

DOCKET NO. 00-10510-C

IN THE
UNITED STATES COURT OF APPEALS
ELEVENTH JUDICIAL CIRCUIT

JERRY GREENBERG and IDAZ GREENBERG
Plaintiffs/Appellants

vs.

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

**APPELLANTS' OPPOSITION TO MOTION BY APPELLEES
TO FILE ADDITIONAL LETTER SUBMISSION; ALTERNATIVELY,
APPELLANTS' RESPONSE TO SUBMISSION**

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Appellants, JERRY GREENBERG and IDAZ GREENBERG ("the Greenbergs"), oppose Appellees' Motion to File Additional Letter Submission.

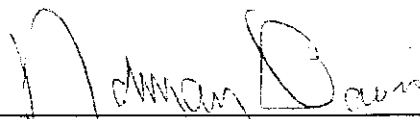
The Appellees seek to expand their written briefing, notwithstanding that the briefing cycle has ended and the Court has not directed any additional briefing. At the conclusion of oral argument on October 3, 2000, the presiding judge advised the parties that the Court may seek additional written discussion on various points. To date, such a directive has not issued. Instead, the Appellees unilaterally have determined what, in their words, was "not resolved" at oral argument, and are seeking the admission of further argument on their selected issues.

The motion should be denied.

Alternatively, if the Court grants the motion, the Greenbergs provide herewith a responding submission, attached hereto as Exhibit A.

Dated: August 19, 2000

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Defendants/Appellees.

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Aronberg, David

Davis, Norman

Greenberg, Jerry

Greenberg, Idaz

Lenard, Joan, U. S. District Judge

Mindscape, Inc.

National Geographic Enterprises, Inc.

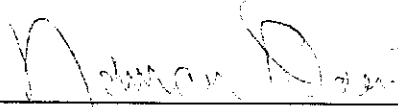
National Geographic Society

Steel Hector & Davis LLP

Sugarman, Robert

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RECYCLED PAPER



October 19, 2000

United States Court of Appeals
Eleventh Judicial Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

ATTN: Jennifer Alexander

Re: Greenberg v. National Geographic Society, et al.
Case No. 00-10510

To The Court:

On October 11, 2000, the Appellees filed what they termed an Additional Letter Submission regarding various questions they deemed to be ripe for further briefing. The Appellants herewith respond to that submission.

“Revision” Under Section 201 (c)
is Limited to Changes in a
Specific Monthly Magazine

Whether collective or derivative, the Complete Geographic Product is a new work as that term is used in the Copyright Act. The Society¹ has conceded, in its copyright registration, that it is new. As a new work, the CD-ROM product is not shielded by Section 201 (c) from infringing the Greenberg copyrights by republishing and by distributing his photographs without his permission.

In its brief, the Society introduced for the first time its contention that even if the Complete Geographic Product is a new collective work, it has a haven in Section 201 (c) in that it constitutes a “revision” of a particular collective work because of the many new elements placed in the product. Brief at 19-20. In the final sentence of the October 11 letter submission, the Society concludes that the Complete Geographic Product is a “revised collective work under § 201 (c).” But Section 201 (c) speaks only of a revision “of that collective work,” and the Tasini II court construed that to mean “a specific edition or issue of a periodical,” i.e., the

¹ “The Society” is intended to encompass all of the defendant/appellees.

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original collective work. See 206 F.3d 161, 167 (2d Cir. Feb. 25, 2000). Each of the 1,200 magazines is a separate, copyrighted collective work. The Society flatly contradicts itself, time and again, by stressing that every page in each original magazine was "slavishly" copied. Where, then, is the "revision," as Section 201 (c) defines the term?

In its October 11 submission, the Society contends that if the new product amounts to a new derivative work, it still is a privileged publication pursuant to the revision clause in 201 (c). But Section 201 (c) does not extend a privilege to inclusion of the Greenberg photographs in a derivative work. As noted above, the privilege extends only to a revision of a specific edition or issue of a periodical, such as a specific edition of the monthly magazine. The Complete Geographic Product did not revise any specific issue of the magazine; it simply collected them, and supplemented them with new material.

With persistence bordering on desperation, the Society has attempted to shoehorn its new product into first one, then another, of the qualified privileges in 201 (c).² It still doesn't fit. Notably, when the Society registered the new product with the Copyright Office, item 6 on the VA Form asked whether the new work was derivative or a compilation (which includes collective works). The Society answered: "compilation of preexisting material." The Act, in Section 101 defines a collective work as one "constituting separate and independent works in themselves . . . assembled into a collective whole." That is what the product is.

The Court seemed at oral argument to suggest that the preexisting magazines, once collected, were transformed into a derivative work because of the various elements added to the package, including a search engine copyrighted and registered by Appellee Mindscape, and because the product implicates a new medium and a new market never contemplated by the parties. Whether the Court concludes that the product is a derivative or a collective work,³ the

² Over and over again, the Society attempts to compare the new product with other collections that the Society never bothered to place in the court record. At page 2 of the latest letter is a reference to "bound volumes the Society has published for years," which include "a mosaic depicting covers." The reference, and the exhibit attached to the submission, should be stricken and ignored. The Society sought and obtained summary judgment solely on facts it placed in the record. The "bound volumes" may or may not be as the Society describes. The exhibit the Court is now asked to consider was not considered by the district court. The same is true for continued references to microfilm and microfiche archiving -- not in the record of this case. (Not to be forgotten is Section 108 of the Copyright Act which gives special dispensation to libraries and archives regarding the display and reproduction of copies of protected works.)

³ Not examined at oral argument, but discussed at length in the briefs, is Greenberg's other claim -- that the Moving Covers Sequence unquestionably amounts to a new derivative work that separately infringes his copyright in the photograph used in the sequence.

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product is unmistakably new -- by the Society's admission one that never existed prior to 1997. And whether derivative or collective, Greenberg, as owner of all copyright interest in his photographs, has an exclusive right under the Copyright Act to publish and to distribute them in new collective or derivative works.

The Society Continues Its Crusade to
Trivialize New Aspects in the CD-ROM
Product that Make it a New Work

The Society contends that the "slavish" copying of its magazines into a new medium cannot, by itself, constitute the originality required for copyright protection. However, much more than mere copying of those magazines is present here. The Greenberg briefs outline in detail the many features and elements added to the new product to make it attractive and marketable. In its unending effort to denigrate those aspects of originality, the Society now emphasizes -- wrongly -- that the elements consume miniscule time when viewed in the context of a work consisting of over 1,200 separate issues of the monthly magazine. But the law does not require originality to be measured on a *de minimis* scale. As set forth in the Greenberg briefs, the Supreme Court has stated over and over again that only a mere dash of originality is required. The elements added to the product appear on each of thirty CD-ROM disks, they are highly prominent each time any disk is opened, and many of the elements are uniquely creative in themselves. The Society's logo globe revolves with a musical background. The Moving Covers Sequence, although infringing in itself, is almost spectacular in its effect. And the Society concedes that a number of the elements are separately copyrightable. When these creative aspects are weighed with the editing aspects (selection and arrangement of various issues of the monthly magazines), those new elements make the CD-ROM product far, far more than a pile of magazines tossed into a box.

The Holding in Cohen
is Not Applicable Here

The Court suggested at oral argument that Cohen v. Paramount Pictures Corp., 845 F.2d 851 (9th Cir. 1988), appeared to have some relevance to the CD-ROM issues here. The successful plaintiff in Cohen had licensed the use of his copyrighted materials for a specific purpose, and the license expressly reserved to the copyright holder all rights not expressly granted. Here, no license exists. In 1985 and 1989, the Society transferred all right, title and interest in Greenberg's photographs to him, and the transfer documents in the court record, R1-25-Ex. B, contain no qualifying language that would authorize the Society to utilize the photographs thereafter in any manner or medium.

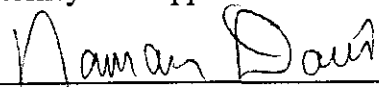
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Conclusion

The Society's October 11 letter extolls in glowing and almost hallowed tones, as did the Society's brief, the Society's role as purveyor of scientific and cultural information. Appellant Greenberg contributed his creative energies to the Society over a number of decades for those very reasons. Throughout its history the Society has zealously defended its own copyrights against abusers. Sadly, it now seeks to bend the plain language of the Copyright Act and the legislative history of that Act to its own purposes, and in the process it has abused copyrighted materials as to which it has no rights at all.

Respectfully submitted,

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