UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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.

Case No. 97-3924 CIV-LENARD

Memorandum of Law in Opposition to Plaintiffs' Motion to Vacate Order Granting in Part Defendants' Motion for Partial Summary Judgment, and for Other Relief

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Memorandum of Law in Opposition to Plaintiffs' Motion to Vacate Order Granting in Part Defendants' Motion for Partial Summary Judgment, and for Other Relief

Defendants National Geographic Society (the "Society"), National Geographic Enterprises, Inc. and Mindscape, Inc. ("Mindscape") submit this Memorandum of Law in opposition to Plaintiffs' Motion to Vacate Order Granting in Part Defendants' Motion for Partial Summary Judgment, and for Other Relief ("Motion to Vacate").

PRELIMINARY STATEMENT

Eighteen months ago, this Court, upon careful consideration of the law and the facts in this case, granted partial summary judgment to Defendants, holding that Defendants were permitted by Section 201(c) of the Copyright Act to republish National Geographic Magazine (the "Magazine") in CD-ROM format under the title "The Complete National Geographic" ("CD-ROM 108"). In its opinion, the Court adopted the legal framework set out in the district court opinion in Tasini v. New York Times, 972 F. Supp. 804 (S.D.N.Y. 1997), applied it to the unique facts and circumstances of this case and determined that, in this case, Defendants should prevail. Plaintiffs have never sought to finalize that judgment or to appeal it to the Eleventh Circuit. Instead, a year and a half later, Plaintiffs seek vacatur and modification

of the judgment solely because the Second Circuit has ruled that Section 201(c) does not apply to the totally different facts that the Second Circuit found determinative in Tasini.

Such drastic action simply is not warranted. As an initial matter, Second Circuit precedent is not binding on this Court. Moreover, in light of the totally different facts in Tasini on which the Second Circuit relied, its opinion does not provide any basis for a modification of this Court's decision in this case. Significantly, Plaintiffs make no mention of the facts involved in Tasini and no attempt to analyze the opinion of the Second Circuit in light of those facts. As demonstrated below, such an analysis compels the conclusion that the decision of this Court was correct and should not be disturbed.

ARGUMENT

I. PLAINTIFFS CANNOT AVAIL THEMSELVES OF RULE 60(B) BECAUSE THERE HAS BEEN NO CHANGE IN CONTROLLING LAW.

A. Grant of relief under Rule 60(b) is a drastic measure warranted only by extraordinary circumstances.

Plaintiffs have moved under Federal Rule of Civil Procedure 60(b)(6). The Supreme Court has indicated that relief under Rule 60(b) is a drastic measure, which should be granted only in extraordinary circumstances, Ackerman v. United States, 340 U.S. 193 (1950), a message which the Eleventh Circuit has heeded. See High v. Zant, 916 F.2d 1507, 1509 (11th Cir. 1990). Furthermore, "parties cannot use Rule 60(b) as a vehicle to relitigate a case." Zahran v. Frankenmuth Mut. Ins. Co., 114 F.3d 1192, at *2 (7th Cir. 1997) (citing Donovan v. Sovereign Sec., Ltd., 726 F.2d 55, 60 (2d Cir. 1984)).

This reluctance to vacate judgments stems from a fundamental need for finality. See Kansas Public Employees Retirement System v. Reimer & Koger Assocs., Inc., 1999 WL 809552, at *2 (8th Cir. Oct. 5, 1999) ("Society's powerful countervailing interest in the finality of judgments simply requires that each case have an end, though the law continues to evolve."); Biggins v. Hazen Paper Co., 111 F.3d 205, 212 (1st Cir. 1997) ("[T]he common law could not safely develop if the latest evolution in doctrine became the standard for measuring previously resolved claims.")

B. There has been no change in controlling law in this case.

Courts have recognized three main grounds which may justify reconsideration under Rule 60(b), none of which are present here: 1) an intervening change in controlling law; 2) the availability of new evidence; and 3) the need to correct clear error or manifest injustice. See Cover v. Wal-Mart Stores, Inc., 148 F.R.D. 294, 295 (M.D. Fla. 1993) (emphasis supplied). These grounds only sometimes justify reconsideration. See Scott v. Singletary, 870 F. Supp. 328, 330 (S.D. Fla. 1994) (supervening change in law "can, but need not always, constitute sufficiently extraordinary circumstances to warrant relief under Rule 60(b)(6)"); see also Hall v. Warden, 364 F.2d 495 (4th Cir. 1966) (supervening contrary Supreme Court decision, rendering appeals court decision clearly erroneous, did not suffice to warrant reconsideration of grant of *habeas corpus*). Plaintiffs have based their argument on the first of the grounds enunciated in Cover, a change in controlling law, which is simply unavailable to them. The change in law they cite, Tasini v. New York Times Co., 1999 WL 753966 (2d Cir. Sept. 24, 1999), is not controlling in this district.

Only a change in controlling law may provide the basis for a Rule 60(b) motion. See, e.g., Cover, 148 F.R.D. 294, 295 (M.D. Fla. 1993) (movant must demonstrate some reason why court should reconsider its initial decision, and set forth facts or law of "strongly convincing nature," such as change in controlling law, to persuade court to reverse itself); Zahran, 114 F.3d, at *2 (summarily affirming denial of 60(b) motion absent change in controlling law); Matura v. United States, 1999 WL 771385, at *3 (S.D.N.Y. Sept. 28, 1999) (refusing to entertain petitioner's Rule 60(b) motion absent intervening change in controlling law, and observing that petitioner was "offering nothing more than arguments that this Court has already carefully analyzed and justifiably disposed"); United States v. City of San Diego, 18 F. Supp. 2d 1090, 1106 (S.D. Cal. 1998); see also Ritter v. Smith, 811 F.2d 1398 (11th Cir. 1987) (affirming grant of Rule 60(b) motion pursuant to change in controlling law enunciated by the United States Supreme Court); Scott, 870 F. Supp. 328 (S.D. Fla. 1994) (Eleventh Circuit decision could only be overruled by the en banc court or the Supreme Court, therefore subsequent three-judge panel's decision did not effect final and definitive change in Eleventh Circuit law).

Thus, Plaintiffs' argument fails because the controlling law in the Southern District of Florida has not changed. Congress has not modified Section 201(c) of the Copyright

Act, nor has the Supreme Court or the Eleventh Circuit rendered any decision construing that section since the Court granted summary judgment to Defendants.

Plaintiffs imply that there has been a change in the law because "the decision of the district court for the Southern District of New York in Tasini was clearly and definitively reversed by a higher court – the Second Circuit Court of Appeals. . ." This is simply irrelevant to Rule 60(b) because this Court is not bound by the decisions of the Second Circuit. This Court, upon careful consideration, correctly adopted the reasoning of a decision of a judge of the Southern District of New York and applied it to the unique facts involved in this case – facts which, as detailed below, differ in substantial ways from those on which the Second Circuit expressly relied in its decision in Tasini.[1] The Second Circuit's disagreement with the reasoning of the judge of the Southern District of New York, on the Tasini facts, has no bearing on this Court's decision in this case, which involves materially different facts.

Thus, although there has been a change in decisional law in the Second Circuit, it does not govern this Court and therefore Plaintiffs cannot obtain Rule 60(b) relief. Plaintiffs' motion should be denied, as they are offering "nothing more than arguments that this Court has already carefully analyzed and justifiably disposed." City of San Diego, 18 F. Supp.2d at 1106.

II. EVEN IF RULE 60(B) APPLIED, THE FACTORS GOVERNING THE GRANT OF RELIEF WEIGH HEAVILY AGAINST VACATING THE COURT'S PRIOR RULING.

The factors relevant in deciding whether a court should grant relief under Rule 60(b) because of new precedent are: 1) whether the change in the law is final and definitive; 2) whether the judgment has been executed; 3) whether the motion for relief was filed soon after judgment was rendered; 4) whether the intervening decision is closely related to the instant case; and 5) considerations of comity. See Scott, 870 F. Supp. at 330 (S.D. Fla. 1994). A balancing of these factors in this case weighs heavily against disturbing the decision this Court has already rendered because the change in the law is not final and definitive; the judgment, although unexecuted, is not improper; and the intervening decision is not related closely enough to this

[1] See *infra* pp. 8-11.

case.[2] Indeed, as established below, the facts of this case are entirely different from those on which the Second Circuit expressly relied in Tasini.

A. The decision in Tasini is neither final nor definitive

The first factor, whether the change in the law is final and definitive, is "obviously the most important factor" in a Rule 60(b)(6) analysis. Scott, 870 F. Supp. at 330. Significantly, the Second Circuit's decision in Tasini is neither final nor definitive, as the defendants' petition for rehearing is still pending (see Exhibit A to the Affirmation of Robert G. Sugarman ("Sugarman Aff.")) and other possible appeals have not been exhausted. Moreover, as noted above, Tasini is not binding on this Court, and is thus not dispositive of this case irrespective of the Second Circuit's ultimate ruling. This factor alone warrants denial of Plaintiffs' motion. Scott, 870 F. Supp. at 336.

Plaintiffs themselves concede the point in analyzing Scott v. Singletary, 870 F. Supp. 328 (S.D. Fla. 1994). Motion to Vacate at pp. 4-5. In Scott, the petitioner argued that there had been a change in the law due to a subsequent decision by a three-judge panel of the Eleventh Circuit. However, because a prior decision of a panel of the Eleventh Circuit "may only be overruled by the en banc court or the Supreme Court," there had been no final and definitive change in the law warranting Rule 60(b) relief. Likewise, because this Court's decision cannot be overruled by the Second Circuit, there has not been, and, indeed, cannot be, a final and definitive change in the law.

Moreover, in the 18 months since this Court rendered its decision, Plaintiffs have taken no steps to seek a final and definitive determination from the Court which can make such a determination – the United States Court of Appeals for the Eleventh Circuit. Having failed to move for this opportunity, Plaintiffs cannot seek relief based on a decision which is neither final nor definitive.

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[2] Because Plaintiffs filed their Rule 60(b)(6) motion less than a month after the Second Circuit's decision in Tasini, the third Scott factor is not at issue. Furthermore, because Plaintiffs' motion for reconsideration is addressed to the same court which has already ruled against them, considerations of comity are not implicated.

B. The Court's grant of summary judgment is not improper.

Although courts are generally more willing to vacate unexecuted judgments than executed judgments, Ritter v. Smith, 811 F.2d 1398, 1402 (11th Cir. 1987), this principle cannot be stretched to imply that any unexecuted judgment is susceptible to being vacated. Rather, only an improper unexecuted judgment should be vacated. Id. Examples of "improper" judgments cited by the Ritter court lend no support for the proposition that a mere change in non-controlling authority renders a judgment improper. See Roberts v. St. Regis Paper, 653 F.2d 166 (5th Cir. Unit B 1981) (acknowledging possibility of future modification of consent decree in light of recent Supreme Court decision); Marshall v. Board of Educ., 575 F.2d 417 (3d Cir. 1978) (partially modifying judgment pursuant to intervening Supreme Court decision). Here, since no intervening controlling law has rendered the Court's opinion improper and Plaintiffs advance no other argument why the Court's opinion was improper, there is no reason for the Court to "undo the past," see Ritter, 811 F.2d at 1402, and vacate its prior judgment.

C. Tasini is not sufficiently related to this case to warrant Rule 60(b) relief.

Cases have been held to be sufficiently related when, for example, two cases arise out of the exact same transaction or when the Supreme Court grants certiorari expressly to resolve a conflict between two cases. Ritter, 811 F.2d at 1402-1403. Neither situation presents itself here. Moreover, even two cases arising out of exactly the same transaction but yielding different outcomes at trial do not provide a sufficient basis for a Rule 60(b) motion where there has been no change in the law. See High v. Zant, 916 F.2d 1507, 1510 (petitioner's argument that his conviction arose out of same criminal transaction as another case was futile where there had been no change in law on which to premise Rule 60(b) motion for reconsideration). Moreover, as established below, although Tasini involves the same statutory provision as this case, it is not closely related as a factual matter and vacatur of the Court's grant of summary judgment is not warranted. Indeed, the factual differences are so significant that the Second Circuit decision in Tasini cannot be authority for vacating this Court's decision in this case. (see *infra* pp.8-11).

Case law under Rule 60(b)(5), which provides for relief from judgment where "a prior judgment upon which it is based has been reversed or otherwise vacated," is also instructive

on this point. See, e.g., Lubben v. Selective Serv. Sys. Local Bd. No. 27, 453 F.2d 645, 650 (1st Cir. 1972). In Lubben, the district judge had relied heavily on a colleague's opinion in a similar case.[3] When the colleague's opinion was reversed, the Selective Service moved to vacate the Lubben injunction. The court refused, noting that:

> "while 60(b)(5) authorizes relief from a judgment on the ground that the prior judgment on which it is based has been reversed or otherwise vacated, it does not authorize relief from a judgment on the ground that the law applied by the court in making its adjudication has been subsequently overruled or declared erroneous in another and unrelated proceeding."

Lubben, 453 F.2d at 650 (citing 7 Moore's Federal Practice ¶60.26[3] at 325). Reversal of precedent on which it had forcefully relied was insufficient to persuade the Lubben court to reverse itself. Likewise, reversal of Tasini is insufficient basis to prompt this Court to vacate its holding in the present case.

Because there has been no change in the controlling law applicable to this case, and because, even if there were, the Ritter factors weigh in Defendants' favor, this Court should deny Plaintiff's Motion to Vacate.

III. THE SECOND CIRCUIT'S OPINION IN TASINI IS NOT APPLICABLE TO THE FACTS AT ISSUE HERE AND DOES NOT, THEREFORE, PROVIDE ANY BASIS FOR VACATING THIS COURT'S DECISION.

A. CD-ROM 108 is merely a republication, not a revision, of the Magazine.

The Second Circuit's opinion addressed only the question whether the electronic databases at issue in Tasini were revisions of the periodicals in question since that was the only argument advanced by the defendants in that case. Tasini, 1999 WL 753966 at *2. In this case, however, as Plaintiffs concede, Defendants have maintained that since CD-ROM 108, unlike the publications in Tasini, reproduces each issue of the Magazine *exactly* as it appeared on paper from cover to cover, CD-ROM 108 is a "straightforward reprint" of each issue. Sugarman Aff. Exh. B at p. 6; Sugarman Aff. Exh. C at pp. 2-4.

Section 201(c) permits the owner of a collective work to reproduce contributions to the collective work as part of "that particular collective work, any revision of that collective

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[3] "Because of the very close similarity between this case and the Lane case, and in the interest of having judges of this court make the same ruling on substantially similar legal issues whenever it is possible to do so, this decision will be in accord with that of Judge Garrity in Lane." Lubben v. Selective Serv. Sys., Local Bd. No. 27, 316 F. Supp. 230, 232 (D. Mass. 1970).

work, and any later collective work in the same series." 17 U.S.C.A. §201(c). The clause permitting republication of contributions in "that particular collective work" clearly permits Defendants to republish each issue of the Magazine. That CD-ROM 108 is republishing "specific issues" of the Magazine on CD-ROM, not on paper, is immaterial because the Copyright Act was deliberately written to be medium-neutral.[4] The Society, like every other major publisher, has republished for many years collections of issues of the Magazine just as it appeared on paper month after month, in bound volumes, microfilm and microfiche, all without objection and as permitted by Section 201(c). These serve prodigious research, archival and historical needs at libraries, schools, homes and universities throughout the world. CD-ROM 108 is nothing more than a collection of issues of the Magazine in a different medium and is, therefore, permitted by Section 201(c).

Plaintiffs argue, as they did in opposing Defendants' summary judgment motion, that CD-ROM 108 is an entirely new collective work, and is thus beyond the reach of Section 201(c). Motion to Vacate at p. 7. The Court rejected that argument once before, Order Granting in Part and Denying in Part Defendants' Motion for Partial Summary Judgment at p. 8, and nothing has changed which justifies any departure from that view. The fact that there is a simple introductory title feature in CD-ROM 108 featuring a short segment of actual covers of National Geographic Magazine from the 108 years, digitally cascading from one into another, only serves to underscore the complete nature of the collective work of the complete Magazine from its beginning in 1898. It no more creates a new collective work than the descriptive new material on a box of microfilm or the titles, credits or instructions contained as an introduction on the film itself.[5]

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[4] Plaintiffs themselves have conceded that "the issue...is not the medium used." 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. 8 n. 4.

[5] In any event, as demonstrated in Defendants' summary judgment papers, the Moving Cover Sequence is permitted by the doctrines of fair use and de minimis use. Sugarman Aff. Exh. B at pp. 7-16; Sugarman Aff. Exh. C at pp. 6-10.

B. Even if CD-ROM 108 were a revision, it would be permitted under Section 201(c) notwithstanding the Second Circuit's opinion in Tasini

Plaintiffs erroneously state that "even if the Court . . . believed 'revision' to be an operative legal basis for its May 14, 1998 order, that basis has been overturned by the Second Circuit in Tasini." See Motion to Vacate at p. 7. First, as pointed out above, the Second Circuit cannot overturn any decision of this Court.[6] In any event, the facts in Tasini are so different from those in this case that the Second Circuit opinion does not provide any basis for this Court to revisit its earlier grant of summary judgment.

Tasini involved three different electronic publications: (1) NEXIS, which the Second Circuit described as a "database comprising thousands or millions of individually retrievable articles taken from hundreds or thousands of periodicals," Tasini, 1999 WL 753966 at *7; (2) New York Times OnDisc ("NYTO"), a CD-ROM containing only the text of some articles that had been published in The New York Times, but not the entirety of the newspaper, Tasini, 1999 WL 753966 at *2; and (3) General Periodicals OnDisc ("GPO"), a CD-ROM containing both texts, abstracts and images of some of the articles from numerous periodicals. Tasini, 1999 WL 753966 at *8. Unlike CD-ROM 108, in each of these electronic publications the articles contributed by the plaintiffs appear in a totally different form and context than that in which they appeared in the original publication. Unlike CD-ROM 108, in each of these electronic publications the search engines allow end users to retrieve articles individually and completely out of the context in which they appeared in the original publications. For example, the Second Circuit first

> describe[d] the process by which any issue of a periodical is made available to Mead for inclusion in NEXIS. First, an individual issue of the paper is stripped, electronically, into separate files representing individual articles. In the process, a substantial portion of what appears in that particular issue of the periodical is not made a part of a file transmitted to Mead, including, among other things, formatting decisions, pictures, maps and tables, and obituaries.

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[6] Plaintiffs go so far as to state that "the Second Circuit says the following about the right of the Society, as a collective-work author, to use the Greenberg photographs. . ." Motion to Vacate at p. 8. Neither the Society nor the Greenbergs were parties to the Tasini case, and the Second Circuit's opinion does not address the Society or CD-ROM 108.

Tasini, 1999 WL 753966 at *1 The Court went on to observe that

> . . . NEXIS does almost nothing to preserve the copyrightable aspects of the Publishers' collective works, 'as distinguished from the preexisting material employed in the work,' 17 U.S.C. § 103(b). The aspects of a collective work that make it 'an original work of authorship' are the selection, coordination and arrangement of the preexisting materials. Id. § 101 (citations omitted). However, as described above, in placing an edition of a periodical such as the August 16, 1999 New York Times in NEXIS, some of the paper's content, and perhaps most of its arrangement are lost. Even if a NEXIS user so desired, he or she would have a hard time recapturing much of "the material contributed by the author of such [collective] work," 17 U.S.C. § 103(b). In this context, it is significant that neither the Publishers nor NEXIS evince any intent to compel or even permit, an end user to retrieve an individual work only in connection with other works from the edition in which it ran. Quite the contrary, The New York Times actually forbids NEXIS from producing 'facsimile reproductions' of particular editions. Citation omitted. What the end user can easily access, of course, are the preexisting materials that belong to the individual author under Sections 201(c) and 103(b).

Tasini, 1999 WL 753966 at *7. Based on these facts, the Second Circuit found that the electronic publications at issue did not constitute "revisions" of the original collective works.[7]

None of the factors which led the Second Circuit to rule against the Tasini defendants is present in CD-ROM 108. Indeed, the differences are material and profound. Unlike NEXIS, NYTO and GPO, CD-ROM 108 contains images of the entirety of only one periodical – National Geographic Magazine. Unlike NEXIS, NYTO and GPO, the only image a user can view is the exact image in the exact manner in which it appeared in the original issue of the Magazine, including all text, all photographs and all advertisements exactly as they originally appeared on paper. Unlike NEXIS, NYTO or GPO, CD-ROM 108 preserves every copyrightable aspect of every issue of the Magazine – "selection, coordination and arrangement" – and provides no tools to the user to cut, paste or alter any of its digital pages. See Sugarman Aff. Exh. D at ¶ 5. Unlike NEXIS, NYTO and GPO, none of the content is lost: CD-ROM 108

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[7] Given that Plaintiffs have relied on the Second Circuit's decision in Tasini as the basis for their Rule 60(b) application, it is surprising – to say the least – that they do not discuss the Second Circuit's reasoning or the facts upon which it relied in deciding the revision issue. Although Plaintiffs allude to the Second Circuit's discussion of the subclauses relating to "that particular collective work" and a "later collective work in the same series," the Motion to Vacate is completely devoid of any reference to the revision analysis – which is supposedly the basis upon which Plaintiffs seek relief.

is an exact archival reproduction of the original print version of the Magazine. CD-ROM 108 contains exact reproductions of every page of every issue, displayed in two-page spreads exactly as one would view and read the original print version of the Magazine, as well as the cover of each issue and all of the advertising pages of each issue (even though they do not contain any articles or editorial content). Moreover, unlike NEXIS, NYTO and GPO, a user of CD-ROM 108 cannot retrieve articles, photographs or any other content individually or out of the context in which it originally appeared. See Sugarman Aff. Exh. D and Exh. A thereto. The text, photographs and other context of each volume are presented, page after page, as in the print version. Thus, a user of CD-ROM 108 cannot use its search engine to directly access one of Plaintiff's photographs. The user must retrieve the issue of the Magazine in which the photograph appeared, then physically (albeit electronically) page through the Magazine to find the photographs. And, when that photograph is found, it will appear, not individually, but in the same form and context, i.e., in the same spot on the same page in the same issue as it appeared in the print copy of the Magazine. Finally, unlike NEXIS, NYTO or GPO, CD-ROM 108 searches the Magazine by the same subject-matter index issued for the paper Magazine and causes the viewer to go back to a particular issue to review an article just as it appeared on paper. If the viewer turns the page, whether electronically by clicking a mouse or by turning a page on paper, the viewer will find everything on the next page just as it appears on paper in the original publication on paper, whether it is the continued story, an advertisement or the next article. From the perspective of the Copyright Act, this is no different than viewing the photograph on microfilm or in a bound volume containing all issues of the Magazine from a particular year.

The Second Circuit analysis in Tasini is based on facts so different from those at issue in this case, that, even if it were binding, it would not provide a basis for any change in this court's decision granting summary judgment to defendants on Counts III and IV.

C. Tasini provides no grounds for revisiting Count V.

Plaintiffs themselves acknowledge that Count V of the Amended Complaint, which has to do with the Moving Cover Sequence, "never had the slightest relevance to Tasini." Motion to Vacate at p. 11. If Tasini is totally irrelevant to Count V, then the Second Circuit's opinion cannot provide a basis for Plaintiffs to seek to vacate this Court's prior grant of summary judgment on this Count.

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion to Vacate should be denied in its entirety.

Dated: November 1, 1999

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