

COPY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 97-3924-CIV-LENARD/Magistrate Judge Simonton

JERRY GREENBERG, individually, and IDAZ
GREENBERG, individually,

Plaintiffs,

v.

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

Defendants.

***REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT
OF DEFENDANTS' CROSS-MOTION FOR PARTIAL
SUMMARY JUDGMENT AS TO NUMBER OF WORKS
INFRINGEMENT***

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This reply memorandum of law is submitted on behalf of Defendants National Geographic Society, National Geographic Enterprises, Inc., and Mindscape, Inc. (collectively, "Defendants") in further support of their cross-motion for partial summary judgment.

ARGUMENT

I. PLAINTIFF'S ARGUMENTS THAT JERRY GREENBERG DID NOT OWN COPYRIGHT IN THE PHOTOGRAPHS INITIALLY AND HIS SUBMISSIONS DID NOT CONSTITUTE COMPILATIONS BECAUSE HE DID NOT OWN THE RIGHTS TO THE ENTIRE STORY MISSTATES THE LAW, AND DOES NOT PRECLUDE AN AWARD OF PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' CROSS-MOTION.

Plaintiffs allege that because Jerry Greenberg ("Greenberg") did not own the copyright in the stories at the time they appeared in the paper version of *National Geographic Magazine* (the "Magazine"), the clear language of the statute which states that compilations are one work for purposes of computing statutory damages should be ignored. See Plaintiffs' Reply Memorandum in Support of Their Motion for Partial Summary Judgment, and Memorandum in Opposition to Cross-Motion for Partial Summary Judgment (hereafter "Plaintiffs' Opp. Mem." or "Opposition Memorandum") at 1-6. Yet, there is nothing in the statute or the legislative history which draws a distinction based on ownership of the individual elements of a compilation. Plaintiffs' argument, therefore, relies on a distinction without a difference.

The Copyright Act is clear that a compilation constitutes one work for purposes of computing statutory damages. A compilation is defined in the Copyright Act as "a work formed by the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101; see also UMG Recordings, Inc. v. MP3.Com, Inc., 109 F. Supp.2d 223, 224-25 (S.D.N.Y. 2000). A story in the Magazine consists of photographs and

text, selected and arranged in a certain manner. The text and photographs – while integrated together in the story – are also capable of standing on their own as compilations in which preexisting materials have been selected and arranged. See Kobersteen Aff. ¶¶ 3-4.¹ Thus, a compilation based upon an article in the Magazine could consist of (1) the text and the photographs selected and arranged in a certain manner; (2) the text alone selected and arranged in a certain manner; or (3) the set of preexisting photographs selected and arranged in a certain manner. The definition of “compilation” in the Copyright Act in no way indicates that there cannot be more than one compilation derived from some of the same overlapping elements, such as text plus photographs, text alone, or photographs alone.

Plaintiffs’ Opposition Memorandum mightily attempts to obscure the essential and undisputed facts already set forth in Defendants’ Memorandum of Law dated May 6, 2002 (“Defendants’ Mem.” or “Defendants’ Memorandum”). Thus, Plaintiffs have not refuted that (1) he took and submitted a number of photographs on his four assignments for the Magazine; (2) a number of photographs submitted were selected by the staff of the Magazine and arranged with text into a story on a particular subject that was ultimately published in the Magazine; (3) copyrights to the photographs were transferred or returned as a group to Greenberg; and (4) he registered or renewed the copyright in the photographs utilizing one registration form for the entire set of photographs published in each story. See Defendants’ Mem. at 8; see also Greenberg Aff., Exs. A, C, D, E; Kobersteen Decl. ¶¶ 3-4.

Moreover, noticeably absent is any claim that Greenberg registered copyrights in those photographs that Greenberg submitted that were not ultimately published in the Magazine

¹ All definition and abbreviations set forth in Defendants’ Memorandum and annexed to Defendants’ Memorandum or Plaintiffs’ motion papers, i.e., Greenberg Aff. and Kobersteen Decl. will be utilized in the instant memorandum of law.

despite the fact that Plaintiffs would have this Court believe that every photograph that Greenberg has ever taken is an independently valuable "gem." Had Greenberg truly been seeking to register each of the individual photographs taken on a particular assignment, and had he believed that each had independent economic value, he would have registered all of the photographs taken, not simply the ones published in the Magazine. This is particularly apparent for the photographs taken for the July, 1990 issue as the copyrights were returned to Greenberg shortly after he submitted the pictures yet there is no evidence that Greenberg registered the copyrights to the unpublished pictures despite his allegation that all of his photographs are commercially viable. See Greenberg Aff. ¶ 12, Ex. D.

Plaintiffs claim that, in the cases cited in the Opposition Memorandum, the entity which registered the compilation also owned the underlying components. See Plaintiffs' Opp. Mem. at 3-5. Assuming this to be the case, however, none of the cases cited relied on this fact in making its decision. In fact, those cases clearly demonstrate that the most important factor to the court is determining whether the works constitute a compilation. See Defendants' Mem. at 5-7 and cases cited therein.

Plaintiffs also argue that "[t]he designation of works for damages is limited to works that were infringed." See id. at 2. Yet, Plaintiffs concede that, in Costar Group Inc., "both the photographs and the compilations had been infringed." See id. at 3 (citing Costar Group Inc. v. Loopnet, Inc., 164 F. Supp.2d 688 (D. Md. 2001)). Despite that fact, the court in Costar Group Inc., following the clear direction of the statute, held that there were 13 works, the number of compilations, not 348, the number of photographs, for statutory damages purposes. See Costar Group Inc. 164 F. Supp.2d at 711-12.

II. PLAINTIFFS' MOTION SHOULD BE DENIED AS THERE ARE SIGNIFICANT FACTUAL ISSUES AS TO WHICH THERE HAS BEEN NO DISCOVERY.

A. Where The Facts On The Basis Of Which Summary Judgment Is Sought Are In Dispute, Additional Discovery Is Appropriate.

As a preliminary matter, contrary to Plaintiffs' assertions, there is no hypocrisy in arguing that the Society is entitled to summary judgment but that Plaintiffs are not because facts on which they rely are in dispute. See Plaintiffs' Opp. Mem. at 8. There is no dispute over the facts on the basis on which the Society moves – the photographs taken by Greenberg were selected and arranged by the Society, were published in four articles and were registered in four groups by Mr. Greenberg. There are significant issues as to the facts on which Plaintiffs base their motion – e.g., whether each photograph has a separate economic life – and Defendants have not had discovery on these issues.

Indeed, the “facts” listed on pages 9 and 10 of the Opposition Memorandum, none of which are supported by any affidavit or declaration, are in dispute or are irrelevant. And Defendants have had no opportunity to take discovery on any of these. See Defendants' Mem. at Point III.B.

B. Plaintiffs Have Not Demonstrated Independent Economic Value As A Matter Of Law And Their Motion Must Be Denied.

Plaintiffs' new argument that he does not have to quantify the independent economic value of each of the photographs that he took is merely a smokescreen to deflect attention away from the fact that he has not demonstrated that any of the photographs has any independent economic value. Although their Opposition Memorandum was served after Defendants pointed out this defect, Plaintiffs still rely upon Greenberg's short conclusory allegation that his photographs are commercially viable. See Plaintiffs' Opp. Mem. at 8; Greenberg Aff. ¶ 12; Defendants' Mem. at 11 (stating that Greenberg has submitted no proof as

to the commercial viability of any of the photographs). Obviously, if Greenberg had any proof of commercial viability, he could easily have submitted it via his own affidavit as supplied with his Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment as to Number of Works Infringed ("Plaintiffs' Mem." or "Plaintiffs' Memorandum").

Defendants are not seeking to have Plaintiffs place a dollar amount upon each photograph. They must, however, establish that each photograph has some independent economic value. They have not done so and are not, therefore, entitled to summary judgment.

In their Opposition Memorandum, Plaintiffs set forth additional "facts" on the basis of which they claim to be entitled to summary judgment. See Plaintiffs' Opp. Mem. at 9-10. As indicated above, these "facts" are disputed and discovery is, therefore, required. In any event, Plaintiffs' new contentions (at pages 9-10) do not establish that each photograph has independent economic value:

1. Plaintiffs contend that the fact that the photographs were not unpublished works appearing in the Complete National Geographic for the first time indicates that each is independently commercially viable. Yet, except for the snippets in Greenberg's self-serving conclusory affidavit (§ 12), Plaintiffs have submitted no proof as to other publication or licensing of the photographs. The only publication of the photographs in the record is their publication as compilations in the four stories published in the Magazine.
2. The allegation that the photographs are not stock photographs stored in a warehouse is irrelevant to the issue before the Court. A stock photograph from a warehouse may have significant independent economic value or it may not depending upon the photograph and the circumstances under which it is

produced and distributed.

3. The allegation that the present value of the photographs should not be the standard for the future value of the photographs as societal demands may alter the present value is similarly irrelevant to the issue before the Court on this motion as it goes to the amount of statutory damages, not to the number of works to be considered for purposes of computing statutory damages.
4. The fourth allegation – that publication in the Magazine enhances the photographs' commercial viability – is also irrelevant to the issue before the Court because it also goes to the amount of statutory damages, not to the number of works infringed. Moreover, this contention actually supports Defendants' argument that the photographs are a compilation as readers have viewed the photographs as "select[ed] and use[d] . . . by the Society" and therefore are likely to expect the selection and arrangement utilized in the story should they decide to purchase the photographs.
5. Plaintiffs' contention that any reasonable observer could ascertain the inherent value of each photograph is erroneous and cannot be adjudicated on the evidence currently before the Court. Even assuming that each photograph has a unique quality and character does not extrapolate to independent economic viability when the photographs may in fact be part of a compilation. For example, a scene from a play may be unique, artistic, and enjoyable without viewing the entire play, but that does not mean that the scene has independent economic value apart from the entire play. In any event, in relying on the conclusion of a "reasonable observer," Plaintiffs concede that

there are factual issues.

6. Plaintiffs' final contention – that the photographs have independent economic value because they were published in a magazine published by a non-profit entity and then included in a product sold by a “for-profit” entity – is both irrelevant and erroneous. First, the fact that the Magazine is distributed by a non-profit entity with an educational and scientific mission and the Complete National Geographic is distributed by a “for-profit” entity – actually wholly-owned taxable subsidiary – is irrelevant. Such a distinction would be relevant only if the non-profit organization distributed its materials for free and the taxable organization required the purchase of its product. In this case, the products of both entities have always been sold for a fee and the fact is undisputed in this litigation that the activities and the revenues of both the not-for-profit parent and the wholly-owned taxable subsidiary are mission related and profits, if any, inure to the benefit of the not-for-profit mission; there are no economic stakeholders for the wholly-owned taxable subsidiary except the not-for-profit parent. Moreover, the fact that an entity is taxable or non-taxable does not necessarily equate with free. Second, the fact that the Society valued the photographs enough to have published them in a magazine as part of a compilation, does not mean or establish that each photograph, standing on its own, has an independent economic value.

CONCLUSION

For all of the reasons stated above, and in Defendants' Memorandum of Law dated May 6, 2002, the Affirmation of Naomi Jane Gray, and the Declaration of Kent Kobersteen, Defendants' cross-motion should be granted and Plaintiffs' motion should be denied.

Dated: May 24, 2002

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that the foregoing has been sent by Federal Express this 24th day of May, 2002 to Norman Davis and David A. Aronberg, Steel Hector & Davis LLP, 200 South Biscayne Boulevard, 40th Floor, Miami, Florida 33131-2398, attorneys for Plaintiffs.

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