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Photographer wins digital fight

Photographer can collect royalties

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A Pinecrest photographer won another major victory Tuesday for freelance journalists in the war over digital media rights when the U.S. Supreme Court refused to consider an appeal by National Geographic magazine.

At issue were four photo spreads by Jerry Greenberg that appeared in the magazine over three decades. In 1997, the magazine included Greenberg's photos in a $99.95 CD-ROM set that reproduced magazines from 1888 to 1996.

Greenberg claimed that the magazine needed his permission to use his work in a new medium and should have paid him an additional fee. U.S. District Judge Joan Lenard in Miami ruled against the photographer. The 11th Circuit Court of Appeals disagreed, saying the magazine had made an unauthorized use of his photos. The magazine appealed to the Supreme Court, which refused without comment to hear the case.

▸ PHOTOGRAPHER, FROM 1C

"I'm just a dumb photographer, a David fighting Goliath," said Greenberg, 74. "If you're going to fight a battle like this, it takes cash, courage and the copyright law on your side."

Greenberg wouldn't say how much the fight has cost him, but when a reporter asked if it was as much as $30,000, he said simply, "It's *way* up there."

Judge Lenard will now conduct a trial to consider Greenberg's claims for payments, damages and attorney's fees.

"This is a major milestone," said Norman Davis, Greenberg's attorney. "Publishers are moving into the electronic era, and the courts are telling them what they can and can't do."

A spokeswoman for the magazine, Mary Jeanne Jacobsen, said the magazine was "disappointed" by the court's decision, but knew that the appeal to the Supreme Court was a "long shot."

She said the company stands by its original position, that it didn't need freelancers' consent because it was offering "the same product in a different medium, comparable to microfilm copies."

This is the second major victory this year for freelancers. In June, the Supreme Court ruled, in the case of New York Times versus freelance writer Jonathan Tasini, that journalists have rights when their creations are reproduced in electronic form, such as on websites.

Jacobsen says that the magazine has four similar lawsuits against it from other photographers, and plans to keep fighting those cases. "We believe in the correctness of our legal position," she said.

Davis said it wasn't clear to him how how many freelancers would be affected by Tuesday's ruling. In the 1980s, Greenberg asked the magazine to have the copyrights of his photos assigned to him, and National Geographic agreed. Those who don't hold copyright to their photos or words in the magazine might not be able to win in court, Davis said.

Because of the crucial issues in the case, National Geographic had an impressive array of supporters in court briefings, including The New York Times, Time Warner and the Magazine Publishers of America. The magazine's appeal to the Supreme Court was prepared by Ken Starr, the famed special prosecutor in the Monica Lewinsky case.

A key issue was the magazine's claim that copyright law should not be interpreted to hinder or prohibit the exploration of new media, and it warned that a negative ruling would dramatically increase costs to the public and libraries for archived information. The $99.95 CD stored the equivalent of $37,000 worth of microfilm.

"They've kept saying we want to prohibit new technology," Davis said. "That's total nonsense. We're just saying that it's a new medium and they need to get the approval of the photographers and writers."

Greenberg's four photo essays included two on John Pennekamp Coral Reef State Park, one on sharks and another on an island.

Greenberg and his wife, Idaz, run a small publishing company out of their home, producing such items as post cards of tropical fish.

Freelancers never have an easy time, he says. "It's a buyer's market. Creative people do it for love and a jingle in their pocket. And if you take the jingle out, it's tough."