UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.

12-3-97 DRAFT

JERRY GREENBERG, individually,
and IDAZ GREENBERG, individually,

Plaintiffs,

vs.

COMPLAINT

NATIONAL GEOGRAPHIC SOCIETY, a District of Columbia corporation, NATIONAL GEOGRAPHIC ENTERPRISES, INC., a ___ corporation, and MINDSCAPE, INC., a California corporation,

Defendants.
_____/

Plaintiffs, JERRY GREENBERG and IDAZ GREENBERG (" the Greenbergs"), sue the NATIONAL GEOGRAPHIC SOCIETY ("the Society"), NATIONAL GEOGRAPHIC ENTERPRISES, INC. ("Geographic Enterprises"), and MINDSCAPE, INC. ("Mindscape"), and allege:

1. This is a complaint for damages and permanent injunctive relief under the Copyright Act, codified at 17 U.S.C. § 101 et seq., and for permanent injunctive relief pursuant to **[insert]**.

2. The Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1338.

3. The Court has personal jurisdiction over the defendants, who continuously and systematically market, distribute and sell the products addressed herein within this district.

4. Venue is proper in this judicial district in that (1) the plaintiffs' residence and principal place of business is in the district, (2) the defendants committed a statutory tort in the district, and/or engaged in business activity in the district.

5. The National Geographic Society is a not-for-profit corporation formed in the District of Columbia, and its principal place of business is there. The Society, on its own or through one or more for-profit subsidiaries, engages in multiple ventures, exemplified by the monthly National Geographic magazine, television and film programs, maps and atlases, and CD-ROM packages.

6. National Geographic Enterprises, Inc. is a ____ corporation, and is a wholly-owned subsidiary of the National Geographic Society.

7. Mindscape, Inc. is a California corporation that, among other things, engages in the development and distribution of consumer software and other products.

8. The Greenbergs are creative artists and entrepreneurs, who for decades have published and distributed their original works in books and other products.

Factual Allegations

The Educational Insights product.

9. A photograph of a redband parrotfish, taken by Jerry Greenberg, was originally published in a book produced by the plaintiffs titled "The Living Reef" in 1972 (and a subsequent edition in 1979) and was published by the plaintiffs in "The Coral Reef" in 1976 (and a subsequent edition in 1988). Both books contain notice of copyright by the plaintiffs, and the copyrights were registered with the U. S. Copyright Office.

10. Copies of "The Coral Reef" were provided to the Society by Jerry Greenberg in 1977, and the Society acknowledged receipt of the copies in a letter from its editor.

11. Authorization was never provided to the Society for any use of any kind of the redband parrotfish photograph.

12. A photograph of a stoplight parrotfish, taken by Jerry Greenberg, was originally published in "The Living Reef" and subsequently in "The Coral Reef." Authorization was never provided to the Society for any use of any kind of that photograph.

13. A photograph of a green moray, taken by Jerry Greenberg, was originally published in "The Living Reef," and subsequently was published in "The Coral Reef." Authorization was never provided to the Society for any use of any kind of that photograph.

14. A photograph of a scuba-diver under water, taken by Jerry Greenberg, was originally published in the Society's monthly magazine in January 1962. Copyright as to that photograph, which originally was possessed by the Society, was assigned to Mr. Greenberg by the Society on December 18, 1985, and Mr. Greenberg renewed the copyright in 1989.

15. A separate photograph, taken by Jerry Greenberg and showing the Greenbergs' son in scuba gear under water, was originally published in "The Living Reef" and was also published in a poster in 1974 titled "Living Corals of the Tropical Atlantic." The poster also displayed notice of copyright by Jerry Greenberg and Idaz Greenberg.

16. In 1995 or 1996, Educational Insights, Inc., a California-based company, began the distribution and sale of a product bearing various titles including "Fish of the Coral Reef" and "Oceans GeoPack." The product otherwise bears identification as Code 2043. The product

was sold, and is being sold, within this judicial district and elsewhere. For simplicity, the product is identified hereinafter as "the GeoPack."

17. The GeoPack product bears a logo of the National Geographic Society, and displays the following notice: "© 1995 National Geographic Society."

18. Copies made from the photographs described above in paragraphs 9, 12, 13, 14 and 15 ("the Disputed Images") are included in the GeoPack. The copies were licensed by the Society to Educational Insights, Inc. for commercial purposes.

19. On information and belief, the Society agreed to indemnify Educational Insights, Inc. with respect to the Disputed Images, and the Society agreed to defend any copyright infringement claim related to the Disputed Images that may ensue, although the Greenbergs have not been provided with any documentation of such an agreement.

The Sea Fan Photograph

20. Jerry Greenberg authorized a one-time use by the Society of a photograph of a sea fan, taken by him, to appear in the Society's monthly magazine in July 1990. In 1996, without authorization, the Society included the photograph of the sea fan in a color brochure promoting the Society's 1996 Jason Project. When challenged by Mr. Greenberg concerning the use, the Society admitted that it had improperly used the photograph. The dispute has not been resolved.

The CD-ROM Product: The Complete National Geographic

21. In 1997, the Society began distribution and sale, on its own and through Geographic Enterprises and Mindscape, of a CD-ROM product titled The Complete National Geographic (hereinafter "the Complete Geographic") that incorporates, among other things, a complete replication of all publications over a span of 108 years of the National Geographic

monthly magazine, amounting to more than 1,200 issues of the magazine. The CD-ROM product consists of approximately 30 discs for display through a computer.

22. The Complete Geographic product also contains, among other things, a multi-media logo for the Society, and an in-motion commercial message on behalf of Kodak.

23. The Complete Geographic product displays the following notice: "© 1997 National Geographic Society. All rights reserved." The notice appears on the box containing the 30-disc set, on each box within the boxed set containing a sub-set of discs for each decade, and on each CD-ROM disc.

24. The year of first publication of the Complete Geographic product was 1997, as indicated in the notice of copyright.

25. None of the 1200+ issues of the monthly magazine contained within the Complete Geographic product was first published in 1997.

26. Each computer "page" or display that is downloaded in hard copy displays the 1997 copyright notice.

27. The Complete Geographic product bears an ISBN identification number that has never been used for any other publication or product of the National Geographic Society or its affiliates.

28. The Society has stated that the Complete Geographic product contains a digital image of every page of the magazine, including advertisements, without any changes, additions, or modifications.

29. No product or publication like the Complete Geographic product ever existed previously.

30. The Complete Geographic is being promoted, marketed and distributed for sale by the Society and/or Geographic Enterprise and/or Mindscape, Inc., in the United States and elsewhere.

31. On information and belief, the Society and/or Geographic Enterprises authorized Mindscape, through a licensing agreement, to transfer its materials to discs, and to supervise the marketing and distribution of the CD-ROM discs.

32. On information and belief, Mindscape transferred all images to the CD-ROM discs.

33. Various monthly issues of the Society's magazine contain approximately 67 photographs created by Mr. Greenberg and provided to the Society for inclusion in particular monthly issues.

34. The Complete Geographic incorporates all of the aforesaid photographs.

35. In early 1997, prior to the start of general distribution and sale of the Complete Geographic, the Society was informed that the photographs described above may not be included in the Complete Geographic without the Greenbergs' prior written permission. Such permission was never sought, and was never provided.

36. On each CD-ROM disc in the Complete Geographic product, near the beginning of the recorded matter, appears a sequence of moving magazine covers ("the Moving Covers Sequence") -- actually a multi-media sequence -- that serves apparently as thematic introductory material for the product. The sequence consists in part of the front covers of ten particular issues of the Society's monthly magazine. The ten covers are electronically and visually manipulated so that they dissolve from one to another, creating imagery in motion.

37. One of the ten covers utilized in the Moving Covers Sequence is taken from the January 1962 issue of the Society's monthly magazine. That cover features a photograph of a female diver, using scuba gear, shown swimming among corals and fishes.

38. The photograph referenced in the paragraph above was taken by Jerry Greenberg. The photograph appears on the cover of the January 1962 issue, as well as inside that issue as part of a feature titled "Florida's Coral City Beneath the Sea," which started at page 70 of that monthly issue.

39. All rights to the photograph, including copyright, are owned by Mr. Greenberg. The Society never sought, and never obtained, permission to use the photograph for inclusion in the Complete Geographic.

Other Photographs and Other Products

40. The Society has in its possession or control hundreds of photographs taken by Mr. Greenberg, or duplicates or electronically-scanned images of those photographs.

41. The Society has acknowledged that, in addition to the Complete Geographic, the Society and Mindscape have developed and are developing 10 other CD-ROM products, or "titles," to be released in 1997 and 1998.

Count I
(Copyright infringement by the Society)

42. The allegations in paragraphs 9 through 19 are realleged and incorporated herein.

43. The Society had access to the Greenberg photographs.

44. The Disputed Images that appear in the GeoPack product are at least substantially similar to the Greenberg photographs, and an inference is warranted that the Disputed Images are copies.

45. Jerry Greenberg and/or Idaz Greenberg hold valid and exclusive copyright in the Greenberg photographs.

46. The Greenberg photographs were copied by or for the Society, and provided to Educational Insights, Inc. by the Society for use in its GeoPack product, without the permission of the copyright owners. Such conduct amounts to infringement by the Society pursuant to the Copyright Act.

47. In July 1996, the Greenbergs advised Educational Insights, Inc. that the copies had not been authorized, and demand was made that use of the copies in the GeoPack product be discontinued. The Society subsequently responded as the apparent licensor by denying the demand, and the continued use of the copies amounts to willful infringement.

WHEREFORE the plaintiffs seek the following relief with respect to Count I:

(1) Entry of judgment against the Society for copyright infringement.

(2) An award of statutory damages.

(3) An award of exemplary damages for willful infringement.

(4) Entry of a permanent injunction to halt any further use of the Disputed Images in the GeoPack product.

(5) Entry of a permanent injunction to preclude any use by the Society, or by others with its participation, of the many photographs currently in the possession and control of the

Society for which Mr. Greenberg, or the Greenbergs jointly, hold exclusive copyright or other proprietary interest.

(6) An award of attorneys' fees and costs.

(7) Such other relief as may be appropriate in the circumstances.

Count II
(Copyright infringement by the Society)

48. The allegations in paragraph 20 are realleged and incorporated herein.

49. The Society had access to the Greenberg photograph of a sea fan, which was delivered by him directly to the Society.

50. The photograph of the sea fan in the color brochure promoting the Society's 1996 Jason Project is identical to the Greenberg photograph.

51. Mr. Greenberg holds valid and exclusive copyright in the sea fan photograph.

52. The sea fan photograph was used by the Society as discussed herein without the authorization of Mr. Greenberg. Such conduct amounts to infringement pursuant to the Copyright Act.

WHEREFORE the plaintiffs seek the following relief with respect to Count II:

(1) Entry of judgment against the Society for copyright infringement.

(2) An award of statutory damages.

(3) Entry of a permanent injunction to halt any further use of the sea fan photograph.

(4) Entry of a permanent injunction to preclude any use by the Society, or by others with its participation, of the many photographs currently in the possession and control of the

Society for which Mr. Greenberg, or the Greenbergs jointly, hold exclusive copyright or other proprietary interest.

(5) An award of attorneys' fees and costs.

(6) Such other relief as may be appropriate in the circumstances.

Count III
(Copyright infringement by the Society, Geographic Enterprises and Mindscape)

53. The allegations in paragraphs 21 through 39 are realleged and incorporated herein.

54. The Complete Geographic product has collected more than 1,200 separate issues of the Society's monthly magazine, and contains reproductions or copies of the full contents of each issue. In copying those contents, the Society included in the Complete Geographic dozens of photographs created by Jerry Greenberg, for which he, or the Greenbergs jointly, own exclusive copyright.

55. The Complete Geographic also includes, among other things, the Moving Covers Sequence, which incorporates a cover photograph by Mr. Greenberg. Because the Moving Covers Sequence appears on each of the 30 CD-ROM discs comprising the Complete Geographic, the Greenberg cover photograph appears in the Complete Geographic in 30 separate places (beyond its original use in the July 1962 issue of the monthly magazine).

56. Each separate issue of the Society's monthly magazine, at least since adoption of the 1909 Copyright Act, is a collective work protected by federal copyright law pursuant to statute.

57. Each separate issue of the Society's monthly magazine is a collective work, by virtue of the collection, selection, arrangement and assembly of materials in such a way that the resulting work as a whole -- the monthly issue -- constitutes an original work of authorship.

58. Each separate issue of the Society's monthly magazine bears copyright notice indicating, among other things, the year of first publication.

59. The existence of the Society's copyright in each underlying collective work -- each monthly magazine -- does not undermine or diminish in any way the Greenberg copyrights as to the Greenberg photographs that appear within particular monthly issues.

60. The Complete Geographic is not a "further use" of a preexisting collective work, or a "revision" of a preexisting collective work. Instead, the Complete Geographic is a new collective work, by virtue of the collection, selection, arrangement and assembly of materials -- some preexisting, some entirely new -- in a product that as a whole constitutes an original work of authorship.

61. No work like the Complete Geographic ever existed previously.

62. As a new collective work, the Complete Geographic is copyrightable. The Society has given notice of a 1997 copyright in that work. Any individual screen display derived from the CD-ROM contains 1997 copyright notice on that display when printed in hard copy.

63. Pursuant to the Copyright Act, the date in such notice indicates the year of first publication.

64. The Society and Geographic Enterprises had no right, as a matter of law, to reproduce, copy, display or sell the Greenberg photographs in the Complete Geographic product

without prior permission. In the absence of permission, the inclusion of the Greenberg photographs in the new collective work amounts to infringement of the Greenberg copyrights.

65. Geographic Enterprises and Mindscape are at least vicariously liable for infringement of the aforesaid copyrights because of their roles in producing the CD-ROM discs and in distributing and selling the Complete Geographic.

66. Prior to the start of general distribution and sale of the Complete Geographic, the Society was warned not to include, or permit the inclusion of, the Greenberg photographs in the new collective work without prior written permission. The Society ignored the demand entirely, never discussed the subject with Mr. Greenberg or his counsel, and never obtained permission for the use of his photographs in the product. The infringement of the Greenberg copyrights addressed in this count was, therefore willful.

WHEREFORE the plaintiffs seek the following relief with respect to Count III:

(1) Entry of judgment against the Society, Geographic Enterprises, and Mindscape for copyright infringement.

(2) An award of statutory damages.

(3) An award of exemplary damages for willful infringement.

(4) Entry of a permanent injunction to halt any further use of the Greenberg photographs in the Complete Geographic product.

(5) Entry of a permanent injunction to preclude any use by the Society, or by others with its participation, of the many photographs currently in the possession and control of the Society for which Mr. Greenberg, or the Greenbergs jointly, hold exclusive copyright or other proprietary interest.

(6) An award of attorneys' fees and costs.

(7) Such other relief as may be appropriate in the circumstances.

Count IV
(Copyright Infringement Against the Society, Geographic Enterprises, and Mindscape)

67. The allegations in paragraphs 9 through 42 above are realleged and incorporated.

68. The Society had access to the Greenberg photograph that is included in the Moving Cover Sequence that appears on each CD-ROM disc comprising the Complete Geographic.

69. An exact replica of the Greenberg photograph is utilized in the Moving Cover Sequence.

70. Mr. Greenberg holds valid and exclusive copyright in the photograph.

71. Mr. Greenberg never authorized the defendants to use the photograph in the Moving Covers Sequence.

72. Inclusion of the Greenberg photograph in the Moving Covers Sequence without his prior permission amounts to infringement under the Copyright Act.

73. Geographic Enterprises and Mindscape are at least vicariously liable for infringement of the aforesaid copyright because of their roles in producing the CD-ROM discs and in distributing and selling the Complete Geographic.

74. The Society knew that it did not possess a copyright interest in the cover photograph discussed in this count, and by utilizing the photograph in the Moving Covers Sequence without consent willfully infringed the Greenberg copyright.

WHEREFORE the plaintiffs seek the following relief with respect to Count IV:

(1) Entry of judgment against the Society, Geographic Enterprises, and Mindscape for copyright infringement.

(2) An award of statutory damages.

(3) An award of exemplary damages for willful infringement.

(4) Entry of a permanent injunction to halt any further use of the Greenberg photograph in the Moving Cover Sequence.

(5) An award of attorneys' fees and costs.

(6) Such other relief as may be appropriate in the circumstances.

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