

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

**JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,**

Plaintiffs,

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

v.

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

**ORAL ARGUMENT IS
REQUESTED**

Defendants.

**Reply Memorandum of Law in Support of
Defendants' Motion to Dismiss Count II And to Dismiss Or
for Summary Judgment on Counts III - V of Plaintiffs' Amended Complaint**

OF COUNSEL:

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- Naomi Jane Gray, Esq.**
- Edward Soto, Esq.**
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- Terrence B. Adamson, Esq.**

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**Reply Memorandum of Law in Support of
Defendants' Motion to Dismiss and for Summary Judgment**

The defendants National Geographic Society, National Geographic Enterprises' (collectively, the "Society") and Mindscape, Inc. ("Mindscape") submit this Reply Memorandum of Law in support of their motion pursuant to Fed. R. Civ. P. 12(b)(6) and 56(b) to dismiss and for partial summary judgment dismissing counts II - V of the Amended Complaint (the "Am. Compl.").

Preface

The plaintiffs do not dispute the defendants' lawful and appropriate use of the plaintiffs' photographs in National Geographic Magazine (the "Magazine"), including the use of one of their photographs on the cover of the January 1962 issue (the "Cover"). Nor do they claim that they were not paid for publication of the photograph in the Magazine. The plaintiffs concede that the copyright law is medium neutral and would encompass the right to

1. National Geographic Enterprises is incorporated under the name NGE, Inc.

republish the Magazine in the CD-ROM medium. The single issue, therefore, is whether the reproduction of multiple issues of the Magazine on one CD-ROM disk and the inclusion of a brief opening promotion of a co-sponsor, a moving sequence of several covers (one of which is a cover on which the plaintiffs' photograph was lawfully used) and a cover display is prohibited by the copyright law.

Argument

I. CD-ROM 108 IS NOT A NEW COLLECTIVE WORK.

The plaintiffs have asserted that CD-ROM 108 is not a reproduction of the Magazine, but an entirely new collective work. They support their argument by claiming that "nothing like it existed before" and by relying on "the selection and arrangement of things included (and excluded) from the work." Plaintiffs' Memorandum in Response to Defendants' Motion to Dismiss Count II and to Dismiss or For Summary Judgment on Counts III - V of Plaintiffs' Amended Complaint at p. 7 (hereinafter "Pl. Mem."). The plaintiffs' claim that "nothing like it existed before" is simply wrong. CD-ROM 108 is nothing more than a collection, in one place, of prior issues of the magazine. For years, publishers have sold collections of their publications in bound volumes and on microfilm and microfiche. Libraries around the country, including institutions such as the Library of Congress and the Eleventh Circuit library, have regularly made available periodicals originally published in print form in these media. And, the defendants in Tasini -- the New York Times, Sports Illustrated and Newsday -- have accumulated their prior issues on electronic media, including CD-ROM.

Moreover, "the selection and arrangement of things included (and excluded) from the work" does not come near the level of originality required to make CD-ROM a new collective work. "In order to qualify for a separate copyright as a derivative or collective work, the additional matter injected in a prior work, or the manner of rearranging or otherwise transforming a prior work, must constitute more than a minimal contribution." 1 Nimmer on Copyright §3.03. This additional matter "must contain some substantial, and not merely trivial, originality." Sherry Mfg. Co., Inc. v. King of Florida, Inc., 753 F.2d 1565, 1568 (11th Cir. 1985); L. Batlin & Son, Inc. v. Snyder, 536 F.2d 486, 491 (2d Cir. 1976)

(differences between plastic "Uncle Sam" coin bank and cast iron original in public domain were trivial, thus plastic bank insufficiently original to support copyright); New York Chinese TV Programs, Inc. v. U.E. Enters., Inc., 1989 U.S. Dist. LEXIS 2760 (S.D.N.Y. March 8, 1989) (attached hereto as Exhibit A). CD-ROM 108 does not satisfy this test.

In Sherry, two towel manufacturers disputed the copyrightability of a towel design depicting three palm trees growing out of the sand, an ocean view with a sailboat in one corner, and clouds on the horizon. Sherry, 753 F.2d at 1566. The plaintiff Sherry had copyrighted a *redesigned* version of its towels which contained changes in the dimensions of the beach, trees and water. Id. The Eleventh Circuit held that the "majority of those distinguishing details are so minor that they are virtually unnoticeable upon a cursory comparison of the two towels." Id. at 1569. The redesigned towels thus lacked sufficient originality to be copyrightable. Id.

In New York Chinese, the holder of an exclusive license to distribute Mandarin language videotapes in the United States sued various videotape rental stores for obtaining unlicensed copies which were taped directly off the Taiwanese airwaves and distributing them. Id. at * 5, 8-10. The licensed and unlicensed tapes differed in a variety of respects, including episode divisions, previews and credits. Id. at * 18. The Second Circuit ruled that these differences were "trivial non-programmatic 'packaging' changes" which did not confer derivative work status on the licensed tapes. Id. at * 18-19.

The packaging and presentation, the Kodak promotional message, the sequence of moving covers and the cover displays are "trivial" additions to the original 1,200-plus issues of the Magazine, which are reproduced exactly as they originally appeared. Moreover, the selection and arrangement of these elements does not display the "minimal level of creativity" which the plaintiffs concede is required by Feist Publishers v. Rural Tel. Servs. 499 U.S. 340, 346, 111 S. Ct. 1282, 1287 (1991); Pl. Mem. at p. 7. The Kodak promotional message,² the sequence of moving covers and the cover displays are simple

2. See Paramount Pictures Corp. v. Video Broadcasting Sys., Inc., 724 F. Supp. 808 (D. Kan.), where the court ruled that the addition of a commercial message at the beginning of a videotape did not create an unauthorized derivative work.

labeling and transitional displays; the placement of these displays involved minimal creativity, such as that at issue in Feist:

The plaintiffs' argument that the Society's selection of the English language edition of the Magazine and not those published in other languages or one of several issues which contains different advertising makes CD-ROM 108 a new collective work, Pl. Mem. at p. 8, borders on the frivolous. Selection of the English language edition, which was the only language in which the Magazine was published prior to 1995, see Reply Declaration of Thomas Stanton at ¶ 4 (hereinafter "Stanton Reply Decl."), can hardly be considered creative. Moreover, the Society did not engage in any selection process whatsoever in choosing one of several "regional" editions which contained different advertising. Rather, it included those issues which it had on hand; it supplemented gaps in its inventory by purchasing issues at used book stores, institutions, and even garage sales. Stanton Reply Decl. at ¶ 3. Again, this is hardly the type of creative decision required to make CD-ROM 108 a new collective work.³

CD-ROM 108 thus does not qualify as a new collective work for purposes of §201(c) because it does not differ in any material creative respect from paper copies of the Magazine. As a straightforward reprint of the Magazine, the Society is entitled to publish it pursuant to §201(c).

II. SECTION 201(C) OF THE COPYRIGHT ACT PERMITS THE SOCIETY TO PUBLISH CD-ROM 108 EVEN IF IT IS A NEW COLLECTIVE WORK.

Even if the Court were to determine that CD-ROM 108 is a new collective work, that determination would be irrelevant to the outcome of this case.

Section 201(c) explicitly permits the use of an author's contribution, initially published in a collective work, in a new collective work. Thus, revisions of a particular collective work and later collective works in the same series -- both explicitly authorized by § 201(c) -- are clearly "new" collective works. For example, "a 'revision' can alter a

3. The inclusion of a 1997 copyright notice has no significance. Under the present law, copyright notice is not even required. 2 Nimmer on Copyright §7.02[C][3]. Thus, it does not signify whether CD-ROM 108 is or is not a collective work. That judgment is based as indicated above, on whether the new matter is substantial and not merely trivial.

preexisting work by a sufficient degree to give rise to a new original creation." Tasini v. New York Times Co., 972 F. Supp. 804, 819 (S.D.N.Y. 1997). Also, a publisher "could reprint an article from a 1970 edition of an encyclopedia in a 1980 revision of it," H.R. Rep. No. 2237, 89th Cong., 2d Sess. 117 (1966), referenced in the final committee report on the 1976 Copyright Act, H.R. Rep. No. 1476, 94th Cong., 2d Sess. 122-23 (1976), even though that 1980 revision would obviously be a "new" collective work. Moreover, if a revision of an encyclopedia, which adds new material, is permitted by §201(c), then the exact reproduction of previous issues of the Magazine to which a promotional message, a sequence of moving covers and cover displays are added is also permissible.

Conceding explicitly that it is not the electronic medium that is at issue here, Pl. Mem. at p. 8 n. 4, the plaintiffs' position is evidently that, while the Society could reproduce each issue of the Magazine on a separate CD-ROM disk, it cannot reproduce all of its back issues on 30 disks. In other words, the Society could distribute a collection of past issues on approximately 1300 disks, but not on 30 disks. The proposition that the plaintiffs allege demonstrates its obvious weakness.

Would the plaintiffs argue that the Society could not distribute a bound volume in which all of the issues for a particular year were reproduced? Obviously not. Nor have they ever objected to the distribution of multiple issues of the Magazine on microfiche and 35mm film, a historically common practice for libraries, educational institutions and others around the world with respect to virtually every published periodical. Yet, while they concede that "the issue . . . is not the medium used," Pl. Mem. at p. 8 n. 4, they argue that the Society cannot distribute a collection of 30 compact disks, each of which contains approximately 43 issues of the Magazine. Not only does this contention defy logic, but, were it the law, it would undermine the medium neutrality which is the hallmark of the 1976 Act. Tasini, 972 F. Supp. at 818-9. Different media have different capabilities with respect to the amount of data they can physically store within a given space. A CD-ROM can hold more data than microfiche or 35mm film, which, in turn, can store more information in a given space than paper.

The plaintiffs' economic argument, that contributors will be disadvantaged if publishers are permitted to exploit extremely marketable new technologies under §201(c),

was roundly rejected in Tasini, 972 F. Supp. at 827. There, Judge Sotomayor correctly pointed out that if recently developed technologies render §201(c) unappealing to contributors like the plaintiffs, their remedy lies in Congress, not the courts. Id.

The plaintiffs have not alleged that the Society had no right to publish any of the photographs involved in Counts III - V in the Magazine, nor have they alleged that they were not paid in full for the photographs at the time of publication. The plaintiffs rely on one contract governing the publication of their photographs in a 1990 issue of the Magazine, Affidavit of Jerry Greenberg at par. 10 and Exhibit 4 thereto (hereinafter "J. Greenberg Aff."), but have set forth no contracts relating to the remainder of the photographs at issue here. The 1990 contract does not restrict the Society's use of the subject photographs to any particular medium. J. Greenberg Aff. Exh. 4. Nor do the plaintiffs claim that it contains an "express transfer of copyright" which undercuts the applicability of §201 (c). See Tasini, 972 F. Supp. at 812. Having failed to bargain for that benefit, the plaintiffs may not now, in an effort to extract additional payment from the Society, escape its strictures.

In sum, it defies logic to admit, as the plaintiffs do, that the Society can reproduce a particular monthly issue of the Magazine containing the plaintiffs' photographs, but cannot reproduce that same monthly issue on a CD-ROM disk containing multiple issues.

III. THE SOCIETY'S USE OF THE COVER IN THE SEQUENCE OF MOVING COVERS IS DE MINIMIS.

A. The significance of the Cover in relation to CD-ROM 108 as a whole is minuscule.

The plaintiffs have neglected to address in their brief the insubstantiality of the Cover's appearance in the sequence of moving covers, which is the relevant de minimis analysis, engaging instead in overblown rhetoric which vastly exaggerates the significance of the sequence of moving covers, and the series of independent covers depicted therein, to CD-ROM 108 as a whole. Pl. Mem. at p. 13. The plaintiffs also overlook the fact that the Cover was designed by the Society and bears a photograph which the Society commissioned and paid the plaintiffs to take; there is no question that the Society is entitled to use the plaintiffs' photograph on the Cover. However, none of the plaintiffs' self-congratulatory arguments can change the simple fact that the reproduction of the Cover in the introductory

sequence appears only for a split second,⁴ is never seen by a customer in any advertising or promotional material, and, indeed, is never seen by a customer before the sale of the product. Thus, it is not "iconic in terms of [its] significance to the product" or "emblematic of all the magazines in [CD-ROM 108]," Pl. Mem. at p. 13.⁵

Nor does the plaintiffs' reliance on the qualitative artistic merit of the Cover carry any legal weight in the de minimis analysis. In Ringgold v. Black Entertainment Television, Inc., 126 F.3d 70 (2d Cir. 1997) and Sandoval v. New Line Cinema Corp., 973 F. Supp. 409 (S.D.N.Y. 1997), the courts did not consider whether the allegedly infringed work had artistic merit. Indeed, it was recognized in Ringgold that the plaintiff's work was used because it had artistic merit. The analysis in those cases concerned how and for how long the admittedly valuable work was displayed, Ringgold, and the value of the material used in relation to the whole work, Sandoval. Here, the visual quality of the images in the sequence of moving covers is fleeting and inferior to that of paper copies of the Magazine. Declaration of Thomas Stanton at ¶ 8 (hereinafter "Stanton Decl."). And, the material used is inconsequential in relation to the whole work. Qualitatively as well as quantitatively, the sequence of moving covers constitutes de minimis use of the Cover.

Finally, the plaintiffs' attempt to find support in Ringgold is unavailing. The defendants here do not contend that *no* visually significant aspect of the Cover is discernible. Rather, the brevity of the Cover's display in the sequence of moving covers, coupled with

4. The defendants invite the Court to view the sequence of moving covers to determine whether the duration of the Cover's appearance is anywhere near the "between one and two seconds" that Idaz Greenberg claims. Affidavit of Idaz Greenberg at ¶ 7.

5. The use of the Cover here is far less than the uses involved in Education Testing Servs. v. Katzman, 793 F.2d 533, 542 (3d Cir. 1986) and Elsmere Music, Inc. v. National Broadcasting Co., 482 F. Supp. 741, 744 (S.D.N.Y. 1980). In Katzman, the defendants copied actual questions from the Scholastic Aptitude Test and the Achievement Tests, which is maintained and administered under highly confidential circumstances. Katzman, 793 F.2d at 536, 543. In Elsmere, the defendants used the most significant and recognizable portion of the song "I Love New York" in a parody. Elsmere, 482 F. Supp. at 744. In contrast, the Society here has made fleeting and insubstantial use of the Cover on which the plaintiffs' photograph appears and the plaintiffs do not contest that the defendants obtained the right to publish the photograph in the Magazine.

the inferior quality of the digitally scanned image, does not cross the de minimis threshold. Significantly, the Ringgold image was displayed for a period *twenty-six times longer* than the Cover appears in the sequence of moving covers. Ringgold, 126 F.3d at 77; Stanton Decl. at ¶ 7. The defendants are not, as the plaintiff suggests, trying to "diminish the importance of a photograph they deemed well-suited for inclusion in a highly-select group of photographs chosen to represent the history of the magazine." Pl. Mem. at p. 15. The defendants recognize the Cover's appearance in the sequence of moving covers for exactly what it is worth -- a split-second flash reproduction in a product containing thousands of images.

B. The defendants' use of the entire Cover does not preclude a finding of de minimis use.

The plaintiffs' claim that the appearance of the entire Cover in the sequence of moving covers precludes a finding of de minimis use is flatly contradicted by the holdings in Amsinck v. Columbia Pictures Indus., Inc., 862 F. Supp. 1044 (S.D.N.Y. 1994) and in Ringgold, 126 F.3d at 70. In Amsinck, the defendant used the plaintiff's crib mobile as part of the set decoration of a film. Id. at 1046. The court found that the use was de minimis despite the fact that the entire work was portrayed. Id. at 1048. In Ringgold, while the court found that the use exceeded the de minimis threshold, it reached that conclusion based ~~on the duration and significance of the use, not on the fact that the entire image was used.~~ Ringgold, 126 F.3d at 77. Similarly, courts have found fair use of photographs where the entire work was used. See Sandoval v. New Line Cinema Corp., 973 F. Supp. 109 (S.D.N.Y. 1997) (finding fair use of ten photographs displayed in film); Ilaberman v. Hustler Magazine, Inc., 626 F. Supp. 201 (D. Mass. 1986) (finding fair use of two photographs reproduced substantially in full in magazine). Clearly, the fact that the defendants used the entire Cover in the sequence of moving covers does not preclude a finding of de minimis use.

IV. THE COURT POSSESSES SUFFICIENT FACTS FOR IT TO RULE ON THE FAIR USE DEFENSE.

The plaintiffs have taken the liberty of not responding at all to the defendants' fair use argument, claiming that they need discovery. Since, as demonstrated below, the

argument that any discovery is needed is fallacious, the Court should not impose delay and unnecessary discovery, but should adopt the defendants' position.

None of the discovery sought by the plaintiffs has any bearing whatsoever on the defendants' fair use defense. Indeed, the plaintiffs' counsel concedes that the issue is whether defendants "seek to exploit the Moving Covers Sequence for commercial gain," Davis Aff. at ¶ 8, not whether CD-ROM 108 is sold for commercial gain. Bearing this critical fact in mind, it is clear that the Court has before it all the facts it needs to determine the fair use question.

It is well established that where a district court possesses sufficient facts to permit it to evaluate each of the four fair use factors, it may determine the fair use issue as a matter of law. Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (finding no fair use); Pacific and Southern Co., Inc. v. Duncan, 744 F.2d 1490 (11th Cir. 1984). "The mere fact that a determination of the fair use question requires an examination of the specific facts of each case does not necessarily mean that in each case involving fair use there are factual issues to be tried." Amsinck, 862 F. Supp. at 1046 (citations omitted). Because the Court possesses all the facts it needs to determine fair use, and because there is no genuine dispute of material fact, the Court may decide the issue.

Moreover, a nonmoving party's request for a continuance to allow it to conduct further discovery with respect to the pending motion must be reasonably calculated to uncover facts which will help the party oppose the motion. Witter v. Abell-Howe Co., 765 F. Supp. 1144 (W.D.N.Y. 1991). The plaintiffs cannot meet this burden.

The plaintiffs claim that they require information regarding "[t]he nature of for-profit corporate affiliates created by the National Geographic Society to produce, market and distribute the 'Complete Geographic' product, and the financial goals and expectations of the affiliates," Davis Aff. at ¶ 8(a), and the expectations of the Society and Mindscape to reap economic gain from CD-ROM 108. Davis Aff. at ¶ 8(b)-(c). However, these requests fall far wide of the fair use mark. The fair use inquiry into commerciality focuses on whether the alleged infringer stands to gain from "exploitation of the *copyrighted material*," Harper & Row, 471 U.S. at 562, not whether the new work, as a whole, is commercial in nature. See Fenelope v. Brown, 792 F. Supp. 132, 137 (D. Mass 1992); Haberman v.

Hustler Magazine, Inc., 626 F. Supp. 201, 210 (D. Mass. 1986) (citing Harper & Row, 471 U.S. at 562). The defendants do not dispute that CD-ROM 108 is sold for a profit by a legal entity which is a for-profit corporation. See Memorandum of Law in Support of Defendants' Motion to Dismiss Count II and to Dismiss or for Summary Judgment on Counts III - V of Plaintiffs' Amended Complaint at p. 13 (hereinafter "Def. Mem."). That, however, as the plaintiffs concede, is not the issue. The proper inquiry in this case is whether the inclusion of the Cover in the sequence of moving covers alone is designed to reap economic benefit, not whether the defendants expect to earn a profit from the sale of CD-ROM 108 as a whole.⁶ The discovery described in ¶ 8(a)-(c) of the Davis Affidavit can shed no light on this issue.

Finally, the plaintiffs have requested information regarding the roles that the respective defendants played in various aspects of the production and sale of CD-ROM 108. Davis Aff. at ¶ 8(d). This, too, is entirely unnecessary for a ruling on fair use. The activities of the defendants in developing, marketing and selling CD-ROM 108 have no bearing on any of the four fair use factors. The minutiae of Interactive's methodology in digitally scanning each issue of the Magazine and Mindscape's efforts to distribute CD-ROM 108 cannot illuminate the Court's analysis of the four factors. Tellingly, the plaintiffs do not provide any rationale for their need to discover these facts. "A 'bare assertion' that the evidence supporting a plaintiff's allegation is in the hands of the defendant is insufficient to justify a denial of a motion for summary judgment under Rule 56(f)." Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 (2d Cir. 1981).

Conclusion

For all the reasons stated, the defendants respectfully request that their motion be granted.

Dated: Miami, Florida
February 23, 1998

6. For a fuller discussion of this aspect of the fair use inquiry, see Def. Mem. at pp. 12-13.

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