UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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(1) DOUGLAS FAULKNER, LOUIS PSIHOYOS,
(2) MATRIX INTERNATIONAL, INC. as agent
for ROGER HUTCHINGS, SARAH LEEN, and
(4) RICK RICKMAN,

Plaintiffs,

V.

NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC INTERACTIVE, EASTMAN KODAK COMPANY, HAMMACHER SCHLEMMER, INC., MINDSCAPE INC.,

Defendants,

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SUMMONS IN A CIVIL ACTION
CASE NUMBER:

97 CIV. 9361

TO:

NATIONAL GEOGRAPHIC
INTERACTIVE & NATIONAL
GEOGRAPHIC SOCIETY
1145 17TH STREET
N.W. WASHINGTON, D.C. 20036-
4688

EASTMAN KODAK COMPANY
90 PARK AVE
NEW YORK, NY 10016

HAMMACHER SCHLEMMER, INC.
147 EAST 57TH STREET
NEW YORK, NEW YORK 10022

MINDSCAPE INC.
88 ROWLAND WAY
NOVATO, CA 94945

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon

PLAINTIFF'S ATTORNEY

WEINGRAD & WEINGRAD, L.L.P.
350 Fifth Avenue, Suite 7720
New York, New York 10118
(212) 244-4187

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

JAMES M. MCGUIRE

CLERK

DEC 19 1997
DATE

BY DEPUTY CLERK

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ORIGINAL

DOUGLAS FAULKNER, LOUIS PSIHOYOS, MATRIX INTERNATIONAL, INC. as agent for ROGER HUTCHINGS, SARAH LEEN, and RICK RICKMAN,

Plaintiffs

-against-

NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC INTERACTIVE, EASTMAN KODAK COMPANY, HAMMACHER SCHLEMMER, INC. AND MINDSCAPE INC.

Defendants

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COMPLAINT

Jury Trial Demanded

Plaintiffs by and through their attorneys, Weingrad & Weingrad, L.L.P. alleges as follows:

NATURE OF ACTION

1. This is an action for damages by plaintiffs against defendants for copyright infringement, unfair trade practices and unfair competition based on copyright infringement, breach of contract, and/or unjust enrichment based on abandonment of contract,

JURISDICTION, VENUE AND PARTIES

2. Plaintiff, DOUGLAS FAULKNER, is a citizen and resident of the State of New York, County of New York, and created original images referred to herein, a copy of said images, listed by published article, are attached as *Exhibit 1*.

3. Plaintiff, LOUIS PSIHOYOS, is a citizen and resident of the State of Colorado, and created original images referred to herein, a copy of said images, are attached as *Exhibit 2*.

4. Plaintiff MATRIX INTERNATIONAL, INC. as agent for ROGER HUTCHINGS, SARAH LEEN, and RICK RICKMAN was and still is, a domestic corporation, organized and existing under, and by virtue of, the laws of the State of New York, and doing business within the City, County and State of New York.

5. ROGER HUTCHINGS, is a citizen and resident of London, England, and created original images referred to herein, a copy of said images, are attached as *Exhibit 3*.

6. SARAH LEEN, is a citizen and resident of Edgewater, Maryland, and created original images referred to herein, a copy of said images, are attached as *Exhibit 4*.

7. RICK RICKMAN is a citizen and resident of Laguna Niguel, California, and created original images referred to herein, a copy of said images, listed by published article, are attached as *Exhibit 5*.

8. Upon information and belief, and at all times relevant herein, defendant THE NATIONAL GEOGRAPHIC SOCIETY was, and still is a domestic, not for profit corporation, organized and existing under, and by virtue of, the laws of the District of Columbia, and doing business within the City, County and State of New York, with offices located at 1145 17TH STREET, N.W. WASHINGTON, D.C. 20036-4688; this corporation owned the limited rights to publish the magazine, "*NATIONAL GEOGRAPHIC*", for the past 108 years.

9. For more than a century the National Geographic Society has published world adventures for educational purposes.

10. The original mission of the magazine has undergone major changes in the past 2 years.

11. After five generations of family leadership under the direction of Bill Allen, in 1995 the magazine was published in a non-English editions, Japanese, and in 1997 Spanish.

12. In 1996 the National Geographic Society specifically established National Geographic Ventures, the Society's wholly owned taxable subsidiary, which includes television, maps and interactive.

13. Upon information and belief, and at all times relevant herein, defendant NATIONAL GEOGRAPHIC INTERACTIVE INC. was, and still is, a domestic, for profit corporation, organized and existing under, and by virtue of, the laws of the State of Delaware, and doing business within the City, County and State of New York, with offices located at 1145 17TH STREET, N.W. WASHINGTON, D.C. 20036-4688, and on information and belief, is owned by THE NATIONAL GEOGRAPHIC SOCIETY; THE NATIONAL GEOGRAPHIC SOCIETY transferred the rights to publish *"NATIONAL GEOGRAPHIC"*, to NATIONAL GEOGRAPHIC INTERACTIVE INC.

14. Upon information and belief, and at all times relevant herein, defendant MINDSCAPE INC. was, and still is a domestic, for profit corporation, organized and existing under, and by virtue of the laws of the State of California, and doing business within the City, County and State of New York, with offices located at 88 Rowland Way, Novato, Ca. 94945; MINDSCAPE INC. actually publish, manufacturer and distribute the transferred rights for *"NATIONAL GEOGRAPHIC",in the new format "THE COMPLETE NATIONAL*

GEOGRAPHIC 108 Years of National Geographic Magazine on CD-ROM". on behalf of NATIONAL GEOGRAPHIC INTERACTIVE INC., THE NATIONAL GEOGRAPHIC SOCIETY and EASTMAN KODAK COMPANY and receive the benefits of the advertising therein.

15. Upon information and belief, and at all times relevant herein, defendant EASTMAN KODAK COMPANY was, and still is, a domestic corporation, organized and existing under, and by virtue of, the laws of the State of New Jersey, and doing business within the City, County and State of New York, with corporate shares of stock being publicly traded; EASTMAN KODAK COMPANY on information and belief financed and participated in the publishing of *"THE COMPLETE NATIONAL GEOGRAPHIC 108 Years of National Geographic Magazine on CD-ROM"*. and receive the benefits of the advertising therein.

16. Upon information and belief, and at all times relevant herein, defendant HAMMACHER SCHLEMMER, INC. was, and still is, a domestic corporation, organized and existing under, and by virtue of, the laws of the State of New York, and doing business within the City, County and State of New York, with a retail store located at 147 EAST 57TH STREET, NEW YORK, NEW YORK 10022; HAMMACHER SCHLEMMER, INC. is selling and marketing *"THE COMPLETE NATIONAL GEOGRAPHIC 108 Years of National Geographic Magazine on CD-ROM"*

20. Exclusive jurisdiction for plaintiffs' claims lie with the United States District Court for the Southern District of New York, pursuant to the Copyright Act of 1976, U.S.C. 17, Sec. 301, U.S.C., 28 Sec.1331, 1332, 1338(a)(b), 1391(b)(2), 1400 and its Plaintiff Faulkner resides

in the State of New York, and defendant's Kodak and Hammacher are doing business in the State of New York. Jurisdiction is grounded in the provisions of Rule 4(a) F.R.C.P, and in pendent jurisdiction.

21. DOUGLAS FAULKNER, LOUIS PSIHOYOS, ROGER HUTCHINGS, SARAH LEEN, and RICK RICKMAN are professional photographers and authors.

SUMMARY ALLEGATIONS

22. Plaintiffs allege that they are the owners of, and/or the successor in interest to or agent for certain contract rights of copyrighted images, which were infringed, by defendants, through the unauthorized alteration, publication, sale, distribution and use thereof, and/or plaintiffs allege that defendant NATIONAL GEOGRAPHIC SOCIETY, breached their contracts with the plaintiffs, and/or, in the alternative, that this defendant abandoned the contracts with plaintiffs and/or were unjustly enriched thereby. Said contracts were the original agreements made at a time when it was not in the contemplation of the parties that the images would be used for profit and commercial use in a *National Geographic Magazine on CD-ROM*; the intent was only educational and/or non profit use. In addition, the plaintiffs claims are for unjust enrichment, common law unfair competition, tortious misappropriation of goodwill, federal dilution, injury to business reputation and dilution of trademark -- New York statutory law.

COUNT I

FIRST CAUSE OF ACTION COPYRIGHT INFRINGEMENT AGAINST NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC INTERACTIVE, EASTMAN KODAK COMPANY, HAMMACHER SCHLEMMER, INC. AND MINDSCAPE INC.

23. The subject images are wholly original with plaintiffs and are copyrightable subject matter under the laws of the United States. All images created by plaintiffs are registered by them with register of copyrights, Library of Congress.

24. Since creation of the subject images, the plaintiffs have complied in all respects with the Copyright Act and all other laws governing copyright, and have secured the exclusive rights and privileges in and to the copyright of said images, and/or will receive a certificate of registration from the Register of Copyrights; a copy of the copyrights, or applications for copyright, are attached as Exhibit 1-5 or in the alternative, plaintiffs ask this Court to adjudicate their copyrights based on these registrations, and any registrations made by the defendants herein, in trust for the plaintiffs, and pursuant to the Berne Convention.

25. The subject images were published by plaintiffs, and all copies of them made by defendants published under their authority or license, prior to 1997, were, and have now, been printed and published in a CD Rom version, which is not in strict conformity with the provisions and laws governing copyright, or in conformity to the plaintiffs' contracts.

26. Plaintiffs have been, and still are, the sole proprietors of, or successors in interest or agent for all rights, title, and interest in the copyright in said images.

27. Prior to and on or about September 1997, and thereafter, defendants infringed said copyright by reproducing said images and publishing and placing in the general market and by mail order catalogue, for sale in the State of New York and world wide, images which were copied from plaintiffs' copyrighted images, known as *"NATIONAL GEOGRAPHIC", in the new*

format "THE COMPLETE NATIONAL GEOGRAPHIC 108 Years of National Geographic Magazine on CD-ROM" as aforesaid.

28. On or about July 1997 and thereafter, the plaintiff Faulkner and others notified the defendant, National Geographic Society, and the defendant was aware, that they were about to publish plaintiffs' copyrighted images, by the publication of the subject images, as part of an advertising campaign and/or for profit business promotions, by sale of a CD Rom collection of magazines and *"NATIONAL GEOGRAPHIC", in the new format "THE COMPLETE NATIONAL GEOGRAPHIC 108 Years of National Geographic Magazine on CD-ROM"* and related products, with substantial changes by adding advertising for the defendant Kodak, NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC INTERACTIVE, EASTMAN KODAK COMPANY, MINDSCAPE INC., and others, by adding sound and music with the ads, by adding animated movie to the product and animated ads, by deleting the full size supplemental maps that were routinely included with the original publications, and by adding a Kodak Sweepstakes promotion on the package shrink wrapping which promoted Kodak and its products.

29. On or about September 1997, and thereafter, defendants have been publishing, selling and otherwise marketing and using the plaintiffs' images, and the images of other contributors, as aforesaid, and have thereby been engaging in unfair trade practices, and in unfair competition, against plaintiffs, to their damage.

30. The non-profit National Geographic Society, which has an Internal Revenue Service status of 501(C)(3), in competition with plaintiffs, who do not have the tax-exempt

status, are selling for profit, in competition with plaintiff's images, which dilute their market and value by using their photo agency, the National Geographic Image Collection/Image Sales.

31. The licenses of the National Geographic Image Collection/Image Sales use this commercial licensing for photographs for profit offered the images to be used to promote the themselves and the *National Geographic Magazine on CD-ROM* and related products the intent was only or for profit use.

32. Defendant, The National Geographic Society impliedly agreed to protect and defend plaintiffs' images, but defendant intentionally and wilfully violated plaintiffs' rights, as aforesaid, in 1997, and as a result the plaintiffs' were damage, and continue to be damaged.

COUNT II

SECOND CAUSE OF ACTION BREACH OF CONTRACT

AGAINST NATIONAL GEOGRAPHIC SOCIETY

33. The plaintiffs entered into agreements with defendant, The National Geographic Society to license to them the subject images for one time non exclusive use by this defendant.

34. Defendant The National Geographic Society agreed to purchase from certain plaintiffs the right to use the copyrighted images as they appear in the original non profit educational magazine.

35. The defendant National Geographic Society abandoned and/or breached the contract which licensed said defendant, a recognized not for profit corporation, when it transferred the rights under the contract to defendant NATIONAL GEOGRAPHIC

INTERACTIVE, and advertised EASTMAN KODAK COMPANY, MINDSCAPE INC., and distributed it through HAMMACHER SCHLEMMER, INC., MINDSCAPE INC., and directly by themselves and others, all corporations being motivated for profit.

36. The National Geographic Society transferred, their not for profit image collection to National Geographic Interactive for profit making purposes.

37. Plaintiffs duly performed all of the terms, covenants and conditions of the agreements to be performed on their part and, delivered the images for use by The National Geographic Society.

38. Defendants actually and impliedly agreed to pay certain fees for the one time magazine publication of the images for non profit/educational use.

39. Defendants National Geographic Society agreed to purchase from plaintiffs the right to use the images created by the plaintiff's but abandoned and breached the contract when they induced the plaintiffs to license to the defendant National Geographic Society a recognized not for profit corporation, and then assigned their rights to the defendant NATIONAL GEOGRAPHIC INTERACTIVE, an undisclosed separate for profit corporation; the plaintiffs did not contract to place the images in a for profit media setting and the plaintiffs would have charged substantially more for a for profit usage to be sold with the extensive ads as referred to above; all such advertising for Kodak, National Geographic, and Mindscape, was not implied or stated.

40. The defendants failed to respond to the plaintiff's, demand to cease and desist in their use and sales and infringement in 1997.

41. Thereafter, defendant National Geographic Interactive began selling the images in New York City without intent to pay plaintiffs for the images in the CD Rom; which sale were made at Hammacher Schlemmer, store and elsewhere in the state of New York.

COUNT III

THIRD CAUSE OF ACTION UNJUST ENRICHMENT AGAINST ALL DEFENDANTS

42. In the alternative, and in the event that plaintiff has no adequate remedy at law, based upon the abandonment of the aforesaid contract, by the defendants, it would be unfair, unjust, and inequitable for defendants to retain, and be enriched by the fruits and benefits of their improper actions, as aforesaid, for which plaintiffs seek equitable relief.

COUNT IV

COMMON LAW UNFAIR COMPETITION AGAINST ALL DEFENDANTS

43. The acts of defendant constitute unfair competition and were designed to trade upon the popularity, good will and intellectual property owned by the plaintiffs and many other contributors without permission to reproduce, and without payment. Defendant infringed upon the rights of plaintiffs to exploit the aforesaid creations, in an effort to "palm off" the images, to members of the public who have been and will be mislead regarding the actual origin or ownership of the images, and who were induced to buy defendant's publication, to purchase the CD Rom version in place of those publications initially authorized by the plaintiffs which are still on the market for sale.

44. Defendant has newly copyrighted all editorial content and images in its name during 1997, stating that "All Rights Are Reserved", without reserving the plaintiffs rights, or giving proper attribution.

45. Defendant's activities are likely to confuse consumers as to the source, and imply the plaintiff's sponsorship or approval of the images and unless defendant is enjoined and restrained from producing, licensing, manufacturing, printing, distributing, selling, marketing, promoting, advertising and otherwise exploiting the images, and the plaintiff's names and reputations, to which the defendants do not hold a license, will be irreparably damaged, for which they have no adequate remedy at law.

46. By reason of the foregoing, plaintiffs are entitled to a permanent injunction, enjoining defendant from further acts of unfair competition, and for an award of compensatory and punitive damages against the defendant in an amount to be determined at the trial.

COUNT V

TORTIOUS MISAPPROPRIATION OF GOODWILL AGAINST ALL DEFENDANTS

47. The acts of defendant constitute tortious misappropriation of the goodwill and reputation of the plaintiffs. Defendant have usurped, for their own commercial advantage, the unique elements and features of the copyrighted images. Defendant's conduct is specifically designed to trade upon the phenomenal popularity and goodwill of plaintiffs valuable images, and others of their profession who were treated similarly by the defendants.

48. Unless defendant is enjoined and restrained from producing, licensing, manufacturing, printing, distributing, selling, marketing, promoting, advertising, and otherwise

exploiting the images, plaintiffs will be irreparably damaged, for which they will have no adequate remedy at law.

49. By reason of the foregoing, plaintiffs are entitled to a permanent injunction enjoining defendant from further acts of misappropriation of goodwill, and for an award of compensatory and punitive damages against the defendant, in an amount to be proved at trial.

COUNT VI

FEDERAL DILUTION AGAINST ALL DEFENDANTS

50. Plaintiffs' images are inherently arbitrary and highly distinctive, and are strong and indeed famous, as a result of its artistic and market place significance.

51. The commercial and copyrighted use by defendants of the infringing images is likely to dilute the distinctive character of plaintiffs images in violation of section 43(c) of the Lanham Act, 15 U.S.C. S 1125(c).

52. As a proximate result of the acts of defendants as alleged herein, plaintiffs have suffered and will continue to suffer great damage to their business, goodwill, reputation, and profits, while defendants are profiting at plaintiffs' expense. The precise amount of the damage to plaintiffs and the unlawful profits accruing to defendants has not yet been determined. Plaintiffs will seek leave to amend the complaint once the amount of such damages and unlawful profits has been determined, or will prove the same at trial.

53. Plaintiffs have no adequate remedy at law against these acts of dilution, unless defendants are enjoined by this Court, plaintiffs will continue to suffer irreparable harm.

COUNT VII



INJURY TO BUSINESS REPUTATION AND DILUTION OF TRADEMARK -- NEW YORK STATUTORY LAW AGAINST ALL DEFENDANTS

54. As a direct result of plaintiffs' extensive experience, care and skill in producing and marketing their images they have acquired a reputation for excellence, and command extensive sales.

55. Defendants are misleading the public into believing that their thirty CD *"NATIONAL GEOGRAPHIC", in the new format "THE COMPLETE NATIONAL GEOGRAPHIC 108 Years of National Geographic Magazine on CD-ROM"* are connected with plaintiffs' business.

56. Such acts by defendants are likely to deprive plaintiffs of the benefit of the goodwill attached to their images and injure plaintiffs' business reputations, put off potential buyers of plaintiff's images, expose them to further infringements, by permitting purchases of the CD ROM set to copy the images by downloading and dilute the distinctive quality of the images in violation of New York General Business Law § 368(d).

57. As a proximate result of the acts of defendants as alleged herein, plaintiffs have suffered and will continue to suffer damage to their business, goodwill, reputation, and profits. The precise amount of such damage has not yet been determined. Plaintiffs will seek leave to amend the complaint once the amount of such damage has been determined, or will prove the same at trial.

58. Plaintiffs have no adequate remedy at law against this dilution of and injury to the images and their business reputations and unless enjoined by this court, plaintiffs will continue to suffer irreparable harm.

WHEREFORE, plaintiffs respectfully demand judgment as follows:

(1) That defendant be enjoined during the pendency of this action, and permanently thereafter, from infringing the aforesaid copyright and trademark of the plaintiffs in any manner, and from further publishing, selling, marketing and/or otherwise disposing of any copies of the infringing images, as aforesaid.

(2) That defendant be required to pay to the plaintiffs such damages as the plaintiffs have sustained in consequence of defendant's infringement of said copyright, and/or of the aforesaid unfair trade practices, and/or of the aforesaid unfair competition, and to account for:

(a) all gains, profits, and advantages derived by defendant from the aforesaid unfair trade practices and unfair competition, and/or,

(b) all gains, profits, and advantages derived by defendant from their infringements, and/or

(c) damages as to this court shall appear proper within the provisions of the statutes, but not less than One Hundred Thousand Dollars ($100,000.00) for each such infringement.

(3) Or that defendant be required to deliver up, to be impounded during the pendency of this action, all copies of said images in its possession or under its control, and to deliver up for destruction all infringing copies, all plates, digital or electronic copies, and all other matter for making such infringing copies.

(4) That defendant pay to the plaintiffs the costs of this action and statutory and/or reasonable attorney's fees.

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(5) That the plaintiffs have such other and further relief as is just, including punitive and statutory exemplary damage to be fixed.

(6) That defendants be required to pay to the plaintiffs the monetary benefit conferred on defendants by reason of its aforesaid wrongful use of the plaintiffs' property.

(7) That the defendant be directed to return all original material , art work, duplicate transparencies in the possession of publisher/manufacturers to the plaintiffs' herein or have damages assessed as to the value of the loss.

(8) That they have such other and further relief as may be just and proper, together with reasonable interest attorneys fees where provided for by law and the costs and disbursements of this action all in excess of $100,000.00.

Dated: New York, New York
December 18, 1997

WEINGRAD & WEINGRAD, LLP

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