Story 764

GREENBERG BEATS NGS – AGAIN!!

October 11, 2005

A federal court judge in Miami has upheld a $400,000 jury award for photographer Jerry Greenberg in his copyright infringement claim against National Geographic Society (NGS).

For those of you with long memories you may recall that way back in the summer of 1997 National Geographic Society published the first edition of "The Complete NATIONAL GEOGRAPHIC: 108 Years of National Geographic Magazine on CD-ROM".

While they used all the pictures ever published in the magazine -- (almost all as it later turned out) – the magazine claimed that it had the right to use images produced by freelance photographers without further compensation and regardless of copyright.

Quite naturally the photographers were up in arms. Various photographer groups offered proposals for various types of minimal compensation for this new use, but NGS flatly refused to pay anything. The first to sue in the fall of 1997 was Jerry Greenberg who had 64 underwater photographs in four articles (later defined by the judge as 4 collective works). Jerry had registered his copyright to all these images prior to the infringement and he had clear paperwork showing that for the fee paid Geographic only had the right to use the images in the magazine and nowhere else.

Many photographers expected this to be a slam-dunk. Jerry had done everything right. He had his copyrights registered in advance of infringement and he also had experience in litigating, and winning, other copyright claims. But, Geographic recognized that any settlement could result in a landslide of claims from hundreds of photographers who would expect similar treatment. Thus NGS dug in its heels and, has since demonstrated that it was willing to go to any extent to prevent a settlement in Greenberg's favor.

Over the years, I've done many stories entitled "Greenberg Wins" only to discover that National Geographic was able to put up another roadblock. If you want to follow the whole saga look back at stories 82, 89, 131, 161, 231, 389, 433, 475, and 542.

A Lesson In The Difficulty In Winning

In 1998 Greenberg's claim was initially rejected when a Miami federal court judge granted NGS a motion for summary judgment on the grounds that the CD was a revision of an existing product. Under copyright law, publishers are not required to seek permission from freelancers in order to produce and distribute revisions of existing works.

Greenberg appealed, and the 11th Circuit Court of Appeals reversed the lower court ruling in 2001 saying that the CD was not a revision, but a "new product, in a new medium, for a new market" since it contained a search engine and other features the magazine did not have.

NGS appealed this decision to the U.S. Supreme Court, but the court refused to hear the case and later in 2001 it was sent back to the Miami trial court to assess damages. The parties were unable to reach an agreement on the level of damages and in 2002 it was determined that a jury trial would be necessary in order to set damages.

That trial took place and in March 2003 and the 8 person jury awarded Greenberg the maximum

allowed by law of $100,000 per infringement for four willful infringements ($400,000). (In 1999 the amount of statutory damages allowed for willful infringement was raised from $100,000 to $150,000 for cases initiated after that date.)

Among the things revealed at the trial were:

- As of that date more than 1.4 million CD had been sold and they generated more than $70 million in total revenue.
- The product was not a single disc set, but more than 100 different CD-ROM products that re-use material originally published in the National Geographic Magazines.

NGS appealed again to the 11th Circuit Court, but the court refused to hear the case and sent it back to the federal court in Miami to hear arguments as to whether there should be a reduction in the jury award. On September 30, 2005 Judge Andrea M. Simonton denied all of NGS's claims for a reduction.

NGS has hinted that it plans to appeal this decision, and if so then back to the 11th Circuit we will go. In the meantime in another case almost identical to Greenberg's, brought in the 2nd Circuit Court of Appeals (New York), it was ruled that the NGS CD was a revision rather than a new work. It would appear that Geographic's strategy in taking the case back to the Supreme Court might be to point out the disparity in circuit court decisions.

It is hard to see why NGS continues to fight so hard given that the statute of limitations for filing new cases has passed. Consequently, even if the current decision were to be accepted it would be impossible for other photographers who have not already filed to bring new cases. There are very few other cases in the pipeline that NGS would have to respond to.

So the saga continues. This case should be a lesson to those photographers who believe that because they own the copyright to their image at the moment of creation it will be easy to collect significant damages from any infringer.

Jerry advises any photographer considering bringing a copyright action to have, "cash, courage, a copyright registered prior to infringement and a dammed good lawyer." While to some the award may seem substantial Jerry says, "I'll never get back what I have put into this case."

Nevertheless he is philosophic about the outcome and says he has no animosity toward National Geographic, "these things happen and its business."

However, after a lifetime of experience as an underwater photographer, and many unauthorized uses of his images, Jerry wants photographers to be realistic about the overall situation they face and recognize that they are easy prey. He suggested they remember the following: "Here's the deal, we create, they steal."

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