

**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.

**NATIONAL GEOGRAPHIC
SOCIETY'S RESPONSES AND
OBJECTIONS TO PLAINTIFFS'
SECOND SET OF
INTERROGATORIES**

Pursuant to Rule 33 of the Federal Rules of Civil Procedure, Defendant National Geographic Society (the "Society"), by its attorneys, Weil, Gotshal & Manges LLP, hereby responds and objects to Plaintiffs' Interrogatories to the Society (the "Interrogatories") as follows:

GENERAL OBJECTIONS

1. The Society objects to the Interrogatories to the extent that they purport to call for the disclosure of attorney-client communications; information that was prepared for, or in anticipation of, litigation; or information that is otherwise privileged or immune from discovery. The inadvertent disclosure of any documents subject to such privileges or protection is not intended to relinquish any privilege or protection and shall not be deemed to be a waiver of any applicable privilege or protection.

2. The Society objects to the Interrogatories to the extent that they request information which is of public record and is equally available to Plaintiffs as to the Society.

3. The Society objects to the Interrogatories to the extent that they seek confidential, proprietary or trade secret information. To the extent that the Society agrees to produce documents containing such information, it will only do so subject to an appropriate confidentiality agreement.

4. The Society objects to the Requests to the extent that they seek to impose discovery obligations upon the Society beyond those provided for in the Federal Rules of Civil Procedure.

5. The Society objects to the Interrogatories to the extent that the Society is not the proper party to whom such Interrogatories should be directed.

6. The Society reserves its right to amend or supplement these Responses.

RESPONSES AND OBJECTIONS TO INTERROGATORIES

INTERROGATORY NO. 1:

Provide the date(s) when the CNG 108 product in CD-ROM format was shown, demonstrated, exhibited or otherwise displayed, by or on behalf of one or more of the defendants or their affiliates, at an Electronic Entertainment Expo in Atlanta.

RESPONSE TO INTERROGATORY NO. 1:

Subject to, and without waiving, its General Objections, the Society responds that nobody presently employed by the Society has knowledge of if or when the Complete National Geographic: 108 Years of National Geographic on CD-Rom ("CD-ROM 108") was shown, demonstrated, exhibited or otherwise displayed, by or on behalf of one or more of the defendants or their affiliates, at an Electronic Entertainment Expo in Atlanta. As yet, the Society has located no documents in its possession containing information responsive to this Interrogatory, but it will continue to search for such information and, if any such information is found, will supplement this Response.

INTERROGATORY NO. 2:

Apart from the answer to Interrogatory No. 1, provide the date(s) and location(s) where, in 1997, a completed version of CNG 108 was shown, demonstrated, exhibited or otherwise displayed to third parties, by or on behalf of one or more of the defendants or their affiliates, prior to the beginning of general sales of the product, and describe briefly what the activity was.

RESPONSE TO INTERROGATORY NO. 2:

Subject to, and without waiving, its General Objections, the Society responds that nobody presently employed by the Society has knowledge of if or when CD-ROM 108 was shown, demonstrated, exhibited or otherwise displayed to third parties, by or on behalf of one or more of the defendants or their affiliates, prior to the beginning of general sales of the product. As yet, the Society has located no documents in its possession containing information responsive to this Interrogatory, but it will continue to search for such information and, if any such information is found, will supplement this Response.

INTERROGATORY NO. 3:

Provide the date(s), in 1997, when a completed version of CNG 108 was first shown, displayed, or otherwise made available for screening or review, to officers, directors, employees or consultants of the defendants prior to the beginning of general sales of the product.

RESPONSE TO INTERROGATORY NO. 3:

Subject to, and without waiving, its General Objections, the Society responds that CD-ROM 108 was first demonstrated to the Board of Trustees of the Society and certain members of staff of the Society on June 12, 1997.

INTERROGATORY NO. 4:

With respect to CNG 108, provide the approximate date(s) when Mindscape, or any agent or contractor acting on its behalf, first began any promotion, advertising or publicity related to the product, and describe the nature and purpose of that activity.

RESPONSE TO INTERROGATORY NO. 4:

Subject to, and without waiving, its General Objections, the Society responds that Mindscape first began promotion and advertising pertaining to the CD-ROM 108 in approximately September 1997. The nature of this promotion and advertising included print

advertising, and the purpose of the advertising was to increase awareness of the product and promote sales.

INTERROGATORY NO. 5:

With reference to section 5.8 of Mindscape's agreement with National Geographic Interactive effective September 13, 1996, provide the approximate date when Mindscape received the "final gold master" for CNG 108, and the approximate date when Mindscape began to make copies for the marketplace from the gold master, and explain the purpose of a final gold master.

RESPONSE TO INTERROGATORY NO. 5:

Subject to, and without waiving, its General Objections, the Society responds that nobody presently employed by the Society has knowledge of the date when Mindscape received the final gold master for CD-ROM 108, or began to make copies for the marketplace. As yet, the Society has located no documents in its possession containing information responsive to this Interrogatory, but it will continue to search for such information and, if any such information is found, will supplement this Response. The purpose of the final gold master for CD-ROM 108 is to provide a template of the CD-ROM 108, from which all copies of the product for commercial sale were to be made.

INTERROGATORY NO. 6:

With reference to Schedule F of Mindscape's agreement with National Geographic Interactive effective September 13, 1996, provide the actual dates and amounts of payments to National Geographic Interactive, or any successor or affiliate, for the CNG 108 product pursuant to the payment events contemplated in the Schedule.

RESPONSE TO INTERROGATORY NO. 6:

In addition to its General Objections, the Society objects to this Interrogatory on the grounds that it seeks information which is more practically obtainable by document requests. Subject to, and without waiving, the foregoing objection and its General Objections, the Society responds that, upon information and belief, information responsive to this Interrogatory has already been produced. (MS 003/0545, MS 003/0548, MS 003/0561, MS 003/0564). The Society will supplement this Response if additional responsive documents are located.

INTERROGATORY NO. 7:

Identify by name, and position held, every fact witness the defendant will use, or intends to use, at trial, and provide a brief summary of each witness' testimony.

RESPONSE TO INTERROGATORY NO. 7:

While Defendants have not made a decision as to which witnesses they will call, Defendants may call the following as witnesses:

Terrence B. Adamson, Executive Vice President, National Geographic Society

Suzanne Dupré, Former Corporate Counsel of the National Geographic Society

John Fahey, President and CEO, National Geographic Society

John Griffin, National Geographic Society, Director of Corporate Finance

Paul Kilmer, Attorney for National Geographic Society

Kent J. Kobersteen, National Geographic Society, Director of Photography

John Rutter, Managing Account Executive in the Text Syndication Office of National Geographic Image Collection

Thomas Stanton, Former Director of CD-ROMs, National Geographic Interactive

Robert G. Sugarman, Attorney for National Geographic Society

Defendants reserve the right not to call these witnesses and to list additional witnesses on their witness list which, by Order of the Court, is to be filed on December 9, 2002.

Terrence Adamson may testify about his knowledge of the decision to publish the Complete National Geographic, the legal advice sought and obtained concerning the Complete National Geographic during his tenure at the Society, about the Society's decision to continue publication of the Complete National Geographic, and to his belief that the publication of the Complete National Geographic did not constitute an infringement of copyright.

Suzanne Dupré may testify about the legal advice sought and obtained concerning the Complete National Geographic during her tenure at the Society, about the Society's decision to publish and continue to publish the Complete National Geographic, and to her belief that the

publication of the Complete National Geographic did not constitute an infringement of copyright.

John Fahey may testify about the general development of the Complete National Geographic, the legal advice sought and obtained concerning the Complete National Geographic, the decision to publish and continue to publish the Complete National Geographic, and to his belief that the publication of the Complete National Geographic did not constitute an infringement of copyright.

John Griffin may testify about the costs and revenues attributable to the Complete National Geographic products.

Paul Kilmer may testify about the legal advice sought and obtained concerning the Complete National Geographic, and to his belief that the publication of the Complete National Geographic did not violate the contracts of freelance authors and photographers.

Kent Kobersteen may testify about discussions at the Society concerning whether photographers should receive additional compensation for the Complete National Geographic.

John Rutter may testify about the Society's longstanding policy to reproduce the Magazine on microfilm and microfiche.

Thomas Stanton may testify about the creation of the Complete National Geographic products, discussions with counsel about the Complete National Geographic products and the letter he wrote to contributors of the Magazine in May 1997.

Robert G. Sugarman may testify about the legal advice sought and obtained concerning the Complete National Geographic and to his belief that the publication of the Complete National Geographic did not constitute an infringement of copyright.

INTERROGATORY NO. 8:

State the number of photographic images that were removed from any Later Version of the CNG 108 product and the product(s) from which removed.

RESPONSE TO INTERROGATORY NO. 8:

In addition to its General Objections, the Society objects to this Interrogatory on the grounds that it is vague and ambiguous. Subject to, and without waiving, the foregoing objections and its General Objections, the Society responds that, to the best of its knowledge, 56 images have been blacked out of Complete National Geographic: 112 Years of National Geographic Magazine on CD-ROM ("CD-ROM 112") and Complete National Geographic: 111 Years of National Geographic Magazine on CD-ROM ("CD-ROM 111").

INTERROGATORY NO. 9:

If you contend that the presumptive privilege in Section 201(c) of the Copyright Act should apply to defendants National Geographic Enterprises, Inc. and/or Mindscape, Inc., explain the legal basis for such a contention.

RESPONSE TO INTERROGATORY NO. 9:

In addition to its General Objections, the Society objects to this Interrogatory on the grounds that it is not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 10:

Explain the legal and factual basis for the defendants' defense against a contention that the infringement of copyrights in the Greenberg photographs was willful.

RESPONSE TO INTERROGATORY NO. 10:

Subject to, and without waiving, its General Objections, the Society responds that it did not act willfully because it sought the advice of its counsel, and that, pursuant to Federal Rule of Civil Procedure 33(c), it has already produced documents responsive to this Interrogatory. (NGS 005/0379-0382; NGS 016/0011-0022; NGS 016/0487-0491; NGS 016/0492-0495; NGS 016/0496-0499; NGS 016/0511-0520; NGS 016/0525-0527; NGS 016/0570-0574; NGS 016/0578-0586; NGS 016/0593-0595; NGS 016/1397; NGS 026/0001-0016; NGS 026-0021-0046; NGS 027/0012-0016; NGS 027/0019-0022; NGS 028/0024-0025;

NGS 28/0028-0029).

INTERROGATORY NO. 11:

Since the 1976 Copyright Act came into existence Congress has amended the Act twice to enlarge the range of statutory damages, including damages for willful infringement, that may be awarded. Identify the base range, and the range for willful infringement, that you contend must apply in this litigation, and explain the legal basis for your contention.

RESPONSE TO INTERROGATORY NO. 11:

Section 504 (c) of the 1976 Copyright Act provides:

- (1) Except as provided by clause (2) of this subsection, the copyright owner may elect, at any time before final judgment is rendered, to recover, instead of actual damages and profits, an award of statutory damages for all infringements involved in the action, with respect to any one work...in a sum of not less than \$500 or more than \$20,000 as the court considers just. For purposes of this subsection, all the parts of a compilation or derivative work constitute one work.
- (2) In a case where the copyright owner sustains the burden of proving, and the court finds, that infringement was committed willfully, the court in its discretion may increase the award of statutory damages to a sum of not more than \$100,000. In a case where the infringer sustains the burden of proving, and the court finds, that such infringer was not aware and had no reason to believe that his or her acts constituted an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200...

The amounts provided in Section 504(c)(1) were increased as part of the Digital Theft Deterrence and Copyright Damages Improvement Act of 1999 (the "Damages Improvement Act"). The higher amounts apply to any action brought on or after the effective date of that statute, December 9, 1999, "regardless of the date on which the alleged activity that is the basis of the action occurred." 4 Nimmer § 14.04[B][1][b] at 14-50. Because this action

was filed in 1997, the pre-Damages Improvement Act figures apply to any potential damages awarded Greenberg.

Dated: New York, New York
November 4, 2002

Robert G. Sugarman (NSG for RGS)

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