, where there  
18 is an amendment from a brief introductory, I think  
19 it was graphic material to a brief introductory  
20 audiovisual montage. I think that was the only  
21 change that we made.

22        Q.    Why was graphical material taken out?

23        A.    Because it wasn't a static image and  
24 if I remember correctly, the examiner's

25 interpretation of graphic material was that it

146

1 Kilmer

2 would have to be a static image to qualify as what

3 the Copyright Office would call graphic material.

4 But if it was a moving image, it would be

5 considered audiovisual as opposed to graphic, and

6 therefore, had to be called something else.

7 Q. There is also or at least there

8 appears to be a change in space 2 on the first

9 page.

10 A. Uh-huh.

11 Q. Where --

12 A. Yes.

13 Q. Where photographic and text are taken

14 out and something is inserted?

15 A. Right. Again, it's introductory

16 audiovisual montage. The same authorship.

17 Q. Were those the changes that you

18 authorized?

19 A. Right, yes. There are two places

20 that say introductory audiovisual montage.

21 Q. Did you get involved, if at all, in

22 registration of any CD-ROM 108 progeny?

23 A. No, I did not.

24 Q. Do you know whether Geographic

25 registered the CD 109 or the CD 110?

147

1 Kilmer

2 A. I have no idea.

3 Q. So I take it you had only one

4 conversation with the Copyright Office with

5 respect to this registration?

6 A. That's correct.

7 Q. And changes were made as reflected on

8 it?

9 A. Yes.

=====

17 Q. Now, in answering the question as to  
18 whether additional compensation is required, what  
19 did you do to ensure that you were fully up to  
20 speed on what the use was going to be?

21 A. The only things that came into my  
22 possession are what we discussed. And that is I  
23 needed to know what the intent of the product was,  
24 how it was going to be, as it were, executed on

25 the CD-ROM. I knew it was going to go onto a

165

1 Kilmer

2 CD-ROM. And what I was advised, as I testified

3 earlier, is that it was going to be a

4 page-for-page reproduction of the magazine from

5 the beginning of time until a certain point in the

6 1990s and that it was going to have a search

7 engine and an index, and that's what I was advised

8 was the current contemplated product at the time

9 of my review.

10 Q. So at the time that you wrote your

11 opinion letter in 1996, that's all you knew about

12 the use?

13 A. That's correct.

14 Q. And that's all you had been told

15 about the use?

16 A. That's correct.

17 Q. When did you first obtain a copy of

18 the CD-ROM yourself, in your own personal physical

19 possession?

20 A. I believe it was at some point in

21 1998.

22 Q. So it was after you wrote your first  
23 letter in '96?

24 A. Yes.

25 Q. It was after you wrote your second

166

1 Kilmer

2 letter in 1997?

3 A. Yes.

4 Q. So when you wrote both of those

5 letters, you didn't have a product available to

6 you at all?

7 A. That's correct.

8 Q. Now, if somebody at National

9 Geographic was to say in testimony that we went

10 ahead on this project because Paul Kilmer told us

11 we were okay from a copyright standpoint, would

12 that be a proper characterization of your opinions

13 in '96 and '97, from your viewpoint?

14 A. No.

15 MR. SUGARMAN: I object to the form.

16 THE WITNESS: Sorry.

17 Q. You never gave that opinion, did you?

18 A. That's correct.

IMPORTANT!

19 Q. You never told National Geographic or  
20 your contacts at National Geographic that you  
21 signed off on this project from a copyright  
22 standpoint, did you?

23 A. No.

24 Q. When you were looking at the 13B  
25 issue, Exhibit 222, did you have a copy of the

167

1 Kilmer  
2 freelance photographer's contract?

3 A. Unless that is the other four-page  
4 contract, I did not, no.

5 Q. And you've already told Mr. Berger  
6 you didn't have a copy of the stock house  
7 contracts?

8 A. Correct.

9 Q. So at best, you could only have given  
10 opinion as to the 13B issue in 222 and the  
11 contract you had in 223?

12 A. In 1996, right, and that's all I was  
13 asked to do, yes.

14 Q. I mean you could only analyze what  
15 you were given?

IMPORTANT!

16 A. Exactly.

17 Q. And that's all you did do?

18 A. At some point in time, yes.

19 Q. At some point did you get the feel  
20 that National Geographic was utilizing your  
21 opinion beyond its intent?

22 A. No.

23 Q. You went to several meetings with  
24 National Geographic people. And here in this  
25 deposition today, you've seen the internal

168

1 Kilmer

2 struggle between the various groups in National  
3 Geographic?

4 A. I was aware of that, yes.

5 Q. You were aware of that at the time?

6 A. Yes.

7 Q. You made some references to that,  
8 correct?

9 A. Yes.

10 Q. You've seen in the documents provided  
11 to you by Mr. Berger several references to the  
12 fact that "our independent counsel okayed the

13 project." Have you seen those references?

14 A. I have seen reference to corporate  
15 counsel and copyright counsel. As to corporate  
16 counsel, I think I testified I'm not exactly sure  
17 who they are referring to. As to copyright  
18 counsel, there is some confusion, because of  
19 overlapping representations, as to whether I'm the  
20 only one being referred to. But yes, I mean I'm  
21 aware of that.

22 Q. Up to the time that they sought the  
23 second opinion from Mr. Radcliffe in California,  
24 you were the copyright counsel?

25 A. I was the copyright counsel.

169

1 Kilmer

2 Q. I'm not a copyright lawyer,  
3 Mr. Kilmer, like everybody else in this room is,  
4 but what is the purpose of a publishing entity or  
5 society like the National Geographic going outside  
6 their own legal counsel to get an independent  
7 opinion?

8 A. You mean going outside of their  
9 in-house counsel?



10 Q. Yes.

11 A. I was just going to say National  
12 Geographic's in-house counsel did not claim any  
13 great copyright expertise at that point in time.

=====

5 Q. When you issued your 1997 letter, it  
6 was an analysis of potential exposure, liability  
7 damages, was it not?

8 A. Damages, right.

9 Q. And when Mr. Radcliffe issued his  
10 opinion, he also was very strong in urging  
11 National Geographic to get clearance of rights  
12 prior to publication, was he not?

13 MR. SUGARMAN: I object to the form.

14 A. My impression of his memo, which is  
15 the only thing I can go from, was that he had  
16 concerns, certainly, about liability exposure  
17 vis-a-vis the stock photo houses.

18 Q. And with your analysis of damages and  
19 Mr. Radcliffe's concerns, you are aware that  
20 National Geographic went ahead and published  
21 anyway?

22 MR. SUGARMAN: I object to the form.

23 A. They went ahead and published anyway,  
24 yes.

25 Q. Now, you said that in reviewing

176

1 Kilmer

2 Mr. Radcliffe's memo, you felt that National  
3 Geographic, your client, had a defense. Do you  
4 recall that testimony?

5 A. Yes.

6 Q. Now, when a lawyer who is a litigator  
7 says that his client has a defense, that doesn't  
8 necessarily mean it's a good defense, does it?

9 A. That's correct.

10 Q. And most good litigators can come up  
11 with a defense to almost any issue, can they not?

12 MR. SUGARMAN: I object to the form.

13 A. They do, yes.

=====  
24 Q. When did you first become aware of  
25 the fact that these products were being marketed

183

1 Kilmer

2 by for-profit subsidiaries of National Geographic

3 Society?

4 A. Today.

5 Q. This is the first time?

6 A. Yes.

7 Q. When your bills were submitted to  
8 National Geographic Society for the consulting  
9 work that you did regarding your '96 and '97  
10 opinion letters, were those bills, to your  
11 knowledge, paid by the Society or someone else?

12 A. They were paid by the Society, to the  
13 best of my knowledge.

=====

24 Q. My name is William Gardner. I'm with  
25 Weingrad & Weingrad and I represent other

184

1 Kilmer  
2 plaintiffs in related cases.

3 You mentioned earlier that you  
4 disagreed with the Greenberg opinion, Greenberg  
5 versus National Geographic. What is the  
6 foundation for your disagreement?

7 A. It's severalfold.

8 MR. SUGARMAN: I object to the form.

9 But you can answer.

10           A.    It's severalfold.  Firstly, the  
11    position that the software elements, if you will,  
12    of the CD-ROM should have been revealed to the  
13    Copyright Office.  The Copyright Office, as I  
14    indicated in my prior testimony, was well aware of  
15    the software drivers.  And in fact, the Copyright  
16    Office, in one of its own circulars, has taken the  
17    position that underlying software for multimedia  
18    products need not, should not, will not, according  
19    to them, be claimed in the registration  
20    certificate as a pre-existing work or otherwise.

21           That is one element of the Greenberg  
22    decision that I find absolutely wrong, quite  
23    honestly.

24           The position that the 108-year  
25    CD-ROM, which is how we're referring to the

185

1           Kilmer  
2    product today, is not covered by 201C of the  
3    Copyright Act, I believe it's an incorrect  
4    analysis by the court and I think it is contrary  
5    to the Supreme Court's decision in Tasini.

6           That the opening montage somehow

7 makes the reproduction of the magazine on a CD-ROM

8 a new product, I also disagree with.

9 Q. This may be a related question.

10 With regard to the copyright

11 registration, which I believe is Plaintiffs'

12 Exhibit 231, which you assisted in amending, to

13 your knowledge, does this copyright only register

14 the montage?

15 A. That's correct.

16 Q. Do you know if the National

17 Geographic Society sought to register the 108-year

18 CD-ROM as a compilation?

19 A. No, they did not want to register the

20 108 years of the magazine as a compilation.

21 MR. GARDNER: That's all I have.

=====

24 EXAMINATION BY MR. SUGARMAN:

25 Q. Let me put before you, Mr. Kilmer,

186

1 Kilmer

2 what's been marked as Exhibit 222 and ask you your

3 understanding of what this is an excerpt.

4 A. My understanding is this is an

5 excerpt from the independent contractor  
6 photographers agreements used by National  
7 Geographic Society between 1975 and 1995.

8 Q. Okay. When you say independent  
9 contractor, what do you mean by that?

10 A. That is, there were some  
11 photographers during that period of time who were  
12 on staff at National Geographic and it would not  
13 cover those individuals because they were regular  
14 employees, for example.

15 Q. And it would cover the other  
16 photographers that took photographs for National  
17 Geographic?

18 A. Right, that were retained by National  
19 Geographic to take photographs, correct.

20 Q. Are those photographers, to your  
21 knowledge, sometimes referred to as freelancers?

22 A. Yes.

23 Q. So that the contract that you were  
24 reviewing covered freelance photographers; is that  
25 correct?

187

1 Kilmer

2 A. That's what I was advised, yes.

3 MR. SUGARMAN: I have no further

4 questions.

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