

DOCKET NO. 05-16964-JJ

**IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

JERRY GREENBERG,  
Plaintiff/Appellee

vs.

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

Defendants/Appellants.

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On Appeal from the United States District Court  
for the Southern District of Florida

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**PETITION FOR REHEARING EN BANC  
By Appellee Jerry Greenberg**

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**PETITION FOR EN BANC REVIEW  
By Appellee Jerry Greenberg**

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NGE, Inc.

NGHT, Inc.

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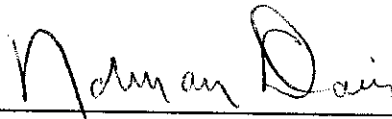
I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the prior precedent doctrine of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court:

U. S. v. Chubbuck, 252 F.3d 1300 (11<sup>th</sup> Cir. 2001)

U. S. v. Steele, 147 F.3d 1316 (11<sup>th</sup> Cir. 1998) (en banc)

Cargill v. Turpin, 120 F.3d 1366 (11<sup>th</sup> Cir. 1997)

N.L.R.B. v. Datapoint Corp., 642 F.2d 123 (former 5<sup>th</sup> Cir. 1981)



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## ISSUES THAT MERIT *EN BANC* CONSIDERATION

1. The panel in Greenberg v. National Geographic Society, Docket No. 05-16964, decided in this Court on June 13, 2007 (“Greenberg II”), reversed a precedent established in this Circuit in Greenberg v. National Geographic Society, 244 F.3d 1267 (11<sup>th</sup> Cir. 2001) (“Greenberg I”), and did so in reliance on a subsequent Supreme Court decision that did not overrule Greenberg I, that was not on point, and that was not clearly contrary to Greenberg I.

2. The subsequent Supreme Court decision was New York Times Co. v. Tasini, 533 U.S. 483 (2001), where the holding was based on totally different facts. Greenberg II improperly relied on dicta and a “strong implication” in Tasini to overturn Greenberg I.

## THE COURSE OF PROCEEDINGS AND THE DISPOSITION OF THE CASE

National Geographic Society, National Geographic Enterprises, Inc., and Mindscape, Inc. (collectively, "the Society") appealed from a final order and judgment of the District Court for the Southern District of Florida entering judgment as a matter of law against them on the issue of liability for copyright infringement and following a jury trial solely on the issues of damages and willfulness. The matter originated in a complaint and amended complaint filed by Jerry Greenberg ("Greenberg") and his wife Idaz Greenberg.<sup>1</sup> They alleged that the Society infringed Greenberg's copyrights in photographs that originally ran in several issues of the National Geographic magazine. In 1997, the Society had released "The Complete National Geographic" ("CNG"), a thirty-disc CD-ROM set that reproduced all monthly issues of the monthly magazine from its first issue in 1888 through 1996 (and subsequent years in later iterations of the CNG).

The Society filed a motion to dismiss on the ground that the Society had a privilege to publish a revision of the original magazines under 17 U.S.C. § 201(c). The district court granted the motion. That decision was reversed by this Court in Greenberg I.

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<sup>1</sup> Idaz Greenberg was subsequently dismissed as a plaintiff by the District Court.

Three months after Greenberg I was decided, the Supreme Court decided Tasini. Subsequently, the Second Circuit, deciding a case brought by other photographers and authors whose works were included in the CNG, held that the CNG was privileged under § 201(c). Faulkner v. National Geographic Enterprises, Inc., 409 F.3d 26 (2d Cir. (2005). The Supreme Court subsequently denied certiorari that could resolve the conflict between the Second and Eleventh Circuits. \_\_\_U.S.\_\_\_, 126 S.Ct. 833 (2005).

#### **FACTS NECESSARY TO ARGUMENT OF THE ISSUES**

The issues warranting a rehearing *en banc* essentially involve matters of law. A core description of The Complete National Geographic product is contained in the statement of proceedings set forth above. A few other facts pertaining to the CNG and to the products at issue in Tasini are included in discrete portions of the argument below.

## ARGUMENT

### A. Compelling Justification for *En Banc* Review

This case involves a CD-ROM product called the Complete National Geographic (“CNG”), involving 30 discs, launched in 1997 by the National Geographic Society (“Society”), that includes every monthly edition of the Society’s magazine ever published. Each CD-ROM contains various additional items to be discussed below. The CNG includes, in four separate issues of the monthly magazine, 64 photographs by Jerry Greenberg for which he owns the copyrights.<sup>2</sup> The Society did not seek his permission to re-publish the photographs.

In Greenberg v. National Geographic Society et al., 244 F.3d 1267, (11<sup>th</sup> Cir. 2001) (“Greenberg I”), the Court held that the CNG infringed Greenberg’s copyrights by unlawfully republishing his photographs in a new collective work.

Later in 2001, the Supreme Court decided New York Times Co. v. Tasini, 533 U.S. 483 (2001), a copyright case based on different facts.

In 2005, the Second Circuit decided Faulkner v. National Geographic Enterprises, Inc., 409 F.3d 26 (2d Cir.), cert. denied, \_\_\_ U.S. \_\_\_, 126 S.Ct. 833 (2005), a case with facts quite similar to those in Greenberg I, and held that,

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<sup>2</sup> Greenberg II said that the Society could pursue certain defenses with respect to the Moving Cover Sequence in the CNG. Greenberg will deal with that issue if a rehearing should take place.

because of the Tasini “rationale,” the Complete National Geographic did not infringe the copyrights of authors and photographers. The opinion created a conflict with the Eleventh Circuit. As noted above, the Supreme Court subsequently denied certiorari that could have resolved the conflict.

In Greenberg II, decided by a panel of this Court on June 13, 2007, with an opinion written by the Honorable David Trager,<sup>3</sup> the Court held that the Tasini decision “effectively overrules the earlier panel decision in this case.” Opinion at 19. The panel reached that conclusion even though it acknowledged that Tasini “was decided on different facts” than Greenberg I. Opinion at 10. Judge Trager cited to Faulkner for the holding there that Tasini “represents an intervening change in law.” 409 F.3d at 37.

Because Tasini, indeed, was decided on totally different facts – set forth below – its holding could not be an intervening change in law affecting Greenberg I. Judge Trager wrote that the prior panel decision must be overturned “when the rationale the Supreme Court uses in an intervening case directly contradicts the analysis this Court has used in a related area, and establishes that this Court’s current rule is wrong,” quoting Johnson v. Kmart Corp., 273 F.3d 1035, 1063 (11<sup>th</sup> Cir. 2001) (Barkett, J., concurring) (emphasis in original). The Tasini “rationale” to which Judge Trager referred consisted of what the Second Circuit called a

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<sup>3</sup> Judge Trager is a district judge from the Eastern District of New York, who was sitting by designation. A copy of the opinion is attached hereto.

“strong implication” in the Tasini language, see 409 F.3d at 37, based on dicta as discussed below. A strong implication in a Supreme Court opinion can hardly be an adequate basis upon which to overturn a prior panel decision in this Court.<sup>4</sup>

“[T]he prior precedent rule would not apply if intervening on-point case law from either this Court *en banc*, or the United States Supreme Court, . . . existed.” U.S. v. Chubbuck, 252 F.3d 1300, 1305 n.7 (11<sup>th</sup> Cir. 2001) (emphasis added).

“Under our prior precedent rule, a panel cannot overrule a prior one’s holding even though convinced it is wrong.” U.S. v. Steele, 147 F.3d 1316, 1317-18 (11<sup>th</sup> Cir. 1998) (*en banc*).

“Without a clearly contrary opinion of the Supreme Court, or of this court sitting *en banc*, we cannot overrule a decision of a prior panel of this court . . . .” N.L.R.B. v. Datapoint Corp., 642 F.2d 123, 128 (former 5<sup>th</sup> Cir. 1981) (emphasis added).

“The law of this circuit is ‘emphatic’ that only the Supreme Court or this court sitting *en banc* can judicially overrule a prior panel decision.” Cargill v. Turpin, 120 F.2d 1366, 1386 (11<sup>th</sup> Cir. 1997).

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<sup>4</sup> The “rationale” in the Johnson case, cited in Greenberg II and quoted above, involved a Supreme Court clarification as to whether former employees were covered, as current employees were, by a discrimination statute. It dealt strictly with clarifying the law. Johnson noted, at page 1063, other Supreme Court rationale that could be controlling in terms of prior panel precedents: the conduct of evidentiary hearings in habeas cases, clarification of the clear error test, and others. Such issues are fundamentally different from dicta based on factual circumstances, as in Tasini.

Tasini was not on-point with the facts here. The Supreme Court did not overrule Greenberg I.

**B. The Tasini “Rationale” Could Not Overrule Greenberg I**

Section 201(c) of the Copyright Act was central to Tasini and Greenberg I.

That section states, in pertinent part:

In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution [1] as part of that particular collective work, [2] any revision of that collective work, and [3] any later collective work in the same series.

(Brackets added.) “In accord with Congress’ prescription, a ‘publishing company could reprint a contribution from one issue in a later issue of its magazine, and could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.’” Tasini, 533 U.S. at 496-97, quoting H.R. Rep. 122-123, U.S. Code Cong. & Admin. News 1976, pp. 5659, 5738.

In Tasini, Greenberg I, and Greenberg II, the publishers contended that the re-publishing of authors’ and photographers’ copyrighted works constituted a “revision” pursuant to Section 201(c). Tasini and Greenberg I held that the resulting product was not a revision. Greenberg II now holds that the CNG is a

revision pursuant to 201(c), by virtue of the implicit “rationale” (but not the holding) in Tasini.

The facts in Tasini and Greenberg I could not be more disparate. Tasini involved the disassembly of collective works such as newspaper editions and magazines. Articles from those publications were tossed randomly into vast databases operated by Lexis/Nexis and others, completely apart from the pages in which they originally appeared.

Greenberg I involved the assembly of more than 1200 monthly magazines, each a collective work, into an unprecedented, new collective work – the CNG.

The Supreme Court said in Tasini that the scattered articles in the databases could not be seen in their original context as part of a newspaper or a magazine. The Court said: “In short, unlike microforms, the Databases do not perceptibly reproduce articles as part of the collective work to which the author contributed or as part of any ‘revision’ thereof.”<sup>5</sup> 121 S.Ct. at 2392. The Society seized on that statement to mean that if an author’s or photographer’s contributions are reproduced in the same context in which they originally appeared – in a newspaper or a magazine – it amounts to a revision under Section 201(c). The Second Circuit in Faulkner, and the panel in Greenberg II, adopted that “rationale.” Judge Trasker relied on Faulkner as follows:

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<sup>5</sup> The Supreme Court thus distinguished the idea of context from the idea of revision.



The Faulkner court described Greenberg I as holding that “if a subsequent work contains independently copyrightable elements not present in the original collective work, it cannot be a revision privileged by Section 201(c).” In contrast, “the Supreme Court held in Tasini that the critical analysis focused on whether the underlying works were presented by the particular database in the context of the original works . . . . [I]t also strongly implied, by contrasting the database to microfilm, that microfilm would constitute a privileged revision.”

Greenberg II at 11 (internal citations omitted). Notably, Tasini did not hold that microfilm would constitute a privileged revision. Notably, microfilm is fundamentally – even dramatically – unlike the Complete National Geographic.<sup>6</sup>

Relying on the Faulkner analysis, Judge Trasker then concluded: “Under the Tasini framework, the relevant question is whether the original context of the collective work has been preserved in the revision.” Id. at 12 (emphasis added). That became the holding in Greenberg II. It is flawed in two ways: the Greenberg photographs were presented in the CNG in their original context, but there was no revision of the underlying individual magazines as the Supreme Court definition of “revision” requires, as is discussed below. Second, Judge Trasker’s opinion relies, for its Supreme Court “rationale,” on what the Second Circuit referred to as a “strong implication” by the Supreme Court regarding privileged revisions, as

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<sup>6</sup> Faulkner said that Tasini “gave tacit approval to microfilm and microfiche as permissible Section 201(c) revisions, by contrasting that method of reproduction with the databases.” 409 F.3d at 35. Greenberg II thus relied heavily on the Second Circuit’s perception of what it considered to be a “strong implication” and “tacit approval” by the Supreme Court of analogous revisions of magazines and newspapers.

mentioned in the quotation above. This Court, sitting *en banc*, should not allow a “strong implication” or “tacit approval” in a Supreme Court opinion, in a case involving completely different facts, to become the basis for overturning a prior panel decision.

**C. There Was No “Revision” Here**

The Society, in its briefs in Greenberg II, firmly embraced the idea that the CNG is a “revision” under Section 201(c). At page 18 of its initial brief, the Society says that, because every cover, article, advertisement, and photograph appears as it did in the original paper copy of the monthly magazine, “the CNG simply reproduced freelance contributions in a ‘revision’ of the original collective work . . . .” A truly remarkable statement, because nothing in any of the four magazines in which Greenberg’s photographs first appeared – each a collective work – was revised.

In Tasini, the Supreme Court defined “revision” many times. In the second prong of Section 201(c), the privilege extends to “any revision of that collective work.” That collective work thus refers to the original collective work identified in the first prong. The Supreme Court interpreted that language as follows:

Under Section 201(c), the question is not whether a user can generate a revision of a collective work from a database, but whether the database itself perceptibly presents the author’s contribution as part of a revision of the collective work.

Tasini, 533 U.S. at 504 (emphasis added). The final clause in the quotation above explains what the Court's reliance on "context" was about: unless the monthly magazine is presented in context, it is impossible to determine whether the magazine was actually revised pursuant to Section 201(c).<sup>7</sup>

In the same paragraph, the Court went on to say that "we cannot see how the Database perceptibly reproduces and distributes the article 'as part of' either the original edition [of the newspaper] or a 'revision' of that edition." 533 U.S. at 500. (emphasis added). The Supreme Court thus did not equate the original edition "in context" with a revision of the original edition.

The Court emphasized the meaning of "revision" still again: "[T]he Databases do not perceptibly reproduce articles as part of the collective work to which the author contributed [a newspaper or a magazine] or as part of any 'revision' thereof." 533 U.S. at 501-502 (emphasis added). The collective works to which Greenberg contributed his photographs were monthly issues of the Society's magazine. The Supreme Court's explanation of "revision" as involving change in the underlying collective work could not be more clear.<sup>8</sup>

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<sup>7</sup> Because the magazine and newspaper articles in Tasini were mixed into the Databases in isolation, there was no way for the Court to find the existence of a privileged revision.

<sup>8</sup> Greenberg listed in his brief examples of true revisions: A newspaper that publishes four editions each day publishes four collective works; each edition after the first constitutes a revision, preserving the bulk of the preceding edition and adding new and updated information. The same is true for a dictionary that

The Society insists – and Greenberg II agreed – that the CNG is a privileged “revision,” even though the CNG does not revise any of the underlying collective works – the monthly magazines.<sup>9</sup> No serious reading of Section 201(c) or Tasini can sustain that conclusion. Greenberg II contains no discussion of the meaning of a “revision” under Section 201(c). The Second Circuit, in Faulkner, said that the collection in the CNG of 1200-plus monthly magazines, supplemented by a computer and search program and an opening sequence, “is a new version of the Magazine” and thus a privileged revision. 409 F.3d at 37. That reasoning is so totally at odds with the Supreme Court’s definition of a revision as to be an invention. Greenberg II followed that fallacy to overturn a prior precedent.

Section 201(c) says nothing about “context.” Tasini used that term because the Court was confronted with the total disassembly of collective works – newspapers and magazines. The Supreme Court did not find a revision to exist, under the Section 201(c) privilege, and did not hold that microform versions of a magazine amounted to a revision. Greenberg II turns Section 201(c) into a

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publishes a revision each year, preserving most of the old material but supplementing with new words and definitions. Or a math textbook republished periodically with fresh material added. Not one monthly magazine in the CNG was modified, updated or supplemented with new information.

<sup>9</sup> Greenberg II, at page 12, said: “Under the Tasini framework, the relevant question is whether the original context of the collective work has been preserved in the revision.” (Emphasis added.) What revision?

limitless concept that greatly broadens what Congress structured as a very limited, qualified privilege.

**D. Greenberg I Had It Right**

The Honorable Stanley Birch, who authored the opinion in Greenberg I, contrasted an author's rights and a publisher's privilege under Section 201(c), saying that the "important distinction . . . militates in favor of narrowly construing the publisher's privilege . . . ."

Judge Birch wrote that "[i]n layman's terms, the instant product is in no sense a 'revision.' In this case we do not need to consult dictionaries or colloquial meanings to understand what is permitted under Section 201(c)." 244 F.3d at 1272. The Supreme Court's later elaboration on what constitutes a revision, discussed at length above, removed any doubt on the point.

Greenberg I held the CNG to be a new collective work, prohibited by Congress when it enacted Section 201(c).<sup>10</sup> 244 F.3d at 1273.

The opinion in Greenberg I noted certain additional items that had been added to the CNG. The opinion referred only to the Replica (the magazines themselves), along with a computer program and an introductory Moving Covers

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<sup>10</sup> The Court's opinion noted that the Society, in registering a copyright for the CNG, said that the product had never been registered before. "Accordingly," said Greenberg I, "this was a new work." Id. The Court noted further that the Society had admitted in the registration form that the CNG was a new compilation, whose definition in the Copyright Act includes collective works. Id.

Sequence as other elements. Id. Those additional items, said the Court, were independently copyrightable, and therefore amounted to significant additions to the product. There were other elements included in the CNG, unmentioned in Greenberg I, such as a prominent Kodak ad, an animated globe logo, a National Geographic Interactive visual montage with sound, and a display depicting moving spines of issues of the magazines. As Greenberg noted in his brief in Greenberg II, all of these elements are independently copyrightable, and none of them are essential to the product. They plainly were added to enhance the product and to make it more lively and interesting. The aggregated new elements confirm the existence of a prohibited new collective work.

### CONCLUSION

This case addresses much more than a dispute between two parties. The ramifications for photographers and authors, as the digital age leaps ahead, are profound. The case has engaged the attention of important segments of the legal and business worlds. The Copyright Act is clear that where a photographer owns the copyright to photographs included in a published collective work, as here, the publisher has a very, very limited statutory privilege to re-publish the photographs without consent. 17 U.S.C. § 201(c). The Supreme Court said, with reference to that section, that if photographs appear properly in a collective work, and there is subsequent demand for the photographs “standing alone or in a new collection,”

the Copyright Act allows the photographer “to benefit from that demand.” Tasini, 533 U.S. at 497. The term “new collection” in the Supreme Court’s statement is significant. In the CNG, Greenberg’s photographs were taken from a dusty archive of monthly magazines and placed into a lavish, new CD-ROM collection that has been marketed very profitably to a huge global audience. Notwithstanding the Supreme Court’s view of the Copyright Act, Greenberg has not benefited from that fresh demand.<sup>11</sup>

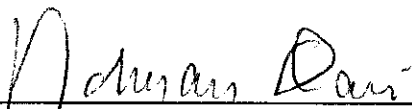
The Supreme Court went on to say: “It would scarcely ‘preserve the author’s copyright in a contribution’ as contemplated by Congress . . . if a newspaper or magazine publisher were permitted to reproduce or distribute copies of the author’s contribution . . . within new collective works.” 533 U. S. at 497 (internal citation omitted). That is exactly what this Court held in Greenberg I had taken place.

Greenberg I did the right thing by protecting a photographer’s copyright interest. Greenberg II did the wrong thing by going counter to this Circuit’s doctrine regarding prior precedent, and by pursuing a faulty reading of Tasini. In these circumstances, a rehearing en banc is required.

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<sup>11</sup> Tasini said: “The Register of Copyrights reports that ‘freelance authors have experienced significant economic loss’ due to a ‘digital revolution that has given publishers [new] opportunities to exploit authors’ works.’” The quotation is from a letter from the Register. 121 S.Ct. at 2390 n. 6.

Dated this 29<sup>TH</sup> day of July, 2007.

  
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